SOUTH-EAST MONASH LEGAL SERVICE INC.

ADVOCACY COMMUNITY EMPATHY

SUBMISSION

Prepared by South-East Monash Legal Service Inc. for the

Parliamentary Joint Committee on Law Enforcement

Australia's illicit drug problem: Challenges and opportunities for law enforcement

Date submitted: 13 January 2023

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This Centre is accredited by NACLC National Association of Community Legal Centres

Our organisation

Established in 1973, South-East Monash Legal Service ('**SMLS**') is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community within the City of Greater Dandenong, the City of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and Victims of Crime Assistance Tribunal.

For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree.

SMLS has an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in.

SMLS also has a significant policy, advocacy, and law reform program, contributing to reforms in family violence laws and practices, access to civil procedure reforms, employment law, sexual assault and victims of crime, youth law, gambling and electronic gaming machines and other legal topics relevant to our service delivery and the needs of our community.

Acknowledgement of Country

SMLS wishes to acknowledge the traditional custodians of this lands upon which our offices are located, the Wurundjeri and the Boon Wurrung peoples. We pay our respects to the Elders past, present and emerging.

We acknowledge the people, traditions, culture and strength of Aboriginal and Torres Strait Islander peoples, and the fight for survival, justice and country that has taken place across Victoria and Australia.

We sincerely thank the Traditional Custodians for caring for Country for thousands of generations. SMLS recognises the ongoing impact of colonisation, dispossession and racism experienced by Aboriginal peoples. As a Community Legal Centre, we acknowledge the violence of Australian law and its ongoing role in processes of colonisation. We recognise that sovereignty was never ceded, and that this always was and always will be Aboriginal land.

Terms of Reference

Pursuant to subsection 7(1) of the *Parliamentary Joint Committee on Law Enforcement Act 2010*, the committee will inquire into and report on the challenges and opportunities for law enforcement in addressing Australia's illicit drug problem, with particular reference to:

1. trends and changes relating to illicit drug markets in Australia, including the supply, trafficking, production, distribution and use of illicit drugs;
2. emerging trends and risks, such as new psychoactive substances, adulterated drugs and other new sources of threat;
3. law enforcement's ability to detect and respond to the trafficking of precursor chemicals and illicit drugs, including the adequacy of screening techniques and the impact of seizures on illicit drug availability and use;
4. the involvement of law enforcement in harm reduction strategies and in efforts to reduce supply and demand, including the effectiveness of its involvement;
5. the strengths and weaknesses of decriminalisation, including its impact on illicit drug markets and the experiences of other jurisdictions; and
6. other related matters.

Scope of submission

Many of the questions are outside of the scope of SMLS services. We have only provided comments where we were confident that our expertise was a valuable contribution to the subjects raised. In particular, our submission will address points 4 and 5 above.

Acronyms

SMLS	South-East Monash Legal Service Inc.
RSA	*Road Safety Act 1986* (Vic)

Terminology

Aboriginal and Torres Strait Islander peoples

We acknowledge that there is diversity in terms of the preferred way that First Nations People identify themselves and that for the sake of consistency we will use 'Aboriginal and Torres Strait Islander peoples' throughout.

Introduction

We thank the Parliamentary Joint Committee on Law Enforcement for the opportunity to provide feedback in relation to the Inquiry into Australia's illicit drug problem: Challenges and opportunities for law enforcement. SMLS welcomes the opportunity to identify areas for in which legislation can be altered to improve access to justice in this field and areas for legislative reform to build a fairer and more just Australia.

Many of our clients are impacted by policy and legislation in this area (particularly in reference to cannabis use), and our suggestions for possible reform address selected stages of the legal process.

Various human rights frameworks underpin the need for reform to current Australian drug legislation. Human rights bodies around the world have expressed concerns regarding the reality that existing drug laws result in breaches of human rights. The International Drug Policy Consortium reflects that 'human rights abuses have proliferated under current drug control policies' around the world.[1] Human Rights Watch claim that 'Health and human rights are at the centre of this polarized debate'.[2]

Research into the possible impacts of the different models on public health, public safety, youth and social justice is ongoing, and many experts agree that further research is required to draw firm conclusions about the long-term changes that may occur once cannabis laws are reformed. [3]

However, there is a growing understanding that traditional 'harms' associated with cannabis use cannot be separated from the harms inflicted by the prohibition and criminalisation of cannabis use, and the stigma these laws engender. The financial burden on the community, in terms of police and court resources spent on minor offending is often cited as a key reason for reforming drug policy, however SMLS strongly believes the human suffering caused by prohibition is grounds enough for urgent reform.

When considering possible changes to drug laws and policies, the focus is often on what may happen and possible outcomes for decriminalisation or legalisation. When considering drug law reform, it is essential to map possible outcomes from the policies we consider. However, it is also important to recognise the harms that are currently happening *now*, and that despite decades of prohibition, people continue to use drugs.[4] We must acknowledge that the criminalisation of cannabis use is currently causing substantial social and health related harms for people, families and communities.

International Drug Policy Consortium, 2017, Policy Principals Statement, retrieved from: http://idpc.net/about/policyprinciples/principle-2

[2] Lohman, Diederik, March, 2016, The War on Drugs – A Cure Worse Than the Disease, Health and Human Rights, Human Rights Watch, retrieved from https://www.hrw.org/content/287990

[3] Office of the Prime Minister's Chief Science Advisor, "Cannabis." Prime Minister's Chief Science Advisor, New Zealand 2019, www.pmcsa.ac.nz/topics/cannabis/. Accessed 18 Sept. 2020.

[4] References 1. Welfare AIoHa (2010) National drug strategy household survey report. Canberra: AIHW.

'The impacts of cannabis use are inherently tied up with, inseparable from and shaped by law and policy itself'

The harms that emerge for people who are exposed to the criminal justice system are well documented. A criminal conviction has a significant impact on the lives of those convicted, their family and community, including possible difficulties with employment, accommodation and travel to certain destinations.[5]. In addition, a criminal conviction is a significant disadvantage in subsequent criminal proceedings, in that a criminal conviction may influence a police officer to lay charges; people with prior convictions may be denied bail' a criminal conviction may be used to undermine a person's credibility; or it may result in more severe penalties.[7]

Our overarching recommendations to this committee are as follows:

1. That legalisation is explored as a model to reduce the harms of the criminal justice system.
2. That where a decriminalisation model is considered, rely on the de jure model to remove criminal penalties from the legislation.
3. That bail laws are reviewed to ensure possession of a drug of dependence (including cannabis) is no longer defined as an indictable offence.
4. That criminal records for possession and use of cannabis are expunged.
5. That any future models avoid reliance on civil and pecuniary sanctions for cannabis use and possession due to the propensity for fines to produce and compound debt related harm.
6. That states further expand the availability of diversion and introduce clear legislative requirements removing police discretion and introducing wider catch all criteria without caps on access to the program.

[5] S. Lenton, A. Ferrante and N. Loh, 'Dope Busts in the West: Minor Cannabis Offences in the Western Australian Criminal Justice System', *Drug and Alcohol Review,* no. 15, 1996, pp. 335-41. It should be noted that WA has recently introduced a cautioning scheme, and that the cannabis offence rate in WA has decreased by 47 per cent between 1995-96 and 1998-99 (The Australian Bureau of Criminal Intelligence, *The Illicit Drug Report 1998-99,* 2000).

[7] S. Lenton, M. Bennett and P. Heale, *The Social Impact of a Minor Cannabis Offence Under Strict Prohibition-The Case of Western Australia*, Curtin University of Technology, National Centre for Research into the Prevention of Drug Abuse, Perth, 1999.

We have previously extensively contributed to inquiries in relation to drug law reform and we now refer the Committee to these submissions attached herewith:

1. Appendix A: ***Legislative Council's Legal and Social Issues Committee: Inquiry into the use of cannabis in Victoria, Submission prepared by Springvale Monash Legal Service, 2020***
   This submission examines:
   a. Drug prohibition intersectionality with a range of other areas of law in addition to the criminal jurisdiction, including but not limited to: Family Law and/or Child Protection, Crimes Compensation, Social Security Law, Visa Cancelations
   b. It also examines how to protect public health and public safety in relation to the use of cannabis in Victoria; and assess the health, mental health, and social impacts of cannabis use on people who use cannabis, their families and carers
   c. The best means to implement health education campaigns and programs to ensure children and young people are aware of the dangers of drug use, in particular, cannabis use
   d. Prevent criminal activity relating to the illegal cannabis trade in Victoria

2. Appendix B: ***Joint submission to the Senate Community Affairs References Committee inquiry into the current barriers to patient access to medicinal cannabis in Australia, Submission prepared by Associate Professor Kate Seear (Faculty of Law, Monash University; Australian Drug Lawyers Network) and Springvale Monash Legal Service, 17 January 2020***
   This submission examines:
   a. Medicinal Cannabis in Australia

3. Appendix C: ***Inquiry into Drug Law Reform, Law Reform, Road and Community Safety Committee, 58th Parliament Received from the Legislative Council on 11 November 2015, Submission prepared by Monash Faculty of Law Students On behalf of Springvale Monash Legal Service, 17 March 2017***
   This submission examines:
   a. A Human Rights Approach to drugs
   b. Drug Driving and Suggested reforms- legislative and policy-making framework surrounding drug driving infringements and offences and provides suggestions for amendments to current laws.
   c. Infringements and Suggested Reforms
   d. Drug Courts and Suggested reforms
   e. Victims of Crime Assistance
   f. Decriminalisation
   g. Suggested reforms

Summary of Recommendations

We have provided a summary of recommendations from the abovementioned Submissions below. Whilst some of the recommendations are Victorian specific, the submissions (and our recommendations) contain evidence and data that may be considered in the national framework and provide opportunities for possible policy and legislative reform.

Summary of Recommendations from:

Appendix A: Legislative Council's Legal and Social Issues Committee: Inquiry into the use of cannabis in Victoria, Submission prepared by Springvale Monash Legal Service, 2020

1. SMLS recommends that the committee consider the urgent need for drug law reform in light of the harms associated with prohibition that are impacting our community in Victoria.
2. In the development and monitoring of legal policies regulating cannabis in Victoria, SMLS recommends all changes to be rights based, in that consideration of human rights obligations is given central importance.
3. SMLS recommends the formal decriminalisation of cannabis possession in order to ensure young people are protected from harm relating to the criminal justice system
4. SMLS recommends removing financial barriers and providing greater opportunities for children and young people to participate in activities outside of schools, such as sports and music programs.
5. SMLS recommends collaboration between researchers and policy makers, including the ongoing monitoring and evaluation of programs addressing children and young people's use of cannabis.
6. We recommended introducing an additional legislative requirement of a blood drug concentration threshold limit for section 49(1) (bb), (h) and (i) of the *Road Safety Act*. This limit should be based on research establishing a correlation between impaired ability to drive and prescribed blood drug concentrations levels, much the same as current drink-driving provisions. SMLS recommends that further independent research is conducted, building on current research findings, to determine a suitable threshold for adaption into Victorian law. Drug education packages must emphasize harm reduction and personal narrative.
7. Position education as an early intervention that disrupts pathways into the criminal justice system by equipping young people with the knowledge and skills to create and participate in safe and meaningful environments.
8. Ensure young people are aware of their rights and responsibilities when dealing with the criminal justice system through holistic education strategies.
9. SMLS recommends a de jure model of decriminalisation that removes criminal penalties from the legislation. A de facto model of decriminalisation leaves scope for drug related harm due to the potential for police discretion regarding enforcement

SMLS takes the opportunity to endorse the submission of Dr Kate Seear. 1. Legalisation is explored as a potential model to reduce criminal activity. 2. Where a decriminalisation model is considered, rely on the de jure model to remove criminal penalties from the legislation. 3. Avoid reliance on civil and pecuniary sanctions for cannabis use and possession due to the propensity for fines to produce and compound debt related harm. 4. Further expand the availability of diversion and introduce clear legislative requirements removing police discretion and introducing wider catch all criteria without caps on access to the program.

Summary of Recommendations from:

Appendix B: Joint submission to the Senate Community Affairs References Committee inquiry into the current barriers to patient access to medicinal cannabis in Australia, Submission prepared by Associate Professor Kate Seear (Faculty of Law, Monash University; Australian Drug Lawyers Network) and Springvale Monash Legal Service, 17 January 2020

1. That the Committee takes into account international developments with respect to cannabis, especially the growing international consensus for moving away from punitive responses to drug use, calls for human-rights based approaches to drugs and reforms to access to cannabis in the form of decriminalisation and legalisation.
2. That any reforms to medicinal cannabis legal frameworks need to consider human rights, incorporating our international human rights obligations and the specific implications for those jurisdictions in Australia that have human rights charters.
3. That state and territory-based regulatory regimes be amended to ensure consistency of access and outcome, wherever possible. This includes a consideration to the extent it is possible at the Commonwealth level for a recommendation that each state and territory consider uniformity in approaches under the criminal law.
4. Consider opportunities to improve public access to medicinal cannabis through placing it on the Pharmaceutical Benefits Scheme or otherwise expanding availability, including through improvements to the regulation of licensing
5. Increase training and education on medicinal cannabis for medical practitioners, including on topics such as patient safety, mental health risk, side effects, legal issues, stigma, quality and cost, and take steps to address stigma.

Summary of Recommendations from:

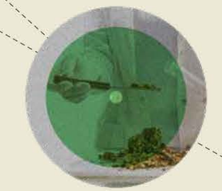
Appendix C: Inquiry into Drug Law Reform, Law Reform, Road and Community Safety Committee, 58th Parliament Received from the Legislative Council on 11 November 2015, Submission

prepared by Monash Faculty of Law Students On behalf of Springvale Monash Legal Service, 17 March 2017

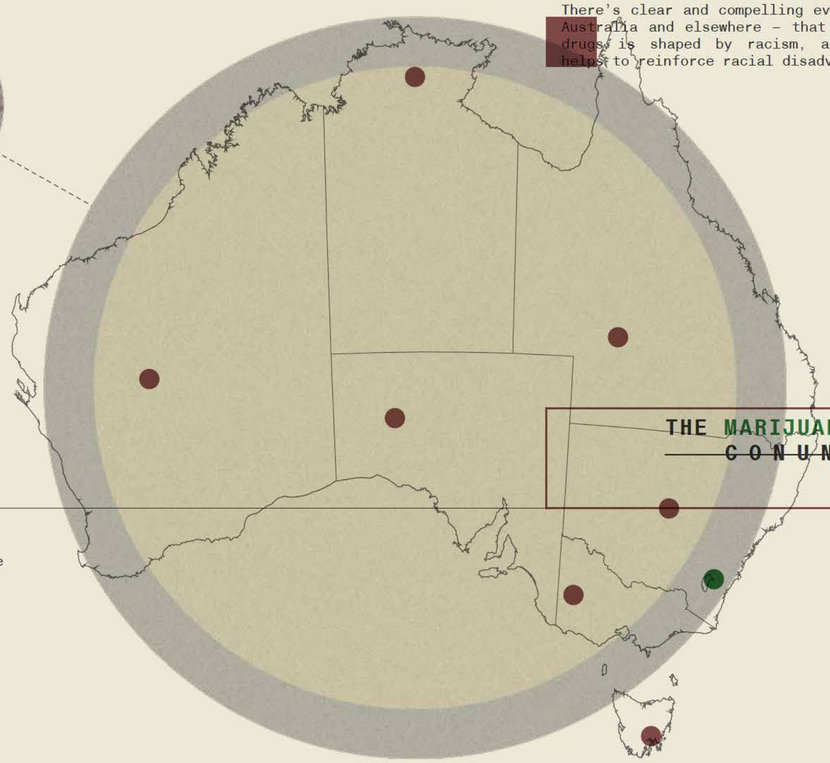
1. Drug Concentration Threshold SS 49(1) (bb), (h) and (i) (RSA) We recommended introducing an additional legislative requirement of a blood drug concentration threshold limit for section 49(1) (bb), (h) and (i) (RSA). This limit should be based on research establishing a correlation between impaired ability to drive and prescribed blood drug concentrations levels, much the same as current drink-driving provisions. There exists a significant body of international research which supports the introduction of threshold blood drug concentration limits. Studies have indicated that the mentioned illicit drugs have an influence on driving performance in a dose-dependent manner. There are slight variations between current recommendations of cut-off blood concentration thresholds. SMLS recommends that further independent research is conducted, building on current research findings, to determine a suitable threshold for adaption into Victorian law.
2. Subsequent Offences S48 (2) (RSA): The s49(1) (RSA) details the various offences involving alcohol or other drugs. These offences vary in culpability as they cover both drink and drug driving, and the provision ranges from offences of refusal to undergo testing, to testing positive to a breath analysis within three hours of being in charge of a motor vehicle. Currently, all s49(1) (RSA) offences are grouped together when considering 'first', 'second', and 'subsequent' offences. Under the s48(2) (RSA) 'blanket' provision, a previous drink driving offence will be considered a prior offence for a later drug driving charge, and vice versa. The practical effect of this provision is that it fails to distinguish between different levels of impairment and culpability of offenders. Additionally, the provision has the potential to adversely affect offenders as the maximum penalty for a subsequent offence can be up to fifteen times that of a first offence. We therefore recommend the removal of the s48(2) (RSA) 'blanket' provision in determining prior and subsequent offences. We further call for a new system of categorisation in accordance with culpability, starting with the offence type (refusal offences, driving with drugs present, driving with alcohol present etc). This new system of categorisation will need to consider the range of different levels of culpability within each offence type.
3. Availability of Special Circumstances Applications for Revocation at any stage: It is recommended that clients can apply for revocation of their infringements on the grounds of special circumstances at any stage of the infringements process.
4. A centralised fine management body It is recommended that a centralised body is established to manage both the enforcement of infringements and decisions regarding special circumstances applications. The adoption of a centralised body will assist in streamlining the complex infringement system, and aid those utilising special circumstances avenues. Adopting the recommendation of the Sentencing Advisory council may bring Victoria's fine enforcement system more in line with that of the other states and territories in Australia.
5. Medicare Item Number: It is recommended that a new Medicare Item Number is introduced for doctors to use when completing reports for special circumstances applications. The prohibitive fees some doctors

charge for these reports can act as a disincentive for clients to make special circumstances applications. An item number would acknowledge the time taken to prepare complex reports; however, the client would receive a rebate. This could also allow doctors to bulk-bill clients. This recommendation will incentivise both doctors to write comprehensive reports, and clients to obtain these reports for special circumstances applications.
6. That the Capacity and locations of the Drug Court is increased: Establishing Victorian Drug Court divisions in more locations will make allow more people to access the Drug Court and DTOs. Currently, those who do not live within the catchment areas for the Drug Court are not able to access it. Expanding the Drug Court would be in line with the Victorian Charter of Human Rights and Responsibilities.
7. We recommend the removal of a criminal record for drug possession for personal use offenses and consider instead either no penalty at all or reducing consequences to fines or similar.

We respectfully invite you to consider these submissions and invite you to contact our office to discuss this matter further.



There's clear and compelling evidence – in Australia and elsewhere – that the war on drugs is shaped by racism, and that it helps to reinforce racial disadvantage.



THE MARIJUANA CONUNDRUM

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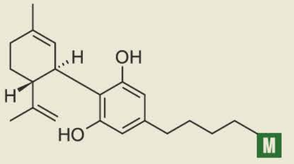
Reduces the costs to society
Improves employment prospects
Doesn't increase crime & drug use



SUBMISSION

Prepared by Springvale Monash Legal Service for the Legislative Council's Legal and Social Issues Committee:

Inquiry into the use of cannabis in Victoria

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Our organisation

Established in 1973, Springvale Monash Legal Service (SMLS) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. We are located in the Local Government Areas (LGA) of the City of Greater Dandenong and the City of Casey, with outreaches throughout the south east. We have been addressing the needs of marginalised community members, the majority who reside within the City of Greater Dandenong, the city of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and Victims of Crime Assistance Tribunal. For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

SMLS welcomes the Inquiry into Cannabis Use in Victoria, and the opportunity to identify areas for legislative reform to build a more fair and just Victoria.

Many of our clients are impacted by drug policy and legislation, and our suggestions for possible reform are based on our experience and observation of the ways in which our legal system impacts people who use cannabis.

SMLS is not seeking confidentiality regarding this submission.

Terms of Reference

That this house, requires the Legal and Social Issues Committee to inquire into, consider and report, by no later than 2 March 2020, into the best means to —

a. Prevent young people and children from accessing and using cannabis in Victoria;
b. Protect public health and public safety in relation to the use of cannabis in Victoria;
c. Implement health education campaigns and programs to ensure children and young people are aware of the dangers of drug use, in particular, cannabis use;
d. Prevent criminal activity relating to the illegal cannabis trade in Victoria;
e. Assess the health, mental health, and social impacts of cannabis use on people who use cannabis, their families and carers;

Introduction

There are various models we could apply when seeking to reform drug policy in Victoria, such as;

- Legalisation with a government-controlled market
- Legalisation, with a focus on profit-driven commercialisation and minimal government regulation
- De jure decriminalisation, criminal penalties for use/possession are removed in the law (with optional use of non-criminal sanctions such as a civil or administrative penalty)
- De facto decriminalisation, criminal penalties remain in the law, but can be lessened in practice (such as via police guidelines to not enforce the law, or removing barriers to the expansion of diversion)

Research into the possible impacts of the different models on public health, public safety, youth and social justice is ongoing, and many experts agree that further research is required to draw firm conclusions about the long-term changes that may occur once cannabis laws are reformed. [1]

However, there is a growing understanding that traditional 'harms' associated with cannabis use cannot be separated from the harms inflicted by the prohibition and criminalisation of cannabis use, and the stigma these laws engender. The financial burden on the community, in terms of police and court resources spent on minor offending is often cited as a key reason for reforming drug policy, however SMLS strongly believes the human suffering caused by prohibition is grounds enough for urgent reform.

When considering possible changes to drug laws and policies, the focus is often on what may happen and possible outcomes for decriminalisation or legalisation. When considering drug law reform, it is essential to map possible outcomes from the policies we consider. However, it is also important to recognise what is currently happening *now*, that despite decades of prohibition people continue to use drugs.[2] We must acknowledge that the criminalisation of cannabis use is currently causing substantial social and health related harms for people, families and communities.

'The impacts of cannabis use are inherently tied up with, inseparable from and shaped by law and policy itself'
- Dr Kate Seear [3]

[1] Office of the Prime Minister's Chief Science Advisor, "Cannabis." Prime Minister's Chief Science Advisor, New Zealand 2019, www.pmcsa.ac.nz/topics/cannabis/. Accessed 18 Sept. 2020.
[2] Welfare AIoHa (2010) National drug strategy household survey report. Canberra: AIHW.
[3] Seear, K., 2020, Submission of Associate Professor Kate Seear To the Parliament of Victoria

Often, when examining the intersections between cannabis use and the law, we traditionally link it to the criminal justice system. This is certainly true, as the consumption, possession and sale of cannabis is illegal in Victoria, unless you have a prescription from a doctor. [4] The harms that emerge for people who are exposed to the criminal justice system are well documented. Lawyers often engage in debates about addiction, impact, substance use, treatment and punishment, while judges and magistrates make decisions about the nature of a person's substance use and its relationship to their legal matter.[5] A criminal conviction has a significant impact on the lives of those convicted, their family and community, including possible difficulties with employment, accommodation and travel to certain destinations.[6] In addition, a criminal conviction is a significant disadvantage in subsequent criminal proceedings, in that a criminal conviction may influence a police officer to lay charges; people with prior convictions may be denied bail, a criminal conviction may be used to undermine a person's credibility; or it may result in more severe penalties.[7]

Drug prohibition intersects with a range of other areas of law in addition to the criminal jurisdiction, including but not limited to:

Family Law and/or Child Protection:

Case Study: Maria (Name changed)

Maria was in a de facto relationship with Mark for 23 years. They have one child who is 14 years old. Maria was diagnosed with Tourette's syndrome 12 years ago. The only medication that would assist was cannabis. She would self-dose and more recently obtained a prescription for medical cannabis. Mark and Maria got into a fight in their home, and Maria threw some tools at Mark's car, though there was no property damage. Mark left with their daughter and obtained an intervention order, alleging her drug use was an issue with her alleged violence. Mark then applied to VCAT to remove himself from the lease and the landlord later obtained an order to evict her. Mark refused to tell Maria where he was taking their daughter to live. Maria is now homeless, and her health has deteriorated. Mark reported various breaches to the intervention order, such as when Maria contacted him to renew the registration on her car, which she was living in. SMLS made an urgent application to the Family Court, and waited approximately three months for a hearing. At the hearing, the father alleged Maria lacked capacity due to her drug use. However in the years they were a family, it was not an issue as she had been self medicating and parenting effectively for many years with no concerns from the father.

Legal & Social Issues Committee, Inquiry into the use of cannabis in Victoria

[4] For more information about medicinal cannabis, please see the Submission to the Senate Community Affairs References Committee inquiry into the current barriers to patient access to medicinal cannabis in Australia, Joint Submission from Associate Professor Kate Seear and SMLS, available at https://www.smls.com.au/wp-content/uploads/2020/04/Medicinal-cannabis-submission.pdf

[5] Seear, K., & Fraser, S. (2014). Beyond criminal law: The multiple constitution of addiction in Australian legislation. Addiction Research & Theory, 22(5), 438–450.

[6] S. Lenton, A. Ferrante and N. Loh, 'Dope Busts in the West: Minor Cannabis Offences in the Western Australian Criminal Justice System', *Drug and Alcohol Review,* no. 15, 1996, pp. 335-41. It should be noted that WA has recently introduced a cautioning scheme, and that the cannabis offence rate in WA has decreased by 47 per cent between 1995-96 and 1998-99 (The Australian Bureau of Criminal Intelligence, *The Illicit Drug Report 1998-99,* 2000).

[7] S. Lenton, M. Bennett and P. Heale, *The Social Impact of a Minor Cannabis Offence Under Strict Prohibition-The Case of Western Australia*, Curtin University of Technology, National Centre for Research into the Prevention of Drug Abuse, Perth, 1999.

Family court generally will not tolerate cannabis use from parents, and frequently make orders for parents to report negative results from drug testing in order to see the children unsupervised, as substance use is viewed as a 'risk factor' for the safety and wellbeing of children.[8] Children of people assessed as having substance 'addiction' are at risk of being temporarily or permanently removed from their care, be placed in state care, or have visitation with their family member who uses cannabis restricted or supervised. SMLS assists clients who use cannabis either recreationally or medicinally (often these are bound together) to treat various symptoms, but have stable jobs, fulfil their commitments and function as loving and responsible parents to their children. Indeed, in many circumstances the Court acknowledges that the use of cannabis does not impact their ability to be a parent, however remain unwilling to make orders for unsupervised time with their children unless the parent tests clear for cannabis. This can cause protracted family separation and delay already lengthy proceedings and orders. This can be problematic in an adversarial system. SMLS has seen cases where one parent uses the other party's cannabis to prevent access to children, where prior to separation, the cannabis use was never an issue. It is also noted that often both parties may have used cannabis at some point, however one party may attempt to frame the other party's use as impacting their parenting, accusing them of lacking capacity to care for children. Often residential rehabilitation is a prerequisite for the return of children from out of home care, and some parents experienced delay in accessing counselling and residential rehabilitation due to waiting lists and lack of services available.

Crimes Compensation:

SMLS has previously raised concerns about the impact drug prohibition and stigma has on victims of crime.[9] Researchers have noted that a person who is the victim of a serious crime such as rape or family violence might be denied compensation under the Victims of Crime Act, despite their drug use being unrelated to the crime perpetrated against them. In addition, the Victims of Crime Assistance Tribunal in Victoria must take into account the victim's past, character, behaviour, and attitudes when determining their eligibility for compensation; and may result in an application for compensation being denied due to their use of illicit substances.[10]

Social Security Law:

The Federal Government has repeatedly threatened to drug test social security recipients and punish those who fail the tests through payment quarantining and forced treatment, despite significant evidence outlining the harms and costs of such a scheme,[11] and almost no evidence that it would achieve it's intended outcomes.[12]

Visa Cancelations:

Charges related to drug use and/or possession can lead to a person's visa being cancelled. There has been a huge increase in visa cancelations in the last ten years, including for minor charges such as drug possession.

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[8] Seear, K., & Fraser, S. (2014). Beyond criminal law: The multiple constitution of addiction in Australian legislation. Addiction Research & Theory, 22(5), 438–450

[9] See SMLS's 2017 submission to the Victorian Law Reform Commission: Review of the Victims of Crime Assistance Act 1996, available at https://www.smls.com.au/our-advocacy-work/

[10] Seear, K., & Fraser, S. (2014). The addict as victim: Producing the 'problem' of addiction in Australian victims of crime compensation laws. International Journal of Drug Policy, in press. doi: 10.1016/j.drugpo.2014.02.016.

[11] Australian National Council on Drug. ANCD position paper: Drug testing 2013. http://www.atoda.org.au/wp-content/uploads/DrugTesting2.pdf

[12] Werb, D, Kamarulzaman, A, Meacham, MC, Rafful, C, Fischer, B, Strathdee, SA & Wood, E 2016, 'The effectiveness of compulsory drug treatment: A systematic review', *International Journal of Drug Policy*, vol. 28, pp. 1–9, viewed 21 September 2020, <https://www.sciencedirect.com/science/article/abs/pii/S0955395915003588>.

Visa cancelations cause significant harm to individuals, families and communities. People whose visa is cancelled spend an average of over 150 days in detention, separated from their families, waiting for final decisions from the Minister for Home Affairs.[13]

In 2019, the Chief Executives Board of the United Nations made a commitment to pursuing 'alternatives to conviction and punishment in appropriate cases, including the decriminalisation of drug possession for personal use'.[14] This statement articulates a global momentum that recognises the need to reform drug law and policy. A group of organisations including the World Health organisation also released the 'International Guidelines on Human Rights and Drug Policy' that without inventing new rights outlines what is required of policy makers in the context of drug control law and human rights laws.[15] SMLS believes these guidelines should inform Victorian drug policy.

Recommendations

1. SMLS recommends that the committee consider the urgent need for drug law reform in light of the harms associated with prohibition that are impacting our community in Victoria.
2. In the development and monitoring of legal policies regulating cannabis in Victoria, SMLS recommends all changes to be rights based, in that consideration of human rights obligations is given central importance.

Addressing the Terms of Reference:

A) The best means to prevent young people and children from accessing and using cannabis in Victoria

Case Study: Tim (Name changed)

Tim was 15 when he started using cannabis. He did not like alcohol, and so he liked to smoke cannabis occasionally at parties. As he grew older, he found that it helped him with his anxiety, and over all felt that using cannabis was not harmful on his health. By the time he was 19, Tim smoked cannabis once or twice a week. He came to SMLS when he was charged with possession. He had already been given a warning by police and was therefore deemed ineligible for diversion. The Magistrate offered him an adjourned undertaking, where the offender must sign a document and make a promise to the Court not to commit any further offences. If the offender commits any further offending during the period of the undertaking, the offender can be bought back to Court and may be re-sentenced on the original charges.

Tim did not want the adjourned undertaking because he did not feel it would be possible to keep this promise, he felt strongly that he was going to use cannabis again. This was setting him up to fail. Tim asked for a fine instead, but he was given the adjourned undertaking anyway. By the end of the hearing, Tim was extremely upset and anxious.

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[13] Visa cancellations on 'character' grounds: The Ombudsman reports 2018, Refugee Council of Australia, Refugee Council of Australia, viewed 21 September 2020, <https://www.refugeecouncil.org.au/cancelling-visas-on-character-grounds-the-ombudsman-reports/>.
[14] United Nations Supports Decriminalisation of Drugs 2019, Drug Policy Australia, viewed 21 September 2020, <https://www.drugpolicy.org.au/un_supports_decriminalisation_of_drugs>.
[15] World Health Organization, UNAIDS, UNDP and the International Centre on Human Rights and Drug Policy. (2019). International Guidelines on Human Rights and Drug Policy. United Nations: Geneva.

The criminalisation of young people in Victoria is a serious concern, particularly for vulnerable young people facing disadvantage. Our legal system already discriminates against young people who are disadvantaged. For example, a residential care youth worker explained to SMLS that prior to approximately 2015, some service provider policies explicitly required workers in residential out of home care to inform police if a young person was using or in possession of cannabis. The youth worker compared this to young people living with their families - 'parents aren't likely to call the cops on their own kids'.[16] Apparently, many services providers have since altered this approach, recognising the harm it causes for young people, adopting a discretionary approach. However, adopting an approach that relies on individual discretion - be it residential worker or police - can be problematic, and may lead to discriminatory practices. To protect young people from criminal justice system related harms for cannabis use; decriminalisation or legalisation of cannabis is necessary.

There is little evidence that prohibitionist approaches to drugs, including cannabis, deters usage, even among young people. There have been several studies into the use of cannabis among young people in countries with different legal structures (decriminalised, legalised, commercialised).[17] One recent study concluded that 'Cannabis policy liberalisation does not appear to result in significant changes in youths' use, with the possible exception of legalisation for recreational purposes that requires monitoring.' [18] Other studies have confirmed this,[19] however, the general consensus appears to indicate that further research is required to map the long-term results of changing drug policy on young people.

SMLS delivers a program in partnership with schools in the south east, called Sporting Change (for more information refer to Term of Reference 'C'). This program includes an afterschool program where we teach young people aged 13-17 about the law by using sport as both an engagement and an educational strategy. A high proportion of the participants are young people who have various attributes of disadvantage, for example family break down, family financial vulnerability, involvement with the legal system or family violence in the home. We provide a sporting activity each week, and over two terms, participants have the opportunity to play 8 different sports, including traditional sports such as Cricket and Soccer, as well as less common sports such as Brazilian Jujitsu and Fencing, while learning about a specific legal issue relevant to young people. The evaluation of the program revealed that sport was a key factor in participation in the program. One young person stated *'I like Sports, and I wish I was better at playing them. But Mum can't really afford for me to join a team, so that's why I joined Sporting Change.'* Another student showed outstanding skills in the Australian Football League module, and the coach from Melbourne Football Club tried to recruit her for the local club. She declined, stating that she knew there was no chance that her parents would be able to afford such an expense. Many young people expressed a similar sentiment; that they wished their families could afford the opportunity for them to participate in sports activities outside of school. From our experience, SMLS can see that whilst learning about the law has a positive impact on the

[16] SMLS youth worker, 2020, Interview, Victoria
[17] See for example: Laqueur et al., "The Impact of Cannabis Legalization in Uruguay on Adolescent Cannabis Use," *International Journal of Drug Policy* 80 (2020); Leung et al., "What Have Been the Public Health Impacts of Cannabis Legalisation in the USA? A Review of Evidence on Adverse and Beneficial Effects," *Current Addiction Reports* 6, no. 4 (2019), Rotermann, "What Has Changed since Cannabis Was Legalized?" Health reports 31, no. 2 (2020); Dilley et al., "Prevalence of Cannabis Use in Youths after Legalization in Washington State," *JAMA Pediatrics* 173, no. 2 (2019);
[18] Melchior, M, Nakamura, A, Bolze, C, Hausfater, F, El Khoury, F, Mary-Krause, M & Azevedo Da Silva, M 2019, 'Does liberalisation of cannabis policy influence levels of use in adolescents and young adults? A systematic review and meta-analysis', *BMJ Open*, vol. 9, no. 7, p. e025880, viewed 14 September 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6624043/>.
[19] Stevens, A 2019, 'Is policy "liberalization" associated with higher odds of adolescent cannabis use? A re-analysis of data from 38 countries', *International Journal of Drug Policy*, vol. 66, pp. 94–99, viewed 14 September 2020, <https://www.sciencedirect.com/science/article/abs/pii/S0955395919300210?dgcid=author>.

young person's safety the vehicle for critical engagement is a youth focused programme that incorporates lessons building knowledge and skill development.

Research has demonstrated that educational strategies should focus on harm reduction, fostering critical thinking, collaborative learning and skill development to empower young people to make safer decisions about using cannabis.[20]

Iceland Leisure card

Iceland has received global attention for the dramatic change in the numbers of teenagers using substances. Data published reported that young people aged 15 to 16 having used cannabis one or more times fell from 17% to 5% from 1998 to 2018.[21] These impressive figures were the result of the implementation of a model based on evidence, community engagement, and building ongoing collaboration between research, policy and practice.[22] The Icelandic government reduced known risk factors and strengthened a broad range of community-level protective factors, such as parental engagement, evidence-based health promotion and alternative youth activities. While not all of the strategies implemented would suit a Victorian context, SMLS is particularly interested in the 'Leisure Card' or 'municipality coupon' that is available in Reykjavik. This coupon subsidizes *every single child* to participate in afterschool activities such as sports or music. A similar program has been introduced in Kaunas, Lithuania, where the city offers free sports activities on Mondays, Wednesdays and Fridays, including free transport for disadvantaged families. In Iceland, they survey young people every year, so that their data is up to date and to ensure the programs are working as intended.

Recommendations

3. SMLS recommends the formal decriminalisation of cannabis possession in order to ensure young people are protected from harm relating to the criminal justice system
4. SMLS recommends removing financial barriers and providing greater opportunities for children and young people to participate in activities outside of schools, such as sports and music programs.
5. SMLS recommends collaboration between researchers and policy makers, including the ongoing monitoring and evaluation of programs addressing children and young people's use of cannabis.

B) Protect public health and public safety in relation to the use of cannabis in Victoria*; and*
E) Assess the health, mental health, and social impacts of cannabis use on people who use cannabis, their families and carers

When considering how best to protect people's health and safety in relation to the use of cannabis, it is essential to consider the nature of these harms, and what is causing them. Popular understandings of the harms associated with drug use including cannabis use often relate to the impacts of the drug itself, rather than impacts of the prohibition. The Global Commission on Drug Policy claims that 'harms created through implementing punitive drug laws cannot be overstated when it comes to both their severity and scope'. The

[20] Midford, R & Cahill, H 2020, 'Taking a Skills Focused, Harm Reduction Approach to School Drug Education', Health and Education Interdependence, pp. 269–288, viewed 20 September 2020, <https://link.springer.com/chapter/10.1007%2F978-981-15-3959-6_14>.
[21] 'Perspective — Iceland Succeeds at Preventing Teenage Substance Use -Emerald Insight' 2014, Emerald.com, viewed 20 September 2020, <https://www.emerald.com/insight/content/doi/10.1108/S2048-757620190000007017/full/html>.
[22] Sigfusdottir, I.D., Kristjansson, A.L., Gudmundsdottir, M.L. and Allegrante, J.P., (2011) Substance use prevention through school and community-based health promotion: a transdisciplinary approach from Iceland', Global Health Promotion. 18: 23

Commission called for an end to punitive measures, calling for the removal of all penalties 'imposed for low level possession and/or consumption offenses'.[23]

Current approaches are a barrier to public health campaigns. Informative and evidence based public health campaigns are an important part of reducing potential harm from cannabis use. Prohibition decreases the efficacy of such campaigns – it is not straightforward to advise users on health issues when use remains illegal. Researchers note that in the current prohibition context, it is difficult to identify who users are, who is a heavy user, how old users are, and how strong the products are, or enforce age limits on purchasing.[24] The assessment of the impacts of cannabis use is best done through collaboration of policy makers, community services, researchers and health experts utilising reliable data collection strategies. Legalisation, regulation and/or decriminalisation allow for better data collection and analysis, and for monitoring and evaluating how people use cannabis and its effects.

The Australian public largely view drug use as a health and human rights issue, and largely support decriminalisation,[25] recognising that the criminalisation of cannabis significantly harms users and the community.[26] When Portugal decriminalised the use and possession of illicit drugs in 2001, it invested in drug treatment, harm reduction and social integration.[27] Studies have indicated a variety of positive social and health outcomes, including a reduced burden on the criminal justice system, decreased problematic drug use, reduced drug-related HIV and AIDS, and drug-related deaths.[28] Researchers have noted that the way in which decriminalisation is implemented is very important, and if implemented properly will have a rage of benefits, notably lower numbers of people exposed to the criminal justice system, and that there is very little evidence that decriminalisation will lead to other types of crimes, such as supply or drug-related crime. [29]

Prohibition leads to criminalisation and stigma, which cause significant social and health harms to individuals, families and communities. Criminalisation further disadvantages already vulnerable and marginalised communities who are already unfairly impacted by the legal system due to class, race and being in public places more regularly. For example, a person experiencing homelessness may be more likely to be found

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[23] Global Commission on Drug Policy, Advancing Drug Policy Reform: A New Approach to Decriminlization (2016) <http://www.globalcommissionondrugs.org/reports/advancing-drug-policy-reform/>.Retrieved March 2017

[24] Hamilton, I & Sumnall, H 2021, 'Are we any closer to identifying a causal relationship between cannabis and psychosis?', Current Opinion in Psychology, vol. 38, pp. 56–60, viewed 19 September 2020, <https://www.sciencedirect.com/science/article/pii/S2352250X20301391>.

[25] Decriminalisation of drug use and possession in Australia - A briefing note -Inquiry Into Drug Law Reform Received 17 Mar 2017 Submission No. 164 -Appendix A N.D.

[26] Associate Professor Nicole Lee and Professor Alison Ritter Australia's recreational drug policies aren't working, so what are the options for reform?" The Conversation March 2 2016 https://ndarc.med.unsw.edu.au/blog/australias-recreational-drug-policies-arent-working-so-what-are-options-reform accessed on 12 September 2020.

[27] Ricardo Goncalves, Ana Lourenco & Sofia Nogueira da Silva, 'A social cost perspective in the wake of the Portuguese Strategy for the fight against drugs' (2015) 26 International Journal of Drug Policy 199.Global Commission on Drug Policy, Advancing Drug Policy Reform: A New Approach to Decriminlization(2016)<http://www.globalcommissionondrugs.org/reports/advancing-drug-policy-reform/>. Retrieved March 2017

[28] Associate Professor Nicole Lee and Professor Alison Ritter Australia's recreational drug policies aren't working, so what are the options for reform?" The Conversation March 2 2016 https://ndarc.med.unsw.edu.au/blog/australias-recreational-drug-policies-arent-working-so-what-are-options-reform accessed on 12 September 2020.

[29] NDARC, Decriminalisation of drug use and possession in Australia - A briefing note, Drug Policy Modelling Program, 2016, p 3

using or possessing drugs because that use is by necessity public. That person may have multiple offences and become ineligible for a diversion program.[30]

Case Study: Farzad (Name changed)

Farzad was 19 years old when he fled Iran. He was a student at a large university, and became involved in political protests against the oppressive government. He was arrested and beaten by the Iranian government, and imprisoned for several months. He describes the torture he experienced as horrific. After he was released, he fled the country. He came as a refugee to Australia and tried to build a new life while experiencing post-traumatic stress. He received counselling and support through Foundation House, a service that assists people who have experienced torture and trauma.

Farzad started using cannabis to help him sleep, as he experienced nightmares and other sleep disorders related to his history of torture.

He maintained his employment at a factory in Dandenong, lived with his friends and sent money back home to support his parents and siblings. He did not see his cannabis use as harmful, on the contrary, he felt that it helped him live his life and participate in his community.

Farzad was caught with a small amount of cannabis in his car while driving home one evening. He was charged with possession, SMLS represented him at Magistrates Court, where he requested a diversion.[31] Farzad felt that the experience of attending court was extremely stressful, including having to take time off work, and that he was ashamed to be there. He also stated that he planned to try and reduce his cannabis use, however he did not know how he would cope with his mental health issue without it.

In order to protect health and safety, we must reduce drug related stigma in our community. Labelling people as 'drug addicts' has implications for their families, their employment, their visa status and more. Criminal records can exacerbate risk of unemployment, homelessness and poverty.[32] The stigma of a criminal record is carried through life; even long after someone may have sought treatment for problematic drug use and reduced their consumption.[33] Criminalisation significantly contributes to the stigma of cannabis use, which increases people's suffering and isolation and impacts the way they engage with services in their community.[34] Experiences of exclusion, marginalisation and discrimination impacted on participants' access to health care (including treatment) and other services such as welfare services, AOD treatment providers, and housing, fair treatment in the justice system, employment opportunities, and relationships with family,

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[30] Alcohol and Drug Foundation 'Decriminalisation vs legalisation' https://adf.org.au/talking-about-drugs/law/decriminalisation/decriminalisation-detail/ accessed on 8 September 2020.

[31] There is a significant amount of evidence that cannabis is beneficial to people's health, including people who have experienced trauma. For example, see Yarnell, S 2015, 'The Use of Medicinal Marijuana for Posttraumatic Stress Disorder', *The Primary Care Companion For CNS Disorders*, viewed 20 September 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4578915/>.

[32] Professor Kate Seear and Springvale Monash Legal Service, *Joint Submission to the Senate Community Affairs References Committee inquiry into the current barriers to patient access to medicinal cannabis in Australia*, 17 January 2020.

[33] Lancaster, K., Seear, K. & Ritter, A. (2018). *Reducing stigma and discrimination for people experiencing problematic alcohol and other drug use.* Drug Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney 108.

[34] Lancaster, K., Seear, K. & Ritter, A. (2018). *Reducing stigma and discrimination for people experiencing problematic alcohol and other drug use.* Drug Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney

friends and community.[35] Criminalisation reinforces stigmatisation of drug dependency, addictions and use, and decriminalisation can be an intervention to stigmatisation.[36]

Drug Driving

Victoria's current laws surrounding drug driving are contained within the Road Safety Act 1986 (Vic) (RSA), specifically the offences outlined in section 49.[37] SMLS highlights that the purpose of the Road Safety Act is 'to provide for safe, efficient and equitable road use'[38], and not to regulate the use of illegal substances. Certain drugs have the potential to impair a person's ability to drive safely, however Victoria's zero-tolerance approach to drug-driving leaves no requirement of a person's driving being actually affected by a drug. Rather, such offences are established on driving with any concentration of an illicit drug in their saliva or blood, irrespective of impairment.[39] These provisions are problematic when they fail to consider how the drug affects actual driving capacity.

There is a lack of scientific evidence to support the causal relationship between significantly low drug concentrations and driving impairment. By capturing the most extreme low doses, the current 'any concentration level' or 'prescribed concentration' definitions fail to target the purposes of the Act. The lasting ramifications of harsh penalties imposed are disproportionate where illicit drugs did not significantly affect a person's driving. Such penalties may include mandatory licence suspensions, fines ranging from $155 to approximately $18,600, possible criminal convictions and imprisonment terms. Given these risks, and the social stigma associated with drug-driving convictions, SMLS stresses the need for reforms away from the current zero-tolerance approach given the wide-ranging implications of convictions, such as limitations on employment prospects. There exists a significant body of international research that supports the introduction of threshold blood drug concentration limits. Studies have indicated that certain illicit drugs including cannabis have an influence on driving performance in a dose-dependent manner.[40]

Recommendations:

1. In order to protect people from the harms related to cannabis use, the Committee should give consideration to a regulated legalisation model, or a formalised (de jure) system for the decriminalisation of cannabis. In the alternative, introduce improvements to de facto decriminalisation through the removal of strict eligibility requirements in place in Victoria (e.g. those pertaining to diversion programs) and through removing barriers to the expansion of diversion, and ensuring access to diversion is not at the discretion of police.
2. Review policies regarding criminal history checks at pre-employment.
3. Consider ways to address stigma through public health programs

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[35] Lancaster, K., Seear, K. & Ritter, A. (2018). Reducing stigma and discrimination for people experiencing problematic alcohol and other drug use. Drug Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney 49.

[36] Lancaster, K., Seear, K. & Ritter, A. (2018). Reducing stigma and discrimination for people experiencing problematic alcohol and other drug use. Drug Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney.

[37] Road Safety Act 1986(Vic) s49

[38] ibid

[39] Road Safety Act 1986 (Vic)ss. 49(1)(bb), (h) and (i).

[40] European Monitoring Centre for Drugs and Drug Addiction, Driving under the influence of drugs, alcohol and medicines in Europe —findings from the DRUID project (European Monitoring Centre for Drugs and Drug Addiction publication 2012) 20. EMCDDA 2014, 7.

4. We recommended introducing an additional legislative requirement of a blood drug concentration threshold limit for section 49(1)(bb), (h) and (i) of the Road Safety Act. This limit should be based on research establishing a correlation between impaired ability to drive and prescribed blood drug concentrations levels, much the same as current drink-driving provisions. SMLS recommends that further independent research is conducted, building on current research findings, to determine a suitable threshold for adaption into Victorian law.

C) The best means to implement health education campaigns and programs to ensure children and young people are aware of the dangers of drug use, in particular, cannabis use

Preventative drug education for young people has incorporated various approaches to protecting young people from drug related harm.[41] Frequently, education programs are premised on the idea that drug taking is illegal and harmful and should be abstained from; therefore, young people must be equipped with skills and knowledge to resist drugs.[42] An abstinence approach is supported by the current legislative regime of drug prohibition. However, this strategy 'contain(s) an implicit assumption that if young people are made aware of the illicit status of certain drugs than they will be less likely to consume them'.[43] In addition, these models have a deficit approach, wherein the use of drugs can be seen as an indication of individual failure.[44] Research also indicates that 'oversimplifying drug information...may work to limit rather than extend young people's agential capacity to reduce potential harms'.[45]

In our experience, we have found a limited number of programs that teach young people to understand the law as it related to drugs, and how the law impacts them. Research indicates that young people are 'excessively and inappropriately policed' due to 'their use of public space, which often makes young people more likely to be subject to stop and searches, name and address checks, move-on orders, as well as invasive strip searches'.[46] A deterrence model of drug education that focuses on warning young people about the illegality of drugs fails to inform young people of their rights if police were to search them on suspicion of possessing drugs.[47] This focus also curtails space for alternative forms of harm reduction education, and limits types of information available to young people, potentially increasing the young person's risk of harm. In our experience, reliance on drug education materials that aim only to deter young people from taking drugs does not speak to young people's lived experience or personal narratives of drugs and drug use.

CASE STUDY: SPORTING CHANGE PROGRAM

Sporting Change is a preventive community development program that contributes to young people engaging constructively in their community and in society. The program combines sports activities and legal education to assist young people with understanding the law. The program also helps young people access

[41] For a full history see Midford, R & Cahill, H 2020, 'Taking a Skills Focused, Harm Reduction Approach to School Drug Education', Health and Education Interdependence, pp. 269–288, viewed 20 September 2020, <https://link.springer.com/chapter/10.1007%2F978-981-15-3959-6_14>.
[42] Ibid 272.
[43] Farrugia, A., Seear, K., Fraser, S., "Authentic advice for authentic problems? Legal information in Australian classroom drug education" in *Addiction Research & Theory (2018)* <https://www.tandfonline.com/eprint/t8na8VJ8x6SH9fWb3xQv/full>, p 197.
[44] Midford, R & Cahill, H 2020, op cit n 43.
[45] Farrugia, A., Seear, K., Fraser, S., op cit n 45, p 195.
[46] Cunneen, Chris; Goldson, Barry; Russell, Sophie --- "Juvenile Justice, Young People and Human Rights in Australia" [2016] CICrimJust 23; (2016) 28(2) Current Issues in Criminal Justice 173, 117.
[47] Farrugia, A., Seear, K., Fraser, S., op cit n 45, p 197.

justice through a school lawyer who is integrated into the school wellbeing team. This partnership program is delivered in three high schools across South-Eastern Melbourne by SMLS.

One of the legal modules taught is 'Drugs and the Law', where we combine legal education about drug law with a focus on rights and responsibilities when dealing with police. The concepts are taught through a sporting lens, linking the rules that professional athletes must abide by when competing with the laws regarding various drugs in Victoria. Young people are taught the consequences of being caught using or possessing drugs in light of the professional and legal consequences of professional athletes testing positive for drug use.

Evaluations of the program highlight the very limited knowledge young people have of Victorian law. Prior to participating in the sessions, when asked about their existing knowledge of drug laws in Victoria, 88% of participants over 2 years reported that they knew 'Not much' or 'Almost nothing'. Program evaluations indicate that the program increases young people's knowledge of their rights and responsibilities and enhances their ability to make informed decisions when it comes to drugs.

Teaching about police interaction positions drug law within a legal system that polices and criminalises drug use, and helps young people understand the legal system and its actors, including police, the court and legal assistance organisations. Many students are eager to learn about drug law, but prohibition acts as a barrier to effectively teach young people about harm reduction practices, including managing interactions with police.

There is an abundance of research that demonstrates early engagement with the justice system has adverse effects on health outcomes for young people. Statistically, only small numbers of Victorian children come into contact with the justice system every year, totaling less than 1% of 10-17 years old.[48] Yet of those children, 40% reoffend within two years and 61% reoffend within 6 years.[49] Children who come into contact with the justice system early go on to "commit a wider range of offences and are more likely to reoffend violently".[50] Incarcerated people in Australia have higher rates of smoking; alcohol and other drug use; chronic physical illness; and mental health issues.[51]

Abstinence and prohibition education have limited evidence proving effectiveness,[52] and despite years of implementation, young people continue to use drugs including cannabis.[53] In contrast, evidence suggests that harm reduction educational strategies have a 'consistently beneficial influence on drug-using behaviour'.[54] Drug education that fails to inform young people of their legal rights and responsibilities may contribute to flow on harms in other areas of the justice system. In line with our avowed commitment to harm reduction drug policies in Australia, we must decriminalize drug use, and deliver drug education focused on harm reduction principles.

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[48] Reoffending by children and young people in Victoria n.d., viewed 21 September 2020, <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending_by_Children_and_Young_People_in_Victoria_Factsheet.pdf>.
[49] Ibid 1.
[50] Ibid 2.
[51] Australian Institute of Health and Welfare 2019. The health of Australia's prisoners 2018. Cat. no. PHE 246. Canberra: AIHW.<https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true> page 4
[52] See for example: McCambridge, J. (2007). A case study of publication bias in an influential series of reviews of drug education. Drug and Alcohol Review, 26(5), 463–468.
[53] Welfare AIoHa (2010) National drug strategy household survey report. Canberra: AIHW.
[54] Midford, R & Cahill, H 2020, 'Taking a Skills Focused, Harm Reduction Approach to School Drug Education', *Health and Education Interdependence*, pp. 269–288, viewed 20 September 2020, <https://link.springer.com/chapter/10.1007%2F978-981-15-3959-6_14>.

Recommendations:

1. Drug education packages must emphasize harm reduction and personal narrative.
2. Position education as an early intervention that disrupts pathways into the criminal justice system by equipping young people with the knowledge and skills to create and participate in safe and meaningful environments.
3. Ensure young people are aware of their rights and responsibilities when dealing with the criminal justice system through holistic education strategies.

D) Prevent criminal activity relating to the illegal cannabis trade in Victoria

The current Victorian legislative framework criminalises possession, use and trafficking of cannabis;[55] however, it is this framework of prohibition that creates a context of 'criminal activity'. We have noted the different approaches to drug law reform that do not rely on prohibition – legalisation with and without subsequent regulation of the cannabis market, and *de jure* and *de facto* decriminalisation.

Legalisation of cannabis provides a legislative mechanism for people to obtain drugs,[56] an example being the legal availability of alcohol and cigarettes. Legalisation of cannabis would see an immediate decrease in drug related crime, and would also provide opportunities for harm reduction through community driven and state level drug education and health promotion programs. SMLS supports exploring potential models of legalisation, with a view to create a framework that has the least associated economic and social harms for the Victorian community.

Global research into drug decriminalisation has shown positive impacts on the community including:

- a reduction of demand on the criminal justice system, with overall less use of police, courts and imprisonment; and
- improved social outcomes, for example better employment prospects due to the absence of recorded criminal convictions.[57]

SMLS recommends a de jure model of decriminalisation that removes criminal penalties from the legislation. A de facto model of decriminalisation leaves scope for drug related harm due to the potential for police discretion regarding enforcement.[58]

SMLS is a member the Federation of Community Legal Centre's Infringements Working Group, and we also assist a large proportion of clients each year with outstanding infringements. Everyday SMLS witnesses the compounding affect infringement debt has on the health and wellbeing of people, especially those experiencing alcohol and drug related harms. When considering opportunities for decriminalisation we note the importance of refraining from civil/pecuniary sanctions as a form of deterrence as this only leads to further justice related economic harms.

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[55] *Drugs, Poisons and Controlled Substances Act* 1981
[56] Hughes, C., Ritter, A., Chalmers, J., Lancaster, K., Barratt, M. & Moxham-Hall, V. (2016). Decriminalisation of drug use and possession in Australia – A briefing note. Sydney: Drug Policy Modelling Program, NDARC, UNSW Australia
[57] Ibid 4.
[58] Eastwood, N., "Decriminalization around the world" in *Legalizing Cannabis: Experiences, Lessons and Scenarios, editors,* Decorte, T., Lenton, S., and Wilkins, C.,(Routledge London and New York, 2020_p 135.

In Victoria the police diversion program, Cannabis Caution Program, is available to adults who: are found possessing less than 50 grams of cannabis; are subject to no other serious charges; and are willing to admit the offence.[59] The program can only be accessed twice and diverts the adult out of the criminal justice system without recording a conviction.

Cannabis diversion programs can be seen as a form of therapeutic justice, due to the requirement to take part in a drug education program instead of normal punitive sentencing. Researchers gathered expert opinion from the justice and health sector, and noted diversion was seen as 'more cost effective, pragmatic and consistent with a harm minimisation approach'.[60] Problems arise with the current model of diversion where the requirement for police discretion and referral may be limited by 'cultural resistance and beliefs that diversion is a "soft option"';[61] and where strict eligibility criteria limits how many times or when a person can access diversion.

An introduction of a legislative scheme for diversion could take away the discretionary element and broaden the criteria for eligibility. Unlimited, mandated diversion, with an increased maximum possession threshold quantity would mean that therapeutic options could be more widely and consistently available.

Recommendations:

Springvale Monash Legal Service takes the opportunity to endorse the submission of Dr Kate Seear.

1. Legalisation is explored as a potential model to reduce criminal activity.
2. Where a decriminalisation model is considered, rely on the de jure model to remove criminal penalties from the legislation.
3. Avoid reliance on civil and pecuniary sanctions for cannabis use and possession due to the propensity for fines to produce and compound debt related harm.
4. Further expand the availability of diversion and introduce clear legislative requirements removing police discretion and introducing wider catch all criteria without caps on access to the program.

[59] Hughes, C., Seear, K., Ritter, A. & Mazerolle, L. (2019). Monograph No. 27: 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. DPMP Monograph Series. Sydney: National Drug and Alcohol Research Centre, UNSW Sydney. http://doi.org/10.26190/5cca661ce09ce, p 26.
[60] Ibid 5.
[61] Ibid 7.

SUBMISSION

Prepared by Associate Professor Kate Seear (Faculty of Law, Monash University; Australian Drug Lawyers Network) and Springvale Monash Legal Service

Joint submission to the Senate Community Affairs References Committee inquiry into the current barriers to patient access to medicinal cannabis in Australia

17 January 2020

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ABOUT US

This is a joint submission of the Springvale Monash Legal Service (SMLS) and an academic from the Faculty of Law at Monash University (Kate Seear). Associate Professor Seear is also the founder and convenor of the Australian Drug Lawyers Network. Brief background details appear below.

Established in 1973, Springvale Monash Legal Service ('SMLS') is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. We are located in South East Melbourne, with offices and outreach locations across the City of Greater Dandenong, the City of Casey, and the Shire of Cardinia. The City of Greater Dandenong is the second most culturally diverse municipality in Australia, and the most diverse in Victoria. People from over 150 different countries reside in Greater Dandenong and 60% of the residents were born overseas. It also has the highest number of resettlements from newly-arrived migrants, refugees and asylum seekers in Victoria. Data from the 2016 Census revealed that Greater Dandenong was the second most disadvantaged LGA in Socio-Economic Indexes for Areas ('SEIFA') ratings. The City of Casey has one of the largest populations of Aboriginal and Torres Strait Islander residents in metropolitan Melbourne, as well as a high number of residents from refugee or asylum seeker backgrounds. Residents speak over 140 different languages and belong to over 120 faiths.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation in courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and VOCAT. For most of our 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer tailored community development programs, community legal education legal education programs and community engagement activities. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

Associate Professor Kate Seear is an Associate Professor in Law in the Faculty of Law, Monash University. The Faculty of Law at Monash University is part of the 'group of eight' universities. She is a practising solicitor and Academic Director of Springvale Monash Legal Service. She also holds a competitive research fellowship from the Australian Research Council in the form of a Discovery Early Career Researcher Award (DECRA) Fellowship. This fellowship was awarded in 2016 and ran until 2019. It funded A/Prof Seear to undertake a major international comparative study on alcohol and other drug issues/'addiction' in Australian and Canadian law. At the conclusion of this fellowship, A/Prof Seear established the Australian Drug Lawyers Network: a professional network for information and knowledge exchange. A/Prof Seear is also an Adjunct Research Fellow at the National Drug Research Institute, Curtin University. She was previously employed there as a postdoctoral research fellow. She is also an associate member of the DruGS (drugs, gender and sexuality) program in the Australian Research Centre in Sex, Health and Society at La Trobe University. She is a member of the editorial board of the international specialist journal *Contemporary Drug Problems*, and regularly peer reviews papers, by invitation from other experts around the world, on alcohol and other drug law and policy, including for prestigious international journals such as the *International Journal of Drug Policy*. A/Prof is the recipient of numerous grants, awards and prizes for her drug research, including the 2019 Vice Chancellor's Award for research impact (economic and social) at Monash University. This is the top prize awarded to an academic at the university. A/Prof Seear is the corresponding author for this submission.

As noted above, A/Prof Seear is an expert in alcohol and other drug issues, and is the author of numerous books, reports and peer-reviewed academic articles on drug policy, drug law, alcohol and other drug-related stigma and discrimination, human rights and drug policy and medicinal cannabis. SMLS has represented two clients charged with medicinal cannabis offences and has other experience over several decades representing people charged with other drug offences including cannabis use, possession and supply. A/Prof Seear's research and SMLS' advocacy for these clients have helped to formulate about approach to this submission and the recommendations we are making. The submission also benefitted from contributions by Monash Law students who provided research assistance on this project.[1]

OUR FOCUS IN THIS SUBMISSION

On 14 November 2019, the Commonwealth Senate agreed to hold an urgent inquiry into access to medicinal cannabis in Australia, seemingly recognising that access issues were leading some people to break the law. We welcome the Inquiry into current barriers to patient access to medicinal cannabis in Australia and the opportunity to identify possible areas of law reform with the aim of improving the justice system's responses to those experiencing barriers to accessing medicinal cannabis. This submission considers the current legal frameworks and administrative requirements governing medicinal cannabis, best practice international models, identifies areas for improvement and makes suggestions for law reform.

We are not seeking confidentiality regarding this submission.

The terms of reference for this Inquiry are as follows:

> The current barriers to patient access to medicinal cannabis in Australia, including:
>
> (a) the appropriateness of the current regulatory regime through the Therapeutic Goods Administration (TGA) Special Access Scheme (SAS), Authorised Prescriber Scheme and clinical trials;
>
> (b) the suitability of the Pharmaceutical Benefits Scheme for subsidising patient access to medicinal cannabis products;
>
> (c) the interaction between state and territory authorities and the Commonwealth, including overlap and variation between state and territory schemes;
>
> (d) Australia's regulatory regime in comparison to international best practice models for medicinal cannabis regulation and patient access;
>
> (e) the availability of training for doctors in the current TGA regulatory regime for prescribing medicinal cannabis to their patients;
>
> (f) the education of doctors in the Endogenous Cannabinoid System (ECS), and the appropriateness of medicinal cannabis treatments for various indications;

[1] Those students are: Aran Haupt; Artin Dezfouli; Bianca Levin; Charlotte Coggin; Lauren Sellars; Mathew Choo; Peter Andreakos; Tingting He; and Wing Leung Chung. The final submission is the work of A/Prof Seear and SMLS alone.

(g) sources of information for doctors about uses of medicinal cannabis and how these might be improved and widened;

(h) delays in access, and the practice of product substitution, due to importation of medicinal cannabis and the shortage of Australian manufactured medicinal cannabis products;

(i) the current status of the domestic regulated medicinal cannabis industry;

(j) the impacts on the mental and physical wellbeing of those patients struggling to access medicinal cannabis through Australia's regulatory regime;

(k) the particular barriers for those in rural and remote areas in accessing medicinal cannabis legally;

(l) the significant financial barriers to accessing medicinal cannabis treatment;

(m) the number of Australian patients continuing to rely on unregulated supply of medicinal cannabis due to access barriers and the impacts associated with that; and

(n) any related matters.

Our submission addresses those terms of reference that are within our expertise and experience. As we are based in Victoria, our submission also focuses on elements of the Victorian experience. We make a number of recommendations and these are detailed below.

OPENING STATEMENT REGARDING MEDICINAL CANNABIS IN AUSTRALIA

1. Australia, like most other countries around the world, is a signatory to international conventions that prohibit the consumption of certain drugs. There are three main conventions, the first of which was introduced in 1961.[2]

2. In recent years, cannabis has begun to be legalised for medicinal purposes across Australia.[3] This change has come about in part because of emerging evidence detailing the benefits of medicinal cannabis for certain medical conditions. It may be of benefit for certain medical conditions (such as arthritis and intractable seizures), ease the side effects of chemotherapy and radiotherapy, and it may even shrink cancerous tumours.[4] Research is being done on these issues around the world, including at the Lambert Initiative (LI) at Sydney University.

3. In recent years, several countries around the world have begun to relax their drug laws.[5] Access to some drugs (such as cannabis and psilocybin) have been decriminalised or even legalised, and several parliamentary inquiries in Australia are currently underway exploring these issues.

4. As the Committee will be aware, and will no doubt hear through other submissions to this Inquiry, Australia's current legal approach to medicinal cannabis is imperfect. Although we commend

[2] https://www.unodc.org/unodc/en/treaties/single-convention.html
[3] https://www.tga.gov.au/access-medicinal-cannabis-products-using-access-schemes
[4] https://www.liebertpub.com/doi/10.1089/pancan.2018.0019
[5] Seear, K. (2020). Addressing alcohol and other drug stigma. Where to next? *Drug and Alcohol Review*. Available early online: https://onlinelibrary.wiley.com/doi/full/10.1111/dar.13028

parliamentarians at federal, state and territory levels for opening up access to medicinal cannabis in recent years, existing systems are flawed in several respects.

5. We will not repeat the history of reforms and the existing regulatory frameworks here, as these matters will be well known to members of the Committee. Nevertheless, the existing regulatory system is complex and slow, the process for obtaining licences is slow, and medical practitioners are not always knowledgeable about medicinal cannabis and comfortable in prescribing it. Medicinal cannabis products are also relatively expensive (compared to some other medications).

6. Importantly, the cost of medication appears to be prohibitive for all but a few members of the community, meaning that although medicinal cannabis is *technically* accessible, for many Australians, it remains *practically* inaccessible. This has resulted in some people deciding to cultivate their own medicinal cannabis, to access it illegally, or to supply it to others on 'compassionate' grounds.

7. Several individuals have been prosecuted for this, including parents, friends, carers and doctors. Recent high-profile cases include the prosecution of Dr Andrew Katelaris in NSW in 2018 and the prosecution of Jenny Hallam in South Australia in 2019. Dr Katelaris represented himself and was acquitted. Ms Hallam received a good behaviour bond and no conviction.

8. Criminal justice responses to these developments have been inconsistent across Australia. These inconsistencies do not merely reflect differences between individual defendants and their circumstances (e.g. whether they have prior convictions) but fundamental differences in criminal law across the states and territories.

9. For the benefit of the Committee, **we include a table of all publicly reported/known cases where individuals have been prosecuted, as Appendix 1 to this report.** This table contains details of these cases and/or their current status, to the best of our knowledge, including some cases, decided on different grounds, from overseas.

10. The creation of inequalities in access on financial grounds or on the basis of one's jurisdiction is hugely problematic. Further, the use of the criminal law to prosecute sick and dying individuals, their carers, parents, other family members and treating physicians is problematic; it exacerbates, generates and magnifies people's suffering at a time of already significant suffering and vulnerability. The fact that the criminal law generates different outcomes for such individuals (Appendix 1) is even more concerning and raises important questions about health justice.

11. In our opinion, finding ways to address and reduce these inequalities and issues must be a focus for this Committee moving forward.

12. It is also important to note that this Inquiry is being undertaken as a seismic shift is underway in global drug policy. In early 2019, for instance, the heads of all 31 United Nations agencies released a communiqué calling for decriminalisation of drugs and a move away from ineffective punitive approaches.[6] Importantly, the UN's call for immediate change noted that reforms must be shaped by *human rights.* The new *International Guidelines on Human Rights and Drug Policy* recommend all countries undertake a 'transparent review' of drug laws and policies for their human rights compliance, and subject proposed new laws to human rights 'assessment'.[7]

[6] United Nations Chief Executives Board for Coordination (2019). *Summary of deliberations.* United Nations: New York.
[7] World Health Organization, UNAIDS, UNDP and the International Centre on Human Rights and Drug Policy. (2019). *International Guidelines on Human Rights and Drug Policy.* United Nations: Geneva.

13. In our view, these developments necessitate that the Committee take into account international developments including calls for moves away from punitive approaches to drugs (currently enabled by inequalities in access) and calls for approaches to be based in human rights. As we shall also explain, it is imperative that the Committee give consideration to the current system's capacity to generate or exacerbate stigma, given the proven relationship between stigma and health, social and economic outcomes. We address these issues later in this submission.

RECOMMENDATION 1: That the Committee takes into account international developments with respect to cannabis, especially the growing international consensus for moving away from punitive responses to drug use, calls for human-rights based approaches to drugs and reforms to access to cannabis in the form of decriminalisation and legalisation.

1. As noted above, the heads of all 31 United Nations agencies released a landmark communiqué in early 2019 calling for decriminalisation of drugs and a move away from punitive approaches.[8]

2. Existing approaches create inequalities of access and provide incentives for people to cultivate, supply, use and possess cannabis unlawfully.

3. In other words, **existing approaches to medicinal cannabis create the enabling conditions for more punitive responses, which is at odds with both recent international developments and the purpose of opening up access to medicinal cannabis to begin with.**

4. Therefore, the Committee should give serious consideration to decriminalisation or legalisation of cannabis more broadly, given that criminalisation remains the overarching (punitive) framework that impacts on individuals who are unable to access medicinal cannabis under the existing schemes.

5. Decriminalisation is defined as 'the removal of criminal offences for specific penalties'.[9] Decriminalisation is distinct from legalisation and may occur in a variety of ways.[10] A distinction is sometimes drawn between 'de facto' and 'de jure' decriminalisation:

> In a *de jure* reform criminal penalties for use/possession are removed in the law (with optional use of non-criminal sanctions). In a *de facto* reform criminal penalties remain in the law, but can be lessened in practice (eg via police guidelines to not enforce the law).

Research suggests a number of benefits associated with decriminalisation. These include financial savings from reduced law enforcement activities,[11] and improved social outcomes.[12]

[8] United Nations Chief Executives Board for Coordination (2019). *Summary of deliberations*. United Nations: New York.
[9] Hughes, C., Ritter, A., Chalmers, J., Lancaster, K., Barratt, M. & Moxham-Hall, V. (2016). *Decriminalisation of drug use and possession in Australia – A briefing note*. Sydney: Drug Policy Modelling Program, NDARC, UNSW Australia at 2.
[10] Hughes, C., Ritter, A., Chalmers, J., Lancaster, K., Barratt, M. & Moxham-Hall, V. (2016). *Decriminalisation of drug use and possession in Australia – A briefing note*. Sydney: Drug Policy Modelling Program, NDARC, UNSW Australia at 2.
[11] Single, E., et al. (1999). The Impact of Cannabis Decriminalisation in Australia and the United States. South Australia, Drug and Alcohol Services Council. See also Baker and Goh (2004) http://www.bocsar.nsw.gov.au/Documents/r54.pdf
[12] Lenton, S., et al. (1999). Infringement versus Conviction: the Social Impact of a Minor Cannabis Offence Under a Civil Penalties System and Strict Prohibition in Two Australian States. Canberra, Department of Health and Aged Care; Males, M. & Buchen, L. (2014). 'Reforming Marijuana Laws: Which Approach Best Reduces the Harms of Criminalization? A Five-State Analysis', San Francisco: Center on Juvenile and Criminal Justice.

RECOMMENDATION 2: That any reforms to medicinal cannabis legal frameworks need to consider human rights, incorporating our international human rights obligations and the specific implications for those jurisdictions in Australia that have human rights charters.

6. As noted earlier, the UN's call for immediate change noted that reforms must be shaped by human rights.

7. In recent years a number of key stakeholders including international figures and organisations have expressed concern that existing drug laws and policies enable human rights breaches.[13] The prosecution of people for certain drug offences also raises important human rights questions.

8. Human rights considerations are especially important in Victoria (where we are based), Queensland and the ACT, as all three of these jurisdictions have introduced human rights charters. These impose specific obligations to consider human rights. In 2006, Victoria became the second Australian jurisdiction (after the Australian Capital Territory) to introduce a human rights charter (formally known as the *Charter of Human Rights and Responsibilities Act 2006;* hereinafter referred to as 'the Charter').

9. The Charter ascribes human rights obligations to various 'public authorities', including, per section 4(1)(d), the Victorian police.

10. Charter obligations imposed on public authorities are both substantive and procedural.

11. Victorians do not have an obligation to prove that their human rights should be upheld; rather, there is an obligation on public authorities to consider and uphold human rights in the work that they do. If they purport to limit human rights in any way, they can do so only in accordance with section 7 of the Charter and they have the obligation to demonstrate how any limitation of rights is justifiable in accordance with the criteria detailed in that section.

12. Similar processes exist for other legislation that imposes human rights obligations.

13. Further, only some rights are capable of being limited. Some rights (such as the right to freedom from torture and cruel, inhuman or degrading treatment) are thought of as absolute rights, meaning that they cannot be limited.

14. The Charter recognises a number of rights potentially relevant to medicinal cannabis access schemes, including the right to recognition and equality before the law (section 8), the right to life (section 9) and the right to protection from torture and cruel, inhuman or degrading treatment (section 10).

15. To the extent that individuals find themselves in the predicament they are in (i.e. unable to practically access medicinal cannabis) due to a combination of illness/disability and reduced financial means, the prosecution of them raises questions about compliance with section 8 of the Charter (the right to equality before the law). That is, a wealthier person facing diagnoses of the kind some people have received may not have had any difficulty accessing medicinal cannabis and thus not been at risk of prosecution.

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[13] See for example: International Centre on Human Rights and Drug Policy, UNAIDS, World Health Organization and the United Nations Development Program (2019). *International Guidelines on Human Rights and Drug Policy*. United Nations Development Program; UNAIDS (2016) *Do no harm: Health, human rights and people who use drugs*. UNAIDS. Available at: http://www.unaids.org/sites/default/files/media_asset/donoharm_en.pdf

16. Put simply, the fact that some people are exposed to prosecution purely because they are unable to afford to access medicinal cannabis offends on public policy grounds, and it may also constitute a violation of fundamental human rights including the right to equality before the law.

17. There is a substantial body of jurisprudence suggesting that some protected rights (including the right to life) place positive obligations on government, including the obligation to preserve life (by virtue of section 9 of the Charter). The UNHRC and the ECtHR have made clear that the right to life entails more than a negative duty to refrain from arbitrarily taking life, but also includes an obligation to take positive steps to safeguard life.[14]

18. Arguably, therefore, barriers (including financial barriers) to vital, lawful medical treatment and care may put lives at risk thus calling into question compliance with section 9 of the Charter.

19. The right to protection from torture and from cruel, inhuman or degrading treatment (section 10) is a right that extends beyond stereotypical or 'common sense' understandings of torture (e.g. of detainees being interrogated in times of war). The nature and meaning of these rights has evolved over time and continues to do so.[15] It places obligations on governments and authorities to avoid 'intense physical and mental suffering' or treatment that arouses 'feelings of fear, anguish and inferiority capable of humiliating and debasing them'[16] including in the provision of health care.

20. Many have argued that the refusal to provide treatment to people, or unequal access to treatment that generates or exacerbates suffering can be a violation of the right to protection from torture and from cruel, inhuman or degrading treatment.[17]

21. The inability of some people to practically access medicinal cannabis thus raises questions about compliance with section 10 of the Charter, in the first instance, and with other equivalent observations in other jurisdictions. The decision to prosecute individuals for accessing lawful treatment raises even more questions about compliance with section 10. As noted earlier, section 10 is an absolute right and cannot be limited.

22. In addition, we suggest that there are potential inconsistencies with section 14 of the *Victorian Charter*[18] (and similar provisions elsewhere), which allow for freedom of thought, conscience, religion and belief.

23. This section was adapted from Article 22 of the UN's *Universal Declaration of Human Rights*[19], which Australia ratified in 1948, asserting that economic, social and cultural rights are indispensable for

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[14] For example, the UNHRC has stated that: 'the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures'**:** General Comment 6, *Article 6: The Right to Life* (1982), U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), [5]. See further Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2nd ed, 2004), Chapter 8, especially [8.01], [8.39]-[8.64]. The same interpretation has been applied to the equivalent right to life under the European Convention on Human Rights, see eg *LCB v UK* (1998) 4 BHRC 477, 456 [36]; *Osman v UK* (1998) 5 BHRC 293, 321 [11]; *Keenan v UK* (2001) 10 BHRC 319, 348-9 [88]-[90].

[15] World Organization Against Torture (OMCT), The Prohibition of Torture and Ill-treatment in the Inter-American Human Rights System: A Handbook for Victims and Their Advocates (2006), p. 107, citing Inter-American Court of Human Rights, Cantoral-Benavides v. Peru, Series C, No. 69 (2000) para. 99; ECHR, Selmouni v. France, Application No. 25803/94 (1999), para. 101.

[16] http://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/1978/1.html&query=(Ireland)+AND+(v)+AND+(the)+AND+(United)+AND+(Kingdom)

[17] See, for example: Lines, R. (2017). *Drug Control and Human Rights in International Law.* Cambridge University Press: Cambridge.

[18] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14.

human dignity and development of the human personality[20]. In November 2015, the Supreme Court of Mexico ruled that the prohibition of producing, possessing and consuming cannabis for personal use was unconstitutional as it violated Mexico's human right to the free development of one's personality.[21] In an important statement about how to balance this right with other considerations, the Court noted that:

> That right [to the free development of one's personality] is not absolute, and the consumption of certain substances may be regulated, but the effects provoked by marijuana do not justify an absolute prohibition of its consumption.[22]

This ruling was influenced by similar decisions in Uruguay[23] and Canada[24], which legalised the use of cannabis for personal use in 2013 and 2015 respectively.

24. Crucially, there is evidence that many people who consume medicinal cannabis do so for reasons connected to freedom of thought, conscience, religion and/or belief. For people living with chronic medical conditions and/or facing terminal illness, there is sometimes a need to process one's pending death, and to address spiritual issues, existential crises or other psychological suffering. Where people cannot practically access medicinal cannabis and where it may be helpful to their psychological wellbeing and state of mind to do so, there may be a breach of these human rights obligations.

25. The Victorian Law Reform Commission in 2015 noted that 'users of medicinal cannabis'[25] should be protected from criminal charges, yet the current scheme does not afford this privilege to ill patients who cannot financially afford to access the drug through legal means. This arguably constitutes discrimination in law against those who, for whatever reason, are unable to access cannabis through the scheme but rely upon the drug for a 'medicinal' purpose. The explicit disapproval of smoking the drug in dried form, even for a 'medicinal' purpose, may also constitute discrimination against those who only have access to cannabis in this form.[26] Affording patients who cultivate their own 'medicinal cannabis' the same legal immunity as those obtaining the drug through the current scheme would improve accessibility for patients of varying socio-economic backgrounds.[27]

26. All of these issues raise a key question: is the criminalisation of some people for medicinal cannabis possession, use, cultivation and/or supply fundamentally at odds with our human rights obligations? While we acknowledge, of course, that human rights can be limited and must be balanced, access to medicinal cannabis throws up a set of unique issues that make it harder for governments to justify existing approaches on human rights grounds. In any event (or in addition) governments should at least be giving consideration to whether and how their existing approaches (including the prosecution of individuals as described in more detail below) can be justified on human rights grounds. This extends to decisions to prosecute vulnerable, sick and suffering individuals, in particular.

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[19] *Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('UDHR').*
[20] UDHR, UN Doc A/810, Art 22.
[21] Elizabeth Malkin and Azam Ahmed, 'Ruling in Mexico Sets into Motion Legal Marijuana', The New York Times (online, 4 November 2015) <https://www.nytimes.com/2015/11/05/world/americas/mexico-supreme-court-marijuana-ruling.html>
[22] Ibid.
[23] Simon Maybin, 'Uruguay: The world's marijuana pioneer', BBC News (Online, 4 April 2019). <https://www.bbc.com/news/business-47785648>
[24] Government of Canada, *Cannabis Laws and Regulations,* (2 October 2019) <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations.html>.
[25] Victorian Law Reform Commission, *Medicinal cannabis* (Report, October 2015) 16.
[26] Ian Freckleton, 'Medicinal cannabis law reform in Australia' (2016) 23(3) *Journal of Law and Medicine* 497, 506.
[27] Ibid 128.

27. We thus strongly recommend that the Committee explicitly consider whether existing approaches are compliant with human rights and ensure that any reforms or amendments made account for human rights.

RECOMMENDATION 3: That state and territory-based regulatory regimes be amended to ensure consistency of access and outcome, wherever possible. This includes a consideration – to the extent it is possible at the Commonwealth level – for a recommendation that each state and territory consider uniformity in approaches under the criminal law.

28. A complete and effective implementation of the regulatory framework of therapeutic goods provided by the Commonwealth Act depends on the complementary legislations enacted by the states and territories. Although States and Territories voluntarily implement the SUSMP through their legislation, particular medicinal cannabis products might be scheduled differently. Further, medical practitioners are subject to different procedural requirements for prescribing medicinal cannabis. For example, prescribers are required to seek approval from state or territory health department and TGA. These factors may lead to differences in access depending on one's jurisdiction.

29. As noted earlier, several people have been prosecuted in recent years for medicinal cannabis offences (see Appendix 1). As we also noted earlier, prosecutions have generated a variety of results, and at least one case (Katelaris) resulted in an acquittal.

30. There are numerous possible reasons for this, including significant differences between the states and territories in terms of criminal offences, available penalties and the availability of drug diversion. The current state of Australian drug law and policy, including differences in penalties, offences and diversionary schemes, was recently documented in a comprehensive report prepared by A/Prof Seear and colleagues for the Commonwealth Department of Health.[28]

31. In effect, differences between jurisdictions – both in terms of access to medicinal cannabis and in terms of criminal law responses to those who fall foul of the law – mean that differences in access to medicinal cannabis and differences in criminal justice approaches will have disproportionate impacts on justice outcomes. In turn, there will be important differences in the physical and mental health outcomes for those so prosecuted.

32. As with any criminal prosecution, there may be other social and economic impacts, too. For instance, one of the clients we represent has been advised that if found guilty, her insurer will terminate her home insurance, thus compounding her already precarious state. Those prosecuted may also receive criminal records, impacting their employment opportunities, future earning capacities, and so on.

33. As an associated point, one of the most important impacts of criminalisation is stigma. Drug-related stigma is a widely documented phenomenon, and one that is proven to have multiple and sometimes lifelong adverse effects.[29] It is not only a product of criminalisation, although the ongoing

[28] See: Hughes, C., Seear, K., Ritter, A. & Mazerolle, L. (2019). *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.* Drug Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney.
[29] See for instance: Lancaster, K., Seear, K. & Ritter, A. (2018). *Reducing stigma and discrimination for people experiencing problematic alcohol and other drug use.* Drug Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney; Fraser, S., Pienaar, K., Dilkes-Frayne, E., Moore, D., Kokanovic, R., Treloar, C. and

criminalisation of drugs is a key factor. A/Prof Seear and colleagues have developed a framework for assessing the stigmatising potential of drug laws.[30]

34. We argue, based on this and associated work, that existing punitive approaches are stigmatising, increase people's suffering and isolation, can impact relationships with vital services (e.g. health care services and police) and may exacerbate harms otherwise understood to stem from drugs themselves.

35. It is important that the Committee act to reduce the risk of further stigmatisation, given the widespread evidence of this phenomenon and its proven adverse impacts. These adverse impacts are likely to be even more problematic when experienced by people who are already marginalised (e.g. by virtue of chronic or terminal illness).

36. The impact of criminal records is also widely documented and well-known, and may intensify the risk of unemployment, homelessness and poverty. This is an especially concerning problem for people already living with disability, chronic illness or terminal illness.

37. People (including those with chronic or terminal conditions) charged with medicinal cannabis offences may face lengthy terms of imprisonment in some jurisdictions, with or without the availability of diversion in exchange for a guilty plea. We urge the Committee to address these issues including through a recommendation that states and territories consider expanding diversion opportunities in line with A/Prof Seear's aforementioned recent research.

38. As highlighted in the attached Appendix, the cases heard before the Australian courts in the last decade show a trend in sentencing judgments, namely, the taking into consideration of external factors influencing the actions of those in possession of medicinal cannabis. Examining specifically the cases of *Lee,*[31] *Bower,*[32] *Pallett,*[33] and *Hallam*,[34] the following factors were considered in the sentencing of the accused:

    i) The benefits of medicinal cannabis on the patients;
    ii) The accused's desire to provide chronic pain relief;
    iii) No attempt by the accused to obtain financial gain; and
    iv) Impact of a conviction on future work of the accused in the growing of medicinal cannabis.

39. As these examples make clear, judicial officers have seemingly acknowledged the dire state of inaccessibility of medicinal cannabis for Australians. There is still a risk, despite the apparent leniency shown by some judges and magistrates, of very disproportionate outcomes.

Dunlop, A. (2017). Addiction stigma and the biopolitics of liberal modernity: A qualitative analysis. *International Journal of Drug Policy*. 44, 192-201; Australian Injecting and Illicit Drug Users League. (2011). *Why wouldn't I discriminate against all of them?: A report on stigma and discrimination towards the injecting drug user community*. Canberra: Australian Injecting and Illicit Drug Users League; Lloyd, C. (2013). The stigmatization of problem drug users: A narrative literature review. *Drugs: Education, Prevention, and Policy, 20*(2), 85-95; UKDPC, (2010). *Getting serious about stigma: the problem with stigmatising drug users*. London: UK Drug Policy Commission (UKDPC); Corrigan, P.W., Kuwabara, S.A. and O'Shaughnessy, J. (2009). The public stigma of mental illness and drug addiction: findings from a stratified random sample. *Journal of Social Work, 9*(2), 139-147; Simmonds, L. and Coomber, R. (2009). Injecting drug users: A stigmatised and stigmatising population. *International Journal of Drug Policy, 20*(2), 121-130; Radcliffe, P. and Stevens, A. (2008). Are drug treatment services only for 'thieving junkie scumbags'? Drug users and the management of stigmatised identities. *Social Science & Medicine, 67*(7), 1065-1073; Room, R. (2005). Stigma, social inequality and alcohol and drug use. *Drug and Alcohol Review, 24*(2), 143-155.

[30] Seear, K., Lancaster, K. and Ritter, A. (2017). A new framework for evaluating the potential for drug law to produce stigma: Insights from an Australian study, *Journal of Law, Medicine and Ethics*. 45(4), 596-606.

[31] See Case # 4 in attached Appendix.

[32] See Case # 5 in attached Appendix.

[33] See Case # 6 in attached Appendix.

[34] See Case # 7 in attached Appendix.

40. One reason for this is the availability of criminal law defences. As we noted earlier, Dr Andrew Katelaris was acquitted in New South Wales, having argued that the defence of necessity applied to his case.

41. In Victoria, however, the common law defence of necessity has been repealed. The only defence now available to Victorians seeking to excuse criminal responsibility for a life-saving act is that of 'sudden or extraordinary emergency'.[35] However, in Victoria, as affirmed in the case of *DPP v Pallett*,[36] the use of medicinal cannabis for pain relief does not constitute an 'emergency' situation.

42. These differences as between jurisdictions mean that in some parts of Australia some people face the prospect of acquittal, but in other locations, they do not. These vastly different possibilities seem to be at odds with the Commonwealth government's original intentions regarding opening up access to medicinal cannabis: **for all Australians on equal terms**.

43. For a vital and life-saving medication, **we are essentially witnessing postcode injustice**. It should be addressed as a matter of urgency by the Committee, including because of the impact of non-access and/or subsequent prosecution on people's mental and physical health and wellbeing.

44. Under the Victorian Charter, and as noted earlier, Victorians have the right to be protected from torture and cruel, inhuman or degrading treatment. The prosecution of individuals for the use, cultivation or possession of medical cannabis without providing legal protection through the defence of medical necessity may breach this right. Specifically, it was held in a Canadian judgment of *Hitzig v The Queen,* that 'a law which requires law-abiding citizens who are seriously ill, to go to the black market to remedy an acknowledged medical need is a dehumanising and humiliating experience'. Thus, it is argued that due to the exorbitant financial cost of medicinal cannabis, further prosecuting otherwise law-abiding citizens for seeking a medical remedy without providing them legal protection before the law through the defence of necessity, is inhuman and degrading treatment and a breach of the Charter.

45. All jurisdictions should thus consider reintroducing a defence of medical necessity. We suggest that the reintroduction of the common law defence of necessity may alleviate the humiliating and degrading treatment of patients suffering from the requisite 'prescribed medical condition[s]',[37] who cannot afford medicinal cannabis under the current system.

46. All jurisdictions might wish to consider some further legal protection or defence. One possibility is that people who have obtained a prescription for medicinal cannabis should have a full defence from prosecution.

47. Further, it is contended that consideration should be given to whether such defences can be extended to others, such as the carers of eligible patients.

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[35] *Crimes Act*, Vic 1958, s322R.
[36] See Case #6 in attached Appendix.
[37] *Access to Medicinal Cannabis Act*, VIC, 2016, s.3.

RECOMMENDATION 4: Consider opportunities to improve public access to medicinal cannabis through placing it on the Pharmaceutical Benefits Scheme or otherwise expanding availability, including through improvements to the regulation of licensing

48. Many medicines prescribed by doctors are subsidised by the Commonwealth Government under the Pharmaceutical Benefits Scheme (PBS). However, there are no medicinal cannabis products subsidised by the PBS. The cost of medicinal cannabis varies depending on various factors including the condition being treated, the type of product and the dosage prescribed by the doctor. The TGA-approved products available to patients are extremely expensive, as we noted earlier.

49. According to Professor Iain McGregor, the high price of medicinal cannabis is a major reason why Australian patients still depend on the black market. He notes:

> Most of the people are extremely poor because they live on social welfare or pensions. People cannot afford pharmaceutical products that are on offer in the federal scheme. It would cost $60,000 a year to treat an epileptic child with 1,000 milligrams of cannabidiol a day.[38]

This is equivalent to approximately $120 a day for just 1 gram of cannabidiol. It is evident that without the subsidy, patients have no choice other than to bear the full cost of the medication themselves. For many Australians, the high cost of medicinal cannabis has left the product out of their reach. For others trying to manage symptoms of their illnesses, it means seeking help outside of the law.

50. Although not our area of expertise, we understand that some experts believe that it is unlikely that any medicinal cannabis will ever make its way onto the PBS. If this is so, we urge the Committee to consider alternative options for access and/or ways to reduce the cost of medicinal cannabis.

51. We understand that there are presently significant delays to obtaining licences and that this may impact both the availability of and pricing for medicinal cannabis. We urge the Committee to take advice from other experts and from health economist Professor Simon Eckermann in this regard.

52. We understand that there are presently no statutory timeframes for reviewing and approving access to licensing, and have heard reports of some waiting more than 700 days to have their licensing application processed.

53. Urgent consideration should be given to providing further funding to the Office of Drug Control to improve the speed of application processing, and to otherwise improving industry capacity to supply.

54. Consideration should also be given to the introduction of statutory timeframes (i.e. deadlines) such that license applications are processed more quickly.

[38] Iain McGregor, 'Is medicinal cannabis on the rise in Australia?' Bedrocan (Web Page, 30 October 2018) <https://bedrocan.com/is-medicinal-cannabis-in-australia-on-the-rise/>.

RECOMMENDATION 5: Increase training and education on medicinal cannabis for medical practitioners, including on topics such as patient safety, mental health risk, side effects, legal issues, stigma, quality and cost, and take steps to address stigma.

55. We advocate for development and delivery of training and education on medicinal cannabis. Medical practitioners must be empowered to relay informed advice to their patients regarding the use, applications, side effects and costs of medicinal cannabis.

56. Applying to prescribe medicinal cannabis involves providing a clinical justification for using this treatment, as well as supportive safety and efficacy data.[39] However, recent Australian research suggests that many medical practitioners feel insufficiently informed about the efficacy of medicinal cannabis and its interactions with other drugs.[40] Therefore, they do not have access to the information required for making an application[41] or may be reluctant to do so.

57. Despite this, patients commonly make inquiries about medicinal cannabis, indicating a considerable gap between medical practitioners' ability to provide patients with advice and treatment, and the patients' interest in the treatment.[42] Prescribers are also concerned about other factors including patient safety, mental health risk, side effects, addiction, legal issues, stigma, quality and cost.[43]

58. Moreover, prescribers must also detail how they intend to monitor their patients' responses to the treatment.[44] However, because some medical practitioners do not feel informed, they also feel incapable of monitoring their patients once they commence treatment.[45]

59. Some medical practitioners are also unsure about how to legally gain access to medicinal cannabis,[46] creating another impasse for patient access.[47]

60. We also note, with disappointment, reports by our clients and others (documented in submissions to this Inquiry) of persistent stigmatising attitudes held by some doctors.

61. As noted earlier, stigmatising attitudes in health care are well-known and widely documented and it is essential that multiple measures be undertaken to combat stigma and discrimination against people who use cannabis.[48]

62. Other prescribers are aware that access is time consuming and difficult and report that many patients are consequently illegally self-medicating with cannabis.[49] Australian research in the area is largely limited to surveys of health professionals.[50] Nevertheless, medicinal cannabis has been proven to

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[39] Therapeutic Goods Administration, *Special Access Scheme* (18 September 2019) <https://www.tga.gov.au/form/special-access-scheme>.
[40] Denesh Hewa-Gamage, 'A cross-sectional survey of health professionals' attitudes toward medicinal cannabis use as part of cancer management' (2019) 26 *Journal of Law and Medicine* 815.
[41] Lambert Initiative for Cannabinoid Therapeutics, *How to get medicinal cannabis* The University of Sydney <https://sydney.edu.au/lambert/how-to-get-medicinal-cannabis.html>.
[42] Hewa-Gamage, above n39, p. 821.
[43] Ibid 816.
[44] Therapeutic Goods Administration, above n 38.
[45] Lambert Initiative for Cannabinoid Therapeutics, above n 40.
[46] Hewa-Gamage, above n 39, p.821.
[47] Ibid.
[48] Lancaster, K., Seear, K. & Ritter, A. (2018). *Reducing stigma and discrimination for people experiencing problematic alcohol and other drug use*. Drug Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney
[49] Hewa-Gamage, above n 39.
[50] Hewa-Gamage, above n 39, p.816.

have great therapeutic potential for symptomatic relief of life-threatening conditions, including cancer,[51] consequently improving certain patients' quality of life.[52]

63. Legislating and funding more training and education for medical practitioners, as well as conducting thorough research to ascertain the efficacy of medicinal cannabis, may increase their ability to prescribe it. This should be a priority moving forward.

We respectfully invite you to consider these submissions and invite you to contact our office to discuss this matter further.

Yours sincerely,

Associate Professor Kate Seear
Associate Professor, Faculty of Law, Monash University
Founder and Convenor, Australian Drug Lawyers Network

Kristen Wallwork
Executive Director, SMLS

[51] Tony Bogdanoski, 'Accommodating the medical use of marijuana: Surveying the differing legal approaches in Australia, the United States and Canada', (2010) 17 *Journal of Law and Medicine* 508, 508.
[52] Ibid.

APPENDIX 1: Table summarising all relevant known cases in Australia (and UK)

No.	Case Name	Jurisdiction	Case status	Facts	Charge/s	Plea	Outcome
1	Lynch v Commissioner of Police	QLD	Open 2017 - Present	Debra Lynch suffers from a rare terminal auto-immune disease (scleroderma), PTSD, anxiety, insomnia and panic attacks.[53] Lynch uses medicinal cannabis to manage these symptoms. Arrested in June 2017.	Possession and production of a prohibited drug (s8; s9 Drug Misuse Act 1986 QLD)	Lynch initially pleaded guilty and then submitted a 20-page affidavit to change her plea which was accepted by the judge.[54] Lynch argued medical necessity as she needs cannabis for life-threatening and terminal illnesses.[55]	The case is currently adjourned until 26 February 2020.[56]
2	R v Barry Futter[57]	NSW	2018 - closed	Ubuntu Wellness Clinic/Church of Ubuntu is a not-for-profit medicinal cannabis growing dispensary in Newcastle. Police raided the clinic and seized 215 cannabis plants. The Clinic was providing small cannabis plants to patients to grow at their own homes to treat conditions such as cancer and relieve symptoms of extreme epilepsy,	Trafficking a commercial quantity and drug supply (s29; s25; 25A Drug Misuse and Trafficking Act NSW 1985)	BJ Futter pleaded guilty to one count of cultivating a large commercial quantity of a prohibited plant by enhanced indoor means and one count of drug supply.[59]	Ellis J: Imposed a conditional release order without conviction, on the condition that BJ Futter enters into a 12 month good behaviour bond.[60]

[53] Greendorphin, 'Court Case Deb Lynch President Medical Cannabis Users Association Australia' (Newsarticle), November 6 2017, https://greendorphin.com/court-case-deb-lynch-president-medical-cannabis-users-association-australia/
[54] Ibid.
[55] Lynch v Commissioner of Police [2019] QDC 099
[56] Sydney Morning Herald, 'Gran with an auto-immune disease calls for cannabis to be legal' (Newsarticle), November 20 2019, https://www.smh.com.au/national/queensland/gran-with-an-auto-immune-disease-calls-for-cannabis-to-be-legal-20191120-p53cd3.html
[57] Church of Ubuntu, 'Submissions R v Barry Futter' October 17 2018, https://www.churchofubuntu.org/church-of-ubuntu-legal-update/submissions-r-v-barry-futter-17th-october-2018/

				particularly in children.[58]			
3	Case against: Michael Lambert[61]	NSW	2017 - Closed	Lambert is a father of a young girl with severe epilepsy (Dravet Syndrome). CBD was found to improve seizures. Lambert cultivated cannabis for his daughter's use. Seven cannabis plants, leaves and oils were found.	Two counts of possession of a prohibited drug and one count of production of a prohibited drug (s10; s24 Drug Misuse and Trafficking Act 1985)	Lambert pleaded not guilty and during his two-year legal fight in Gosford Local Court argued a defence of medical "necessity".[62]	Magistrate Williams handed down his decision stating that "this movement by government to explore the possible benefits of cannabis does not provide a platform for everyone who may believe in cannabis, even on the most honest grounds, to circumvent the law," to which he then handed down his sentence.[63] Guilty of 2 charges of possession and production. No conviction and put on a section 10 good behaviour bond per *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*.
4	Case against: Malcolm Ronald Lee[64]	NSW Newcastle District Court	2015 - Closed	Lee was supplying local cancer patients with cannabis. Lee was found to be in possession of 116 cannabis plants and large amounts of cannabis oil when his home was raided by police. Lee was said to supply cancer patients with medical cannabis,	Three charges, including possession and production of a prohibited drug (s10; s24 Drug Misuse and Trafficking Act 1985)	Lee plead guilty to three offences, including manufacturing a commercial quantity of a prohibited drug. The prosecution did not request a custodial sentence as there was no harm to the community and no financial gain made by Lee.	Judge Roy Ellis: Imposed a 2-year good behaviour bond on Lee. Took into consideration (i) the benefits of medicinal cannabis, (ii) that Lee was not trying to obtain any financial gain; and (iii) that Lee was attempting to help people suffering from chronic pain. The Judge further noted that Lee should help with the state government's terminal illness cannabis scheme.[66]

[59] Church of Ubuntu, 'Submissions R v Barry Futter' October 23 2018 https://www.churchofubuntu.org/wp-content/uploads/2018/10/Submissions-R-v-Barry-Futter-%E2%80%93-23rd-October-2018.pdf
[60] Church of Ubuntu, 'Legal Update' November 1 2018 https://www.churchofubuntu.org/church-of-ubuntu-legal-update/
[58] ABC, 'Police Seize Medical Cannabis Plants from Newcastle Unit' Dec 1 2016 https://www.abc.net.au/news/2016-12-01/police-seize-medicinal-cannabis-plants-from-newcastle-unit/8085128
[61] Full case citation is unknown.
[62] Daily Mail, Michael Lambert faces drug charges following parents record Sydney University donation, August 12 2016, https://www.dailymail.co.uk/news/article-3735605/Michael-Lambert-faces-drug-charges-following-parents-record-Sydney-University-donation.html
[63] Daily Telegraph, Medical cannabis martyr guilty but escapes conviction, June 14 2017, https://www.dailytelegraph.com.au/newslocal/central-coast/medical-cannabis-martyr-guilty-but-escapes-conviction/news-story/db8c9d9fe732ffd26427bd35db4659f5
[64] Full case citation unknown.

				paying Lee half of the street value.[65]			
5	Case against: Anthony David Bower[67]	NSW; Port Macquarie District Court	Closed - March 2018	Tony Bower was found in possession of 280 cannabis plants in New South Wales. Bower, provided medical cannabis to hundreds of families across Australia for chronic pain relief and terminal illness management.	Charged with dealing in the proceeds of crime, cultivating prohibited plant, and possessing and supplying a prohibited drug (*Drugs Misuse and Trafficking Act* 1985).	Bower pleaded guilty to all offences.	Judge Leonie Flannery: 18 month intensive Corrections Order; servable by way of home detention, following a home detention assessment. In sentencing Bower, Flannery J noted (i) the quantity and size of the cannabis plants and extensive set-up on Bower's property; (ii) Bower's desire to provide relief to patients suffering from chronic pain; and (iii) the medicine produced by Bower contained lower levels of Tetrahydrocannabinol (THC), accepted to be a feature of medicinal cannabis. Flannery J accepted that Boiwer "acted out of compassion for people" and acknowledged that no supply of cannabis in an illicit form was evident. An Intensive Corrections Order reflected the seriousness of Bower's offence.[68]
6	Director of Public Prosecutions (Victoria) V Elizabeth Pallett and Director of Public Prosecution	Victoria County Court	Closed - November 2016	The Palletts were found in possession of 15.5kg of cannabis on their property. The Palletts provided cannabis products to clients who suffer from	Charged with possession, cultivation and drug trafficking offences (*Drugs, Poisons and Controlled Substances* Act 1981 (Vic)).	Palletts pleaded guilty to all charges.	Jury found the Palletts guilty of one count of cultivating the drug Cannabis, deemed a narcotic plant under the *Drug Misuse and Trafficking Act 1985* (Vic). Sentenced $1000 fine, ($500 to each Atthew and Elizabeth). Judge Bill Stuart did not record any criminal

[66] Newcastle Herald, 'Cannabis supplier Malcolm Lee's moral win' 16 October 2015
https://www.newcastleherald.com.au/story/3428620/cannabis-suppliers-moral-win/
[65]ABC, 'Medicinal cannabis supplier escapes jail time for trafficking' 16 October 2015
https://www.abc.net.au/news/2015-10-16/medicinal-cannabis-supplier-escapes-jail-time-for-trafficking/6861554
[67] Full case citation unknown.
[68] ABC, 'Medicinal cannabis producer and advocate Tony Bower avoids jail for cultivating a commercial quantity of a prohibited drug' 5 March 2019
https://www.abc.net.au/news/2019-03-05/medical-cannabis-producer-tony-bower-escapes-jail/10869800

	s V Matthew Pallett (Victoria) (2016)[69]			medical conditions such as chronic pain, MS, cancer, epilepsy and Crohn's disease.			conviction, taking into account the impact of a conviction on the Pallett's future involvement with the growing of medicinal cannabis under the Victorian law. Medical necessity was unsuccessfully argued, as the pain of the patients receiving the medicinal cannabis was not deemed an "emergency situation".[70]
7	Case against: Jenny Lee Hallam	South Australia: Adelaide District Court	Closed - 2017	Hallam's property was raided by police in January 2017; cannabis oil product were found on the property. Hallam claimed that she provided the cannabis products, namely cannabis oil, to terminally ill people. Hallam suffers chronic back injury and nerve damage daily	Charged with possessing and manufacturing of a controlled drug (s.33J;33L Controlled Substances Act 1984 (SA)).	Hallam pleaded guilty to possession and manufacturing of a controlled drug.	Judge Rauf Soulio: Good behaviour bond, no conviction recorded. Soulio J took into consideration that Hallam (i) was making a financial loss from the production of cannabis oil, and (ii) there was strong evidence that the recipients of Hallam's oil were benefitting from the medicine.[71] Hallam did not claim medical necessity as it was impractical to bring to court all of the patients she treated with cannabis oil.[72]
8	Case against Andrew Katelaris	NSW: Downing Centre District Court	Closed - 2018	Andrew Katelaris is a doctor who was deregistered in 2005 for providing medical marijuana to sick children.[73]He is	Supply (being 10.6245kg of cannabis leaf) and manufacture of cannabis leaf contrary to section 25	Katelaris represented himself in court and pleaded not guilty to the charges against him arguing a defence of medical	The jury found Dr Andrew Katelaris not guilty of the charges relating to the supply and manufacture of medical cannabis.[75]

[69] Full case citation unknown.
[70] The Age, 'Pensioner cannabis growers fined $1000, escape criminal convictions' 10 November 2016 https://www.theage.com.au/national/victoria/pensioner-cannabis-growers-fined-1000-escape-criminal-convictions-20161110-gsmfia.html
[71]ABC, 'Cannabis oil advocate Jenny Hallam spared conviction for supplying medicinal cannabis' 7 November 2019 https://www.abc.net.au/news/2019-11-07/cannabis-oil-advocate-jenny-hallam-spared-conviction/11680772
[72] Sydney Criminal Lawyers Blog, 'A Healer, Not a Dealer: Jenny Hallam Pleads Guilty to Drug Charges', 21 February 2019 https://www.sydneycriminallawyers.com.au/blog/a-healer-not-a-dealer-jenny-hallam-pleads-guilty-to-drug-charges/.
[73] The Daily Telegraph, 'Dr Pot Andrew Katelaris allegedly caught with cash and cannabis' 31 May 2017 https://www.dailytelegraph.com.au/news/nsw/dr-pot-andrew-katelaris-allegedly-caught-with-cash-and-cannabis/news-story/894ed162ebfb767d089370bfbca05ac1.

				also a pro-cannabis campaigner. In 2017, police raided his home and seized a quantity of cannabis and cash suspected of being from proceeds of crime.	of the *Drug Misuse and Trafficking Act 1985* ('DMT Act'); Supply of a large commercial quantity of cannabis oil (8.1975kg) (s25 DMT Act); Manufacturing or producing a large commercial quantity of a prohibited drug (being the same 8.1975kg of cannabis oil) (s24 DMT Act); Dealing with suspected proceeds of crime by being in possession of around $10,000 in cash.	necessity.[74] His defence was based on the notion that the needs of his patients were so serious that it was necessary for him to break the law in the way that he did in order to provide his patients with life-saving cannabis medicine.	
9	*R v Quayle* [2005] 1 WLR 3642	EWCA Crim: England and Wales Court of Appeal (Criminal Division) (UK)	Closed - 2005	Initial case facts: Mr Quayle is 38 years old and is a bi-lateral below-knee amputee. He suffers from severe and chronic pain. He was found to be cultivating cannabis plants at his home for	Charge: Cultivation of a cannabis plant in contravention of s.6(1) of the *Misuse of Drugs Act 1971*.	Quayle wanted to raise a defence of medical necessity: 'he did grow cannabis, but did so out of necessity and uses it for personal use to alleviate pain'.[76] However, the Court refused to	Decision at first instance: The Court imposed a four-month prison sentence suspended for six months.[77] Decision on appeal (Mance LJ, Newman and Fulford JJ)[78]: Appeals were dismissed. The court of appeal held that

[75] Ibid.
[74] Paul Gregoire, 'Not Guilty on All Charges: An Interview With Medicinal Cannabis Crusader Dr Andrew Katelaris', *Sydney Criminal Lawyers* (Blog Post, 30 November 2018) <https://www.sydneycriminallawyers.com.au/blog/not-guilty-on-all-charges-an-interview-with-medicinal-cannabis-crusader-dr-andrew-katelaris/>.
[76] The Guardian, 'Is there a medical marijuana defence?' (News article), October 21 2009, https://www.theguardian.com/commentisfree/libertycentral/2009/oct/21/medical-marijuana-defence
[77] Ibid.
[78] *R v Quayle* [2005] 1 WLR 3642.

				his own personal use.		put Quayle's defence of necessity to the jury and so Quayle pleaded guilty. Appeal: Quayle appealed the court's decision to prevent him from raising the defence of necessity. Quayle's appeal was heard with five others.	the defence of necessity was not available in these cases for two main reasons: 1. Parliament had put in place a legislative scheme for the supply of drugs. This provided for controlled drugs to only be prescribed by medical practitioners. In the court's view, the 'necessitous medical use on an individual basis … is in conflict with the purpose and effect of the legislative scheme'. Allowing such unqualified persons to prescribe the drugs to themselves or others 'would involve obvious risks for the integrity and the prospects of any coherent enforcement of the legislative scheme'. 2. The elements of necessity defence were also not satisfied. The circumstances of pain to which Quayle and the others were responding, was not extraneous to them and so was not open to objective assessment by the courts. The court doubted whether this kind of chronic pain could constitute the kind of risk of serious injury that the law required in order to make out the necessity defence; and the requirement that the risk be 'imminent and immediate' was not established as there was deliberate and continuous violations of the law by these individuals over a period of time. A human rights argument was also raised by Quayle. He relied on Article 8 of the European Convention on Human Rights (right to

							respect for private life). However, there was not enough evidence before the court to support this argument.
10	*R v Altham* [2006] 1 WLR 3287	EWCA Crim: England and Wales Court of Appeal (Criminal Division) (UK)	Closed - 2006	The defendant had been in a serious car accident which resulted in severe injuries to his hip and he has been experiencing chronic pain ever since. He tried various forms of pain relief prescribed by his doctor which were either ineffective or had intolerable side effects. He tried cannabis and found that it was the most effective form of pain relief for him and so he decided to use it on a regular basis.[79]	Charge: Unauthorised possession of 5 grams of cannabis resin.	The defendant raised the defence of necessity. However, the court held that the defence of necessity could not be raised following the decision in R v Quayle. Consequently, the defendant pleaded guilty.	Appeal: The defendant appealed against the judge's ruling arguing that denial of the defence amounted to a breach of Art 3 of the European Convention of Human Rights because his medical symptoms amounted to inhuman or degrading treatment. Article 3 prohibits in absolute terms subjecting anyone to inhuman or degrading treatment. Therefore, if the only way to avoid the symptoms was to break the law, then the state was subjecting him to inhuman or degrading treatment. Argued that the Misuse of Drugs Act 1971 had to be read subject to a defence of medical necessity in order to avoid the law being incompatible with article 3. Held: The appeal was dismissed and his conviction was upheld. The court rejected his argument on the following bases[80]: it was not 'treatment' by the State that resulted in the pain that the defendant experienced. Rather, it was his road accident. Therefore, the State was not responsible for the harm done to the defendant; the defence of necessity was contrary to the legislative scheme and parliamentary intent.

[79] The Guardian, 'Is there a medical marijuana defence?' (News article), October 21 2009, https://www.theguardian.com/commentisfree/libertycentral/2009/oct/21/medical-marijuana-defence
[80] Ibid.

							Scott Baker LJ: 'In our judgment the state has done nothing to subject the appellant to either inhuman or degrading treatment and thereby engage the absolute prohibition in Article 3. …The defence of necessity on an individual basis as advocated by this appellant, as it was by the appellants in Quayle, is in conflict with the purpose and effect of the legislative scheme'.[81]

[81] 'R *v Altham* [2006] 1 WLR 3287 Court of Appeal', E-law resources (Web Page) <http://www.e-lawresources.co.uk/cases/R-v-Altham.php>.

Attachment C

SPRINGVALE MONASH LEGAL SERVICE Inc.

Celebrating 40 years of Working for Justice

SUBMISSION

Prepared by Monash Faculty of Law Students

On behalf of Springvale Monash Legal Service

For the Inquiry into Drug Law Reform

LAW REFORM, ROAD AND COMMUNITY

SAFETY COMMITTEE

58th Parliament

Received from the Legislative Council on 11 November 2015

17 March 2017

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INTRODUCTION

Our organisation

Established in 1973, Springvale Monash Legal Service (SMLS) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. For all of our operation, we have located within the Local Government Area (LGA) of the City of Greater Dandenong. We have been addressing the needs of marginalised community members, the majority who reside within the City of Greater Dandenong and its surrounds. The City of Greater Dandenong is the second most culturally diverse municipality in Australia, and the most diverse in Victoria. People from over 150 different countries reside in Greater Dandenong and 60% of the residents were born overseas. It also has highest number of resettlements from newly-arrived migrants, refugees and asylum seekers in Victoria. Data from the 2011 Census revealed that Greater Dandenong was the second most disadvantaged LGA in Socio-Economic Indexes for Areas (SEIFA) ratings.

For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

SMLS welcomes the Law Reform, Road and Community Safety Committee's Inquiry into Drug Law Reform, and the opportunity to identify areas for in which legislation can be altered to improve access to justice in this field.

Many of our clients are impacted by policy and legislation in this area, and our suggestions for possible reform address selected stages of the legal process.

This submission considers the legislative and policy-making framework surrounding drug driving infringements and offences, and provides suggestions for amendments to current laws. Our submission also discusses Drug Courts and their role in Victoria. We finish with a brief discussion around decriminalisation. SMLS is not seeking confidentiality regarding this submission.

A HUMAN RIGHTS APPROACH

Various human rights frameworks underpin the need for reform to current Victorian drug legislation. Human rights bodies around the world have expressed concerns regarding the reality that existing drug laws result in breaches of human rights. The International Drug Policy Consortium reflects that 'human rights abuses have proliferated under current drug control policies' around the world. [1] Human Rights Watch claim that 'Health and human rights are at the centre of this polarized debate'. [2]

More locally, human rights considerations must be considered and addressed in all legislation, given the introduction of a Human Rights Charter in 2006.[3] This Charter recognises various human rights for Victorians, including:

- The right to recognition and equality before the law;
- Rights in criminal proceedings

This Inquiry is an opportunity to consider current and proposed reforms legislation and policy from a human rights framework. Our submission reflects how our potential reforms can address this and incorporate our human rights obligations.

[1] International Drug Policy Consortium, 2017, Policy Principals Statement, retrieved from: http://idpc.net/about/policy-principles/principle-2

[2] Lohman, Diederik, March, 2016, The War on Drugs – A Cure Worse Than the Disease, Health and Human Rights, Human Rights Watch, retrieved from https://www.hrw.org/content/287990

[3] Charter of Human Rights and Responsibilities Act 2006

A. DRUG DRIVING

Zero Tolerance Approach

The 'zero tolerance' approach means, unlike drink driving, the level of driver impairment is not measured, which means that people can be convicted of a driving offence without evidence they were impaired or that drug use impacted their driving capacity.

Existing zero-tolerance drug-driving laws

Victoria's current laws surrounding drug-driving are contained within the *Road Safety Act 1986* (Vic) (RSA), specifically the offences outlined in section 49.[4] This discussion will be confined to driving offences involving illicit drugs, which are defined as delta-9-tetrahydrocannabinol (THC), 3, 4-Methylenedioxy-NMethylampthetamine (MDMA) and methylamphetamine.[5] SMLS highlights that the purpose of the Road Safety Act is 'to provide for safe, efficient and equitable road use'[6], and not to regulate the use of illegal substances.

Evidence suggests that in certain circumstances, these drugs have the potential to impair a person's ability to drive safely.[7] The call for reform stems from current injustices surrounding Victoria's zero-tolerance approach to drug-driving, particularly offences which have no requirement of a person's driving being actually affected by a drug. Rather, such offences are established on driving with *any* concentration of an illicit drug in their saliva or blood, irrespective of impairment.[8]

These provisions are problematic when they fail to consider how the drug affects actual driving capacity. There is a lack of scientific evidence to support the causal relationship between significantly low drug concentrations and driving impairment. By capturing the most extreme low doses, the current '*any concentration level*' or '*prescribed concentration*' definitions fail to target the purposes of the Act.[9]

Perhaps the catch-all approach of these provisions was more understandable in the past, when minute concentrations of substances in blood and saliva were not detectable as they increasingly are today. However, as technology continues to advance and testing machines become more refined, an individual should not receive harsher penalties purely based on technological development. Instead, the precision of technology and testing should underpin the shift away from zero-tolerance laws.[10] The acquittal of a person who tested positive for cannabis smoked nine days before he was pulled over in New South Wales highlights the flaws in the current system. His lawyer, Steve Bolt, compares the current zero-tolerance

[4] *Road Safety Act 1986* (Vic) s49.
[5] Ibid s3.
[6] Ibid s1
[7] Bosanquet, David, et al, 'Driving on ice: impaired driving skills in current methamphetamine users' (2013) 255 *Psychopharmocology (Berlin)* 163; European Monitoring Centre for Drugs and Drug Addiction, *Drug use, impaired driving and traffic accidents*, (European Monitoring Centre for Drugs and Drug Addiction publication, 2014) 45.
[8] *Road Safety Act 1986* (Vic) ss. 49(1)(bb), (h) and (i).
[9] Ibid s 3 and ss 49(1)(bb), (h), and (i).
[10] Pfaffe Tina, et al, 'Diagnostic Potential of Saliva: Current State and Future Applications' (2011) 57 (5) *Clinical Chemistry* 675; Kristof Pil and Alain Verstraete, 'Current developments in drug testing oral fluid' (2008) 30(2) *Therapeutic Drug Monitoring* 197.

drug-driving laws to, 'punishing someone by taking away their licence when they might have had a beer or two three days before driving.'[11]

Furthermore, the lasting ramifications of harsh penalties imposed are disproportionate where a person's driving was not significantly affected by illicit drugs. Such penalties may include mandatory licence suspensions, fines ranging from $155 to approximately $18,600, possible criminal convictions and imprisonment terms.[12] The punishment only differs based on first-time, second-time repeat offending. Unlike drink-driving offences, the penalties for drug-driving do not vary based on blood concentration readings. The implications of this are such that a person who tests positive for THC *9 days after* smoking cannabis can be held equally culpable as someone who has smoked cannabis *whilst* driving.[13]

Concerns regarding criminal convictions and the current zero-tolerance approach

Given the current zero-tolerance approach, acts of low culpability will often fall within the ambit of drug driving offences. Accordingly, our clients face serious concerns regarding the recording of criminal convictions in this area, and the implications this may have on their future prospects.

Currently in Victoria, the release of criminal conviction records is governed by the Victoria Police Information Release Policy. Such records may be released for employment, licensing, registration and voluntary work purposes.[14] Despite having anti-discrimination legislation in place, Victorian is the only state that is not afforded spent conviction legislation. In force at a Commonwealth level and in all other states and territories, spent conviction legislation generally applies to most offences where the offender has not reoffended in ten years.[15] The impact of a possible conviction and penalty can be devastating for an individual and their family. The outcomes are disproportionate; smoking a joint five days prior, as opposed to an alcohol related driving offence where the driver consumes alcohol immediately before entering a vehicle.

The AHRC has liberally construed the term 'criminal record' to encompass "*not only the actual record of a conviction but also the circumstances of the conviction including the underlying conduct*".[16] This can often be the most significant penalty for many of our clients, particularly the social stigma associated with drug-driving convictions. We therefore stress the need for reforms away from the current zero-tolerance approach given the wide-ranging implications of convictions, such as limitations on employment prospects.

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[11] Lorna Knowles and Alison Branley, 'Acquittal of man caught drug-driving nine days after smoking cannabis throws NSW drug laws into doubt', *Australian Broadcasting Corporation News* (online), 3 February 2016, <http://www.abc.net.au/news/2016-02-02/man-caught-drug-driving-days-after-smoking-cannabis-acquitted/7133628>. Retrieved March 2017

[12] *Road Safety Act 1986* (Vic) s49(3AAA).

[13] Ibid

[14] Victoria Police, *Victoria Police Information Release Policy* (November 2016) <http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=38447>. Retrieved March 2017

[15] *Crimes Act 1914* (Cth); *Criminal Records Act 1991* (NSW); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Spent Convictions Act 1988* (WA); *Annulled Convictions Act* 2003 (Tas); *Spent Convictions Act 2009* (SA); *Spent Convictions Act 2000* (ACT); and *Criminal Records (Spent Convictions) Act 1992* (NT).

[16] Australian Human Rights Commission, *Reports of inquiries into complaints of discrimination in employment on the basis of criminal record* No 19 (2002) 9.2.2.

SUGGESTED REFORMS

Recommendation 1: Drug Concentration Threshold SS 49(1) (bb), (h) and (i)

We recommended introducing an additional legislative requirement of a blood drug concentration threshold limit for section 49(1) (bb), (h) and (i).[17] This limit should be based on research establishing a correlation between impaired ability to drive and prescribed blood drug concentrations levels, much the same as current drink-driving provisions.[18]

There exists a significant body of international research which supports the introduction of threshold blood drug concentration limits. Studies have indicated that the mentioned illicit drugs have an influence on driving performance in a dose-dependent manner.[19]

There are slight variations between current recommendations of cut-off blood concentration thresholds. SMLS recommends that further independent research is conducted, building on current research findings, to determine a suitable threshold for adaption into Victorian law.

Recommendation 2: Subsequent Offences S48 (2)

The s49(1) (RSA) details the various offences involving alcohol or other drugs. These offences vary in culpability as they cover both drink and drug driving, and the provision ranges from offences of refusal to undergo testing, to testing positive to a breath analysis within three hours of being in charge of a motor vehicle.

Currently, all s49(1) (RSA) offences are grouped together when considering 'first', 'second', and 'subsequent' offences.[20] Under the s48(2) 'blanket' provision, a previous drink driving offence will be considered a prior offence for a later drug driving charge, and vice versa. The practical effect of this provision is that it fails to distinguish between different levels of impairment and culpability of offenders. Additionally, the provision has the potential to adversely affect offenders as the maximum penalty for a subsequent offence can be up to fifteen times that of a first offence.[21] We therefore recommend the removal of the s48(2) 'blanket' provision in determining prior and subsequent offences. We further call for a new system of categorisation in accordance with culpability, starting with the offence type (refusal offences, driving with drugs present, driving with alcohol present etc). This new system of categorisation will need to consider the range of different levels of culpability within each offence type.

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[17] *Road Safety Act 1986* (Vic) s 3 and ss 49(1)(bb), (h), and (i).
[18] Ibid s 49.
[19] European Monitoring Centre for Drugs and Drug Addiction, *Driving under the influence of drugs, alcohol and medicines in Europe — findings from the DRUID project* (European Monitoring Centre for Drugs and Drug Addiction publication 2012) 20. EMCDDA 2014, 7.
[20] *Road Safety Act 1986* (Vic) s48 (2)
[21] Ibid ss49 (3) (a)-(c); ss49 (3AAA)(a)-(c).

B. INFRINGEMENTS

Procedural Problems with the Infringements System

A number of our clients experience challenges in relation to their alcohol or other drug (AOD) use and we are frequently asked to prepare 'special circumstances' applications under s 65 of the *Infringements Act 2006* (Vic)[22] on their behalf. We have analysed the recent changes to the *Infringements Act 2006* (Vic) made by the *Fines Reform Act 2014* (Vic), highlighting how these changes will affect our clients with problematic AOD use. We note the infringements system is complex and difficult to navigate.[23] We highlight the need for a centralised fine management body, and the opportunity for special circumstances applications to be lodged earlier than enforcement order stage.

Reforms in Fines Reform Act 2014 (Vic)

The *Fines Reform Act 2014* (Vic) (FRA) has made some recent amendments in relation to infringements which will affect people who use AOD.

Section 215 - Application for Internal Review

S 215(1) (b) of the FRA allows people charged with offences to apply for internal review where they were unaware that an infringement notice had been served. This is of particular benefit to clients who regularly use AOD, as well as those who suffer from homelessness and mental health issues that may contribute to their capacity to attend to infringement notices. S215 (4) does, however, limit the scope of this provision, requiring applications to be made in writing within 14 days of notification. People must also have registered their change of address with VicRoads. At SMLS, we have seen clients including those with AOD dependency issues who may have limited capacity to respond to VicRoads in writing within this time period[24].

Section 208 and 209 - Service and Payment

S 208(1) of the FRA has reduced the deemed length of service of an infringement from 14 days after the date of the infringing act, to 7 days. In addition, s 209 reforms have reduced the payment time for infringements from 28 days to 21 days after the accused has been served with the infringement notice. This seven-day reduction in the deemed length of service may impose burdens for many of our clients to respond appropriately once a fine has been issued.

[22] *Infringements Act 2006* (Vic) s 65(1)(c).
[23] 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.
[24] This also impacts clients who face housing instability.

Section 219 - Penalty Reminder Notices

S 219 of the FRA has further restricted the time for clients to pay their infringements or seek advice without financial punishment. The amendments have reduced the minimum time extension from 28 days to 14 days. This may put further pressure on community legal centres to provide more timely assistance.

Complexity of the Infringement System

The infringements system in Victoria is complex and difficult to navigate,[25] particularly for vulnerable and disadvantaged members of the community including those with AOD dependencies.[26] The key complexities are procedural and are largely due to having multiple enforcement bodies, two different systems of review and revocation, all with inconsistent applications. The system creates unnecessary delay, and is detrimental to individual wellbeing[27] as well as creating burden for service providers.

Burden on Community Legal Centres (CLCs)

SMLS assisted many clients with infringement matters and we are aware that many other CLCs are struggling to meet the needs of clients facing these issues. Changes to the procedural law governing infringements would deliver a sustainable decrease in the workload for these centres.

Multiple enforcement bodies

People who use AOD including problematic AOD use often present to CLCs with infringements relating to a number of different offences. At least 120 enforcement bodies were authorised to issue the 4.97 million infringements issued in 2010-11.[28] Given public transport offences, driving offences and parking tickets will attract infringements from separate enforcement bodies (and in the case of parking and other local council related fines; different enforcement bodies in different councils), it is not surprising that there is a lack of consistency in the issuance and management of infringements.

For this reason, the Sentencing Advisory Committee has recommended that Victoria introduce a centralised fine management body, in line with the other Australian states.[29] It was noted by the Sentencing Advisory Committee that there has been a similar trend in overseas jurisdictions including New Zealand and the United Kingdom.[30]

An example of this recommendation in practice is the introduction of the State Debt Recovery Office (SDRO) in New South Wales. The SDRO is responsible for '*the receipt and processing of fines issued*

[25] Saunders et al, 'An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System' (Criminal Justice Research Consortium, No 1, Monash University, February 2013), 59.
[26] Ibid, 29.
[27] Ibid, 30.
[28] Ibid, 20.
[29] The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report, Sentencing Advisory Council, 4.3.18
[30] Ibid, 4.3.18

by various government agencies...and administering the fine enforcement system'.[31] If an infringement is payable to the SDRO, the enforcement agency registers the infringement once it has been issued. If the fine is payable to the agency itself, the enforcement agency registers the infringement with the SDRO after default of payment.[32]

Inconsistency in Outcomes of Internal Review Applications

People who have AOD dependency issues have two options if electing to rely on their substance use as grounds for review or revocation due to special circumstances.[33] Until an infringement has reached the enforcement order stage, an individual may apply for internal review of the infringement with the enforcement agency. As there are at least 120 enforcement agencies and no consistent procedure for dealing with these reviews, 'inconsistent decision making within and across agencies'[34] is a typical consequence. Despite a requirement in the Attorney-General's guidelines that each agency have guidelines for assessing appeals by people with special circumstances, none of the five agencies surveyed by the Victorian Auditor-General in 2009 including Victoria Police had produced such guidelines.[35]

The inconsistent manner in which applications for internal review are dealt with has led to many solicitors discouraging clients from seeking internal review, particularly for matters managed by Victoria Police.[36] In 2013, Monash University's Criminal Justice Research Consortium found that all 23 interviewed solicitors and most financial counsellors were concerned about Victoria Police's internal review system as they 'rarely' withdraw notices on internal review and always refer matters to the Magistrates' Court where the individual is denied access to the Special Circumstances List.[37]

Without consensus on the method of analysing internal reviews across the 120 agencies state wide, it is difficult to predict the outcome of internal review applications. The perpetuation of random inconsistent outcomes undermines community confidence in the system.[38]

Special Circumstances List Restricted to Rejected Applications for Revocation

A rejection of an application for revocation on the basis of special circumstances results in a hearing on the special circumstances list of the Magistrates' Court, before a specially trained Magistrate with typically lower penalties.[39] By contrast, an unsuccessful application for internal review typically results in a hearing in open court. This may result in harsher penalties than the Special Circumstances List, for what is otherwise an offence incurred in identical circumstances.[40] This can be discouraging for clients

[31] The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report, Sentencing Advisory Council, 4.3.19
[32] Ibid, 4.3.20
[33] See introduction to this section.
[34] Saunders et al, 74.
[35] Victorian Auditor General, Withdrawal of Infringement Notices Report (2009) VAGA, 2.
[36] Saunders et al, 79.
[37] Ibid, 79.
[38] Ibid
[39] Ibid, 27.
[40] Ibid.

who may seek payment plans to deal with these infringements rather than wait for the application of additional penalties in order to apply for revocation.[41] The result is that vulnerable people are paying for infringements the law may well be prepared to waive.[42]

Difficulty meeting requirements of Special Circumstances Applications

Given the requirements of a special circumstances application necessitating medical and/or psychological/social work reports, it can be challenging for clients who have AOD dependency issues to obtain the relevant documentation. Barriers include professional fees for the writing of such reports and letters as well as access to Medicare for non-residents including new migrants and people seeking asylum.

Further issues relate to the time taken to obtain such reports and the inconsistency of the reports provided, leading to rejected applications.[43] Even in cases where the costs of seeking such documentation are not prohibitive, many clients with problematic AOD use do not maintain consistent relationships with the same practitioners, resulting in the common occurrence of rejection of reports on the basis of rare or singular visits.[44] These challenges extend the time taken to apply for internal reviews and revocations and, even with the assistance of a CLC, this time pressure may result in infringements progressing to later stages of the infringement system. [45]

SUGGESTED REFORMS

Recommendation 1: Availability of Special Circumstances Applications for Revocation at any stage

It is recommended that clients are able to apply for revocation of their infringements on the grounds of special circumstances at any stage of the infringements process.

As explained above, SMLS clients, including clients with problematic AOD use are anxious about waiting for their infringement notices to reach the enforcement order stage (particularly if there are many), and many feel pressured to take out payment plans despite having strong special circumstances. In addition, this recommendation can greatly reduce the expense borne by enforcement bodies such as Civic Compliance Victoria when adding late penalty fees and sending repeated correspondence to a client who is waiting to reach a later stage. At SMLS, clients with many infringements and long histories of AOD dependency issues sometimes have to present to court multiple times for special circumstances hearings, as they have to wait for their infringements to become enforcement orders in stages.

It would be beneficial for clients to be able to apply for revocation on special circumstances grounds at an earlier stage. This may also reduce the administrative burden for enforcement bodies.

[41] Victoria Legal Aid, 'Vulnerable People and Fines' (Position Paper No 1, Victoria Legal Aid, October 2013) 8.
[42] Ibid, 25.
[43] Saunders et al, 19.
[44] Ibid, 20.
[45] Ibid.

Recommendation 2: A centralised fine management body

It is recommended that a centralised body is established to manage both the enforcement of infringements and decisions regarding special circumstances applications. The adoption of a centralised body will assist in streamlining the complex infringement system, and aid those utilising special circumstances avenues.[46] Adopting the recommendation of the Sentencing Advisory council may bring Victoria's fine enforcement system more in line with that of the other states and territories in Australia.

Recommendation 3: Medicare Item Number

It is recommended that a new Medicare Item Number is introduced for doctors to use when completing reports for special circumstances applications. The prohibitive fees some doctors charge for these reports can act as a disincentive for clients to make special circumstances applications. An item number would acknowledge the time taken to prepare complex reports, however the client would receive a rebate. This could also allow doctors to bulk-bill clients.
This recommendation will incentivise both doctors to write comprehensive reports, and clients to obtain these reports for special circumstances applications.

[46] Saunders et al, 29.

C. DRUG COURTS

The Drug Court of Victoria (DCV) is the Drug Division of the Magistrates' Court of Victoria.[47] It is the only court that can sentence an offender to a Drug Treatment Order (DTO) and currently operates at the Dandenong Magistrates Court.[48] In March 2017, Victoria will see its second Drug Court opened at the Melbourne Magistrates' Court.

Drug courts represent a number of challenges when being assessed through a human rights lens. It could be argued that mandatory treatment, ordered, motivated or supervised through the justice system even with perceived consent violates a person's human rights. [49] In addition, mandatory treatment for people with substance use disorders has not been proved effective in reducing long term drug use. [50]

Despite positive evaluations published in favour of Drug Courts, critical literature indicates methodological flaws in many evaluations regarding the success of drug courts. Research indicates that evidence about the effectiveness of drug court programs in reducing participants' substance abuse was limited and mixed. Drug courts tend to be selective of which offenders they work with, excluding people who may fall outside their scope, skewing recidivism comparisons. [51]

Despite these criticisms, it appears that the Dandenong Drug Court has contributed to reduce recidivism and many people appreciate this approach. SMLS also recognises that following a 2014 Inquiry regarding Methamphetamine use in Victoria[52], Drug Courts are likely to be rolled out in various locations across Victoria. Due to these factors, SMLS recognises the important role of Drug Courts in Victoria.

Sentencing and crime reduction advantages of DTOs

The DCV operates according to the overarching principle that in order to reduce AOD related offences the underlying AOD use must be treated. DTOs intend to rehabilitate the offender and thus reduce AOD related crime.[53] A DTO is a personalised and judicially monitored AOD recovery program that may involve addiction counselling, health treatment, housing assistance, education, training and employment.[54] This is an appropriate sentence for the offender group as it addresses both the problematic AOD use and its complex causes. According to the Chief Magistrate Peter Lauritsen, "no other non-custodial sentence could work with this group [and] there is really no capacity within a Community Corrections Order to bring treatment of such intensity and immediacy to bear upon these

[47] *Sentencing Act 1991* (Vic) s 3.
[48] Ibid s 18Y.
[49] Lunze Karsten, et al, 2016, Mandatory addiction treatment for people who use drugs: global health and human rights analysis BMJ 2016; 353 :i2943
[50] Ibid
[51] Franco, Celinda, Drug Courts: Background, Effectiveness, and Policy Issues for Congress (2010) Congressional Research Service, 7-5700, https://fas.org/sgp/crs/misc/R41448.pdf, retrieved March 2017
[52] Law Reform, Drugs and Crime Prevention Committee, 2014, Inquiry into the Supply and Use of Methamphetamines, particularly 'Ice', in Victoria — Final Report, Parliament of Victoria, retrieved March 2017 http://www.parliament.vic.gov.au/images/stories/LRDCPC/Tabling_Documents/Inquiry_into_Methamphetamine_text_Vol_01_with_addendums.pdf
[53] Sentencing Act 1991 (Vic) s 18X(1)(a), (c).
[54] Drug Court of Victoria, Submission to Australian Government *The National Ice Taskforce*, 20 June 2015 10-11 [8].

people".[55] Thus they are likely to be sentenced to a term of imprisonment. According to an Evaluation of the Drug Court of Victoria by KPMG, DTOs are preferable to imprisonment as they reduce the rate of recidivism[56].

Financial and economic advantages of DTOs

When compared to imprisonment, DTOs have clear financial and economic advantages. According to the same study, the total cost of an average two year term of imprisonment is $197,000.[57] This is over seven times greater than the cost of a DTO, which is $26,000. The reduction in recidivism and severity of offending because of DTOs is another financial advantage. According to the recent evaluation of the DVA by KPMG, over a two year period, offenders sentenced to DTOs were sentenced to a total of 6 125 days imprisonment for their subsequent reoffending. The control group was sentenced to a total of 10 617 days imprisonment. By reducing the days of imprisonment, DTOs saved $1.2million in associated costs.[58]

The holistic nature of DTOs that includes education, training and employment assistance for offenders yields considerable economic benefits. There is an increase income of the participating offenders and reduction of unemployment rates by 32%.[59]

Social advantages of DTOs

In addition to recidivism and cost savings, wider societal benefits have been associated with the DTOs. Such general societal benefits include a reduction in AOD use and long-term sobriety, a consequent increase in employment, further education, the reunification of families and drug-free babies.[60] By its multidisciplinary input and collaboration with social support providers, the DCV can address underlying causes of the offending such as family violence, unemployment or homelessness and also respond to social needs such as mental health care and crisis accommodation. All these other social needs and problems can affect the success of the DTO.[61] DCV Magistrates also prioritise the task of building trust and rapport with offenders, who are often socially marginalised, to promote cooperation towards defeating their addiction.

[55] Lee, Jane 'Drug Court the 'only way' to help drug-addicted criminals', *The Age* (Melbourne), 13 March 2015, 12.
[56] KPMG, Evaluation of the Drug Court of Victoria: Final Report (2014), KPMG, Magistrates' Court of Victoria
[57] Ibid 5.
[58] Ibid.
[59] Drug Court of Victoria, Submission to Australian Government *The National Ice Taskforce*, 20 June 2015 14 [10].
[60] Daniel McGlone, 'Drug Courts- A Departure from Adversarial Justice' (2003) 28(3) Alternative Law Journal, 138.
[61] National Association of Drug Court Professionals United States of America, *Defining Drug Courts: The Key Components* (Office of Justice Programs, US Department of Justice, 2004) 6.

SUGGESTED REFORMS

Recommendation 1: That the Capacity and locations of the Drug Court is Increased

Establishing Victorian Drug Court divisions in more locations will make allow more people to access the Drug Court and DTOs. Currently, those who do not live within the catchment areas for the Drug Court are not able to access it.[62] Expanding the Drug Court would be in line with the Victorian Charter of Human Rights and Responsibilities.

Under section 8(3) of the Charter 'every person is equal before the law and is entitled to the equal protection of the law without discrimination.'[63] Ensuring every person has equal access to the courts is one of the key elements of every person being equal before the law.[64] A person's postcode should not be a barrier to accessing the Drug Court. Expanding the Drug Court to all regions of Victoria would provide eligibility for DTOs to all Victorians regardless of where they live.

Even if it would be less efficient to expand the Drug Court to regional Victoria than investing in metropolitan areas, the Drug Court should nevertheless be expanded to regional Victoria.[65] The failure to do so would place people living in regional communities at a disadvantage, impacting on how they experience the justice system and preventing the rehabilitation and treatment of offenders.[66] People should not be denied equitable access to sentencing options due to the tyranny of distance. Any court jurisdictions with lower populations and less demand for a Drug Court could open a Drug Court part time, so that even in smaller Court jurisdictions the Drug Court is still accessible.[67] Making the Drug Court available all around Victoria would have beneficial effects on the health and wellbeing of those who experience drug addiction and who would be eligible for a DTO were it not for where they live.[68]

Recognising the need for infrastructure and support services

When it comes to expanding the Drug Court to other parts of Victoria, it is important to ensure that the proper infrastructure is in place and that detoxification centres and other support services are available. Effective drug treatment requires not only drug and mental health treatment but also the availability of other support services.[69] Comprehensive services including health, housing, education, employment, and social services are necessary to enhance the effectiveness of DTOs and the Drug Court.[70] It is important to allocate resources to ensure the links to these support services are available in all the areas to which the Drug Court is expanded.

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[62] Victorian Alcohol and Drug Association, *Drug Courts in Victoria: evidence & options*, Position Paper (2013) 2.
[63] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.
[64] Richard Coverdale, *Postcode Justice - Rural and Regional Disadvantage in the Administration of the Law in Victoria* (Centre for Rural Regional Law and Justice, Deakin University, 2011) 15.
[65] Ibid 16.
[66] Ibid.
[67] Victorian Alcohol and Drug Association, *Drug Courts in Victoria: evidence & options*, Position Paper (2013) 4.
[68] Ibid
[69] National Association of Drug Court Professionals United States of America, *Defining Drug Courts: The Key Components* (Office of Justice Programs, US Department of Justice, 2004) 6.
[70] Victorian Alcohol and Drug Association, *Drug Courts in Victoria: evidence & options*, Position Paper (2013) 3.

D. VICTIMS OF CRIME ASSISTANCE ACT

We have read the submission prepared by Dr Kate Seear pertaining to amendments relating to the Victims of Crime Assistance Act.

Specifically, the recommendation to amend s54 of the Victims of Crime Assistance Act 1996 (Vic) to limit the circumstances within which past evidence of illicit drug use may adversely impact a victim of crime application of the Road Safety Act 1986 (Vic) and endorse that recommendation. SMLS operates a legal clinic for victims of sexual assault, in partnership with the South Eastern Centre Against Sexual Assault (SECASA), assisting victims with Victims of Crime Assistance claims. We wholeheartedly endorse Dr Seear's proposed reforms.

E. DECRIMINALISATION

In Australia, government expenditure in response to illicit drugs in 2009-2010 consisted of:

- 66% allocated to drug law enforcement
- 21% to drug treatment
- 9% to prevention; and
- 2% to harm reduction.[71]

Despite the allocation of a substantial portion of government funds on drug law enforcement, the overwhelming majority of people who use drugs in Australia in 2012 reported that obtaining illicit drugs was 'easy' or 'very easy'.[72] When criminalisation is prioritised over harm reduction strategies, neither drug use nor overdoses are reduced.[73]

[71] A Ritter, R McLeod & M Shanahan, Government Drug Policy and Expenditure in Australia- 2009/10 (2013) <http://www.dpmp.unsw.edu.au/sites/default/ files/dpmp/resources/DPMP%20MONO%2024.pdf>. Retrieved March 2017

[72] Jenny Stafford & Lucinda Burns, *Key Findings From The 2016 Illicit Drug Reporting System: A Survey of People Who Inject Drugs* (2016) National Drug and Alcohol Research Centre <https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/IDRS%20October%202016_FINAL.pdf>. Retrieved March 2017

[73] The European Monitoring Centre for Drugs and Drug Addiction.

Recommendation 1

We recommend the removal of a criminal record for drug possession for personal use offenses, and consider instead either no penalty at all or reducing consequences to fines or similar. [74]

The Global Commission on Drug Policy claims that 'harms created through implementing punitive drug laws cannot be overstated when it comes to both their severity and scope'. The Commission called for an end to punitive measures, calling for the removal of all penalties 'imposed for low level possession and/or consumption offenses'. [75] Internationally, various countries including Czech Republic[76] and Portugal[77] have implemented successful decriminalisation policies. Extensive research highlights the benefits of decriminalisation including social, financial, public health, recidivism and community harmony. [78]

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[74] Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminlization* (2016) <http://www.globalcommissionondrugs.org/reports/advancing-drug-policy-reform/>. Retrieved March 2017
[75] Ibid.
[76] See, e.g, *Single Convention on Narcotic Drugs as amended by the 1972 Protocol*, signed 13 March 1961, 520 UNTS 204 (entered into force 13 December 1964).
[77] Ricardo Goncalves, Ana Lourenco & Sofia Nogueira da Silva, 'A social cost perspective in the wake of the Portuguese Strategy for the fight against drugs' (2015) 26 *International Journal of Drug Policy* 199.
Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminlization* (2016) <http://www.globalcommissionondrugs.org/reports/advancing-drug-policy-reform/>. Retrieved March 2017
[78] McLaren J, Mattick RP, 2007, Cannabis in Australia: use, supply, harms, and responses, Drug Strategy Branch, Australian Government Department of Health and Ageing, 57, Canberra
Lenton, S., et al. (1999). Infringement versus Conviction: the Social Impact of a Minor Cannabis Offence Under a Civil Penalties System and Strict Prohibition in Two Australian States. Canberra, Department of Health and Aged Care.