

Submission to the Inquiry into workplace drug testing in Victoria

February 2024

Our background and expertise

We are a group of academics and practitioners from diverse backgrounds. Collectively we have expertise in law, public health, sociology, psychology, criminology, and human rights, in issues of alcohol and other drug use, stigma, discrimination and social policy, and have collectively authored many books, articles and reports on areas of direct relevance to this Inquiry. Our affiliations and expertise are detailed below.

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Overall statement

The health and safety of all Australians is of paramount importance. There are often sound public policy reasons for regulating the use of alcohol and other drug (AOD) consumption by specific workers in certain industries and circumstances. However, protecting the health and safety of publics must also be balanced with the human rights, health, and safety of other members of the community, including workers themselves. In any analysis of how best to manage these issues, parliament must simultaneously take into account various rights of relevance, including procedural fairness and due process rights, any relevant rights under anti-discrimination law, and a range of human rights including the right to privacy, the right to bodily integrity and autonomy, and other basic interests linked to health and wellbeing, such as the importance of being protected from stigma and discrimination.

The management of AOD testing in workplaces should only be contemplated where there are clear public policy grounds for doing so, and – in accordance with accepted legal principles – where testing is proportionate, necessary, and the least restrictive means available to achieve the stated goals. Our submission is framed with these issues in mind and draws on findings from various research projects

that our team has conducted in recent years. This includes research on AOD-related stigma, drug policy and law and human rights.

We explain these issues in more detail in the section that follows.

Analysis and recommendations

In 2005, the Victorian Law Reform Commission published their *Workplace Privacy: Final Report* (the Report), the result of an inquiry that considered whether legislative or other reforms should be made to ensure that workers' privacy is appropriately protected in Victoria, including in activities such as AOD testing.

The Report recommended the creation of workplace privacy legislation and mandatory codes of practice about the taking of bodily samples from workers or prospective workers for the purpose of AOD testing, which address the following matters:¹

- The need for written consent from the worker.
- What kind of tests should be used.
- The purposes for which tests may be used.
- Whether testing is for a specific purpose or is random.
- How tests should be conducted.
- What substances may be tested for.
- The qualifications of the personnel who conduct the tests.
- The accreditation status of laboratories used to analyse the tests.
- Secure storage and handling of any samples taken.
- Cross reference made to information privacy requirements contained in the *Health Records Act*.

To date, these recommendations have not been implemented, though New South Wales has since introduced the *Workplace Surveillance Act 2005*. WorkSafe Victoria do, however, have a *Guide for Developing a Workplace Alcohol and Other Drugs Policy* (the Guide), which stipulates that the workplace should first consider the strengths and limitations, costs, and potential unintended consequences of a testing program, including that positive drug tests are not always linked to impairment and there is a possibility of inaccurate results.

If an employer decides to implement AOD testing, the Guide stipulates that:

- It should be part of a comprehensive AOD program and supported by appropriate safeguards, clear policy and procedures, and provision of information, instruction, education, and support.
- The policy and procedures for testing should be developed in consultation – and, preferably, agreement – with employees.
- Issues relating to privacy and confidentiality of employees need to be considered, given that testing may be intrusive and raises confidentiality and privacy issues.
- Procedures should be developed on how to address the situation where an employee refuses to be tested, acknowledging that an employee may have a valid reason to refuse to be tested and noting it cannot be presumed that the employee is intoxicated.

¹ Victorian Law Reform Commission, *Workplace Privacy: Final Report* (2005) 66.

- Appropriate safeguards should be put in place that ensure: cut-off points for a positive result are selected and clear; testing is conducted in accordance with *AS 4760-2019: Procedures for specimen detection and the detection and quantitation of drugs in oral fluid* and *AS/NZ 4308-2008: Procedures for specimen collection and the detection and quantification of drugs of abuse in urine*; there is no discrimination in the selection of employees for testing; there are well defined procedures indicating who the final result will be communicated to; confidentiality is protected and the procedures identify who will have access to the results, who will interpret them, how the results will be stored and for how long; there is a grievance and complaints process, including accepted procedures to challenge the outcome of a test; and procedures are put in place for employees to travel home safely following a positive test.

The Guide notes that some industries and occupational groups are covered by specific legislation that regulates the use of AOD in the workplace. A handful of Acts and regulations in Victoria govern workplace testing for AOD in certain industries and for certain categories of workers. These include: the *Independent Broad-based Anti-corruption Commission Act 2011*; the *Independent Broad-based Anti-corruption Commission Regulations 2023*; the *Victoria Police Act 2013*; the *Victoria Police Regulations 2014*; the *Bus Safety Act 2009*; the *Commercial Passenger Vehicle Industry Act 2017*; the *Marine (Drug, Alcohol and Pollution Control) Act 1988*; and the *Rail Safety National Law Application Act 2013*. Our analysis of these laws shows that workers may be:

- **Tested for different reasons or purposes.** For instance, under the *Independent Broad-based Anti-corruption Commission Act 2011* and associated regulations, IBAC officers may be tested because a test is considered to be ‘relevant to the capacity of the... officer to perform his or her duties or exercise his or her powers’ (s 172(1)(a)) or because ‘the IBAC believes that the ... officer has consumed alcohol or a drug of dependence and as a result is incapable of, or inefficient in, performing their duties’ (reg 16(1)(a)(i)) or because ‘the ... officer has been involved in a critical incident’ (s 172(1)(b); reg 16(1)(a)(ii)). In contrast, under the *Victoria Police Act 2013* and associated regulations, tests may be ordered because ‘the Chief Commissioner reasonably believes that the person has been involved in a critical incident’ (s 89(3)(a)), or because ‘the Chief Commissioner reasonably suspects that the person has consumed alcohol or a drug of dependence’ and ‘ought to be tested for the good order and discipline of Victoria Police’ (ss 88(2), 89A(2)) (except for Victoria Police employees: s 88(1)) or because ‘the Chief Commissioner reasonably believes that the person appears to be unfit for work because he or she has consumed alcohol or a drug of dependence’ (ss 88(3), 89A(3)) (except for Victoria Police employees outside designation work units or functions: s 90(1)), or because the person ‘works in a designated work unit’ (s 92), or the person ‘carries out a designated work function’ (s 93).
- **Asked to provide samples using different methods.** For instance, under the aforementioned *Independent Broad-based Anti-corruption Commission Act 2011* and associated regulations, samples of breath, urine and blood may be sought (s 172(2)), whereas under the *Victoria Police Act 2013* and associated regulations, samples of breath, urine, hair, oral fluid, buccal swabs and blood may be sought (s 82). Under the *Bus Safety Act 2009*, it is a sample of blood or breath (s 57(2)). And under the *Commercial Passenger Vehicle Industry Act 2017*, a booking service provider must implement ‘systems or processes for drug and alcohol testing of drivers’ (s 24(2)(c)(ii)).
- **Required to provide samples in diverse circumstances, including circumstances where there are clear protections for their dignity and privacy, and circumstances where such protections are not clear or present.** For instance, under the *Victoria Police Act 2013* and associated regulations,

tests must be conducted ‘in a respectful manner’ (reg 34(1)(a)) and ‘in circumstances affording reasonable privacy to the member’ (reg 34(1)(b)), and must not be taken ‘in the presence or view of a person whose presence is not necessary for the purposes of obtaining that sample’ (reg 34(2)), or so as to ‘require the removal of more clothing than is necessary for the sample to be taken’ (reg 34(3)(a)), or to ‘require more visual inspection of the member than is necessary for the sample to be taken’ (reg 34(3)(b)). In contrast, the *Commercial Passenger Vehicle Industry Act 2017* does not set out how booking service providers are to implement systems and processes for testing of drivers and whether similar protections are required, or how they are to be guaranteed. Similarly, the *Marine (Drug, Alcohol and Pollution Control) Act 1988* stipulates no equivalent protections, and it is unclear in practice whether such protections are afforded.

- **Afforded different confidentiality protections, or potentially no such protections.** For instance, under the *Independent Broad-based Anti-corruption Commission Act 2011* and associated regulations, ‘a person must not disclose to any person the identity of a person to whom or in respect of which a direction is given ... other than as required or authorised’ (s 177; regs 16(1)(h); 32(2)), and ‘records must be kept in a secure location’ (reg 32(1)). The position under both the *Commercial Passenger Vehicle Industry Act 2017* and the *Marine (Drug, Alcohol and Pollution Control) Act 1988* are unclear.
- **Provided deidentified data on the number of tests or not.** For instance, Victoria Police advises that 8,693 tests involving the taking of samples were conducted during 2021-2022; 4,348 persons were tested; and 26 tests indicated the presence of a drug of dependence in the person’s body.² However, the Independent Broad-based Anti-corruption Commission does not provide deidentified testing data.
- **Covered by the scheme or not.** The statutory workplace drug-testing schemes only cover certain workers in certain industries, namely: IBAC officers (except the Commissioner: *Independent Broad-based Anti-corruption Commission Act 2011* s 171); police (*Victoria Police Act 2013*); bus drivers (*Bus Safety Act 2009*); commercial passenger vehicle drivers (*Commercial Passenger Vehicle Industry Act 2017*); and boat operators (*Marine (Drug, Alcohol and Pollution Control) Act 1988*). For workers outside these industries, there is no legislative scheme in place to govern the reasons for testing, the use of test information, the tests that may be conducted, the method of collection of samples, the consequences of failure to undergo testing, and confidentiality provisions.

There is some case law on these matters that could guide the application of workplace drug-testing in other industries. In *Endeavour Energy v CEPU*, Fair Work Australia set out the requirements for workplace AOD testing as follows:³

- The appropriate method of drug testing should be through oral fluid, done in accordance with *AS 4760-2019: Procedures for specimen detection and the detection and quantitation of drugs in oral fluid*.
- Post-incident and causal/suspicion testing should only occur where the line manager has reasonable grounds for suspecting that alcohol or drugs have been a contributory factor to the relevant incident or pattern of behaviour.
- Confirmatory testing should occur in the laboratory consistent with AS4760.
- Employees in a workplace should not be subject to random testing until six weeks have elapsed since an education program has been rolled out in relation to that workplace.

² Victoria Police. (2022). *Annual Report 2021-2022*.

³ *Endeavour Energy v CEPU* [2012] FWCA 1809 [61].

- Employees should not have to disclose personal information about prescription medication unless and until they have returned a confirmed positive test or if they have reason to believe they are suffering or may suffer side effects from taking prescription medicine.

The effects of a positive test are, however, varied, particularly in relation to cannabis (medicinal or otherwise). For example, in *Millar v FQM Australia Nickel*, a dispute between an employer (FQM) and a worker (Millar), it was held that ‘there is a consensus that THC could be detected in [...] a person’s urine well after the period when the person would be impaired by the drug’,⁴ and the Court did not ‘accept the proposition which underscored much of the submissions for FQM that the nature of the issue was such that, in effect, the only way to ensure there was no risk to safety was to require Mr Millar to refrain from taking his medication as a condition of his employment.’⁵ In *Harbour City Ferries v Toms*, another dispute between an employer (Harbour City) and a worker (Toms) stemming from a workplace in an incident, it was held that:

The lack of any impairment arising from drug use, the absence of a link between drug use and the accident and the absence of substantial damage [...] are not factors relevant to the ground of misconduct identified as non-compliance with the [workplace drug and alcohol testing] policy. The fact is that Harbour City required its policy complied with without discussion or variation. As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. It does not need to have a discussion with any relevant insurer, litigant or passenger’s legal representative about those issues. What it wants is obedience to the policy [...] The valid reason for termination of Mr Tom’s employment was his deliberate disobedience, as a senior employee, of a significant policy.⁶

Similar conclusions were reached in *Sharp v BCS Infrastructure Support*⁷, *Haigh v Platinum Blasting Services*⁸, and *Eather v Whitehaven Coal*.⁹ In some cases, adverse actions could, however, amount to discrimination or unfair dismissal.¹⁰

As we have shown in other work,¹¹ it is very common for laws of all kinds that deal with AOD to contain inconsistencies. This includes inconsistencies or variations of the kind we have identified here, such as what kind of AOD ‘problem’ (e.g. evidence of *consumption* vs evidence of *impairment* vs evidence of *dependency* vs evidence of *affected capacity*) triggers a power under the Act to act. It is also common for Acts to afford variable protections and sometimes no protections. A consistent legislative approach is needed. As other scholars have found ‘while the traditional sources of law have provided some

⁴ *Millar v FQM Australia Nickel* [2022] FCA 1331 [37].

⁵ *Millar v FQM Australia Nickel* [2022] FCA 1331 [40].

⁶ *Harbour City Ferries v Toms* [2014] FWCFB 6249 [27]-[28].

⁷ *Sharp v BCS Infrastructure Support* [2014] FWC 7310.

⁸ *Haigh v Platinum Blasting Services* [2023] FWC 2465.

⁹ *Eather v Whitehaven Coal* [2018] FWC 250.

¹⁰ *Fair Work Act 2009* ss 351, 385.

¹¹ Quilter, J., McNamara, L., Seear, K. & Room, R. (2018). ‘Intoxication’ and Australian criminal law: implications for addressing alcohol and other drug-related harms and risks. Australian Institute of Criminology: Canberra; Quilter, J., Luke, M., Seear, K & Room, R. (2018). The significance of ‘intoxication’ in Australian criminal law. *Trends & Issues in Crime and Criminal Justice*, 546, pp. 1–16; Quilter, J., McNamara, L., Seear, K. and Room, R. (2016). Criminal law and the effects of alcohol and other drugs: a national study of the significance of ‘Intoxication’ under Australian legislation. *UNSW Law Journal*, 39(3), pp. 913-949.

normative framework for WDT [workplace drug testing] practice, they are insufficient to ensure that WDT respect employee privacy while achieving its legitimate goals.¹²

Although there can be sound public policy reasons for different approaches between industries and types of employees, it is essential that Parliament consider:

1. Whether the relevant tests, methods, approaches, and protections remain fit for purpose, depending on the relevant public policy rationales, and whether they need to be revised to accommodate new developments, knowledges, or revisions to public policy logics.
2. Whether the approaches have the potential to generate new, unintentional, or otherwise overlooked harms, and whether they should be revised accordingly.
3. How to ensure protections for workers from all industries, including through a consistent legislative approach.

We argue that there are two especially important inter-related issues here, and these involve stigma and human rights. This is a complex and rapidly developing field but one that requires some explanation.

Stigma considerations:

Public understandings of stigma and its relationship with drug law and policy have developed in recent years. The lead author of this submission has previously given evidence about these matters to the Victorian Parliamentary Inquiry into Drug Law Reform (in 2017) and the Victorian Inquiry into the Use of Cannabis (2021) and here we repeat for this Committee's benefits some of the background observations made there. These include that:

- Recent research suggests that AOD-related stigma arises from a wide range of sources, that it can be long lasting (including across a person's lifetime), and that it carries a range of adverse health, social and economic consequences.¹³ It can, for instance, delay or impede people's willingness to seek help or health care.¹⁴ For instance in recent research by the fourth and fifth authors of this submission, it was found that approximately two-thirds of people who inject drugs had delayed accessing health care, not attended follow-up appointments and not disclosed drug use in order to avoid negative treatment by health services.¹⁵
- People who use drugs are highly stigmatised, in part due to negative stereotypes of this group as erratic and violent, and perceptions that substance use is within an individual's control.¹⁶

¹² Grant, J., Prichard, J. & Griggs, L. (2013) A Workplace Drug Testing Act for Australia. *University of Queensland Law Journal*, 32(2), pp. 219-235, 234.

¹³ C. Lloyd. (2010). *Sinning and sinned against: the stigmatisation of problem drug users*. UK Drug Policy Commission: London; C. Lloyd. (2013). The stigmatization of problem drug users: A narrative literature review. *Drugs: Education, Prevention, and Policy*, 20(2), pp 85-95. See also: Fraser, S., Pienaar, K., Dilkes-Frayne, E., Moore, D., Kokanovic, R., Treloar, C. and Dunlop, A. (2017). Addiction stigma and the biopolitics of liberal modernity: A qualitative analysis. *International Journal of Drug Policy*. 44, pp 192-201; Hatzenbuehler, M., Phelan, J., & Link, B. (2013). Stigma as a Fundamental Cause of Population Health Inequalities. *American Journal of Public Health*, 103(5), pp 813-821.

¹⁴ Hatzenbuehler, M., Phelan, J., & Link, B. (2013). Stigma as a Fundamental Cause of Population Health Inequalities. *American Journal of Public Health*, 103(5), pp 813-821; Link, B., & Phelan, J. (2001). Conceptualizing Stigma. *Annual Review of Sociology*, 27, pp 363-385; Schulze, B. (2007). Stigma and mental health professionals: A review of the evidence on an intricate relationship. *International Review of Psychiatry*, 19(2), pp 137-155.

¹⁵ Broady, T., Brener, L., Cama, E., & Treloar, C. (2023). Stigma snapshot: People who inject drugs 2023. Sydney: Centre for Social Research in Health, UNSW Sydney. <http://doi.org/10.26190/cpyt-yz29>.

¹⁶ Broady, T., Brener, L., Cama, E., & Treloar, C. (2023). Stigma snapshot: People who inject drugs 2023. Sydney: Centre for Social Research in Health, UNSW Sydney. <http://doi.org/10.26190/cpyt-yz29>; R Room, J Rehm, R Trotter, A Paglia and T

- There is a growing recognition that when considering how drugs ‘work’ and whether to reform our approaches to them, we should consider how policies and laws shape stigma.¹⁷ For instance:
 - Many international organisations, key stakeholders and bodies are becoming increasingly cognisant of the prevalence of such stigma, the adverse dimensions of stigma, the need to understand its origins and to address them. The law has come into increasing focus as a result of these insights.¹⁸ For example, in the 2008 *World Drug Report*, the United Nations Office on Drugs and Crime (UNODC) described stigma as one of the ‘unintended consequences’ of the international drug control system and its application.¹⁹ In the 2016 *World Drug Report*,²⁰ it was noted that people who use drugs are often subject to stigmatisation and discrimination. Other international bodies have raised similar concerns, including stigma for specific groups such as women and mothers.
 - Various national and state strategies acknowledge the importance of minimising stigma and discrimination. For example, the *National Drug Strategy* calls for a reduction in drug-related stigma, and emphasises the importance of avoiding policies and practices that ‘unintentionally further marginalise or stigmatise’ people.²¹ Stigma has also been a key concern of recent major inquiries into drug use, such as the Victorian Coroner’s inquest into a death in custody in which drug stigma associated with opioid dependency was found to be a causal contribution to a preventable death. A consistent theme across these inquiries and strategies is that stigma is not just a form of harm in its own right or something which has the capacity to exacerbate and magnify harms, but that it can contribute to or be a causal factor in death.

This matters because workplace AOD testing has the potential to generate stigma and discrimination in a range of ways. This might happen where:

- there are insufficient protections for people’s private information;
- the methods of testing do not contain adequate safeguards to ensure that testing takes place in ways that are respectful and dignified;
- those with the power to request or order a test have broad, imprecise powers or excessive discretion; and/or

Üstün (2001) ‘Cross-cultural views on stigma valuation parity and societal attitudes towards disability’ in T Üstün, S Chatterji, J Bickenbach, R Trotter, R Room, & J Rehm, et al. (Eds.), *Disability and culture: Universalism and diversity*. Hofgrebe & Huber, pp 247-291.

¹⁷ Seear, K. (2020). *Law, drugs and the making of addiction: Just habits*. Routledge: London; Seear, K. (2020). Addressing alcohol and other drug stigma. Where to next? *Drug and Alcohol Review*, 39, pp 109-113; 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), pp 596-606.

¹⁸ For a more detailed discussion, see: 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), pp 596-606

¹⁹ United Nations Office on Drugs and Crime, *World Drug Report 2008*, https://www.unodc.org/documents/wdr/WDR_2008/WDR_2008_eng_web.pdf at 216 (accessed 24th February 2017).

²⁰ United Nations Office on Drugs and Crime, *World Drug Report 2016*, https://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf (accessed 24th February 2017).

²¹ Commonwealth Department of Health. (2017). *National Drug Strategy 2017-2026*. Commonwealth of Australia: Canberra.

- where people order tests based on problematic, stereotypical or discriminatory assumptions about issues including how people who use AOD might present or behave, what ‘kinds’ of people use AOD, or where they have access to other information, including private medical information, and draw inappropriate or dangerous assumptions based on this information, including assumptions that a person might be using drugs licitly or illicitly, and in ways that trigger an authority to test under the relevant Act and regulations.

There are also procedural risks here, including where those tasked with making decisions, managing tests, collecting samples and handling information do so without any or any adequate training on stigma and discrimination, and are unaware of the ways in which they might generate, exacerbate, or magnify stigma and its adverse consequences through their actions. This includes various issues not necessarily addressed in law itself, such as how people are told they will be tested and why; how they are escorted to an area to be tested; how interactions with other staff are managed around such testing; whether they are questioned about their AOD use or made to feel that their use is ‘problematic’, ‘wrong’ ‘harmful’, ‘dangerous’ and so on; how their privacy and dignity is retained throughout. In a context where the status of drugs has changed (e.g. where medicinal cannabis is now lawful under certain conditions), there are additional risks. This includes that: people may be asked to disclose whether they use AOD; asked intrusive and sensitive questions about their medical history, conditions and/or any disabilities relevant to AOD use (including where they have been prescribed medicinal cannabis); and/or treated adversely as a result. Where the law is rapidly evolving and/or public literacy about drug law reform may be low, there is a risk that those responsible for managing workplace testing will draw improper or even unlawful conclusions through the testing process, including that medicinal cannabis is illegal.

The overall point here is that laws, policy, and practice associated with workplace AOD testing can generate and exacerbate stigma and discrimination, and there are a range of reasons why it is important to try and minimise (or better still, eradicate) stigma and discrimination for people who use AOD. These are properly legal problems and should be considered by this Committee in any review of or proposed reform to, workplace testing in Victoria.

Human rights considerations:

In recent years, alongside this heightened focus on stigma, a global shift in understandings of human rights and drug policy has emerged. As we explain below, these developments have important implications for all AOD laws but in ways that all dovetail with and reinforce the importance of a focus on stigma minimisation and/or eradication including in relation to workplace AOD testing.

In 2019, the *International Guidelines on Human Rights and Drug Policy* were released. These were produced by the World Health Organization, UNAIDS, UNDP and the International Centre on Human Rights and Drug Policy and among other things, recommend that 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’. They also note that drug-related stigma is a human rights issue and an obstacle to the right to the highest attainable standard of health.²² In doing so, the guidelines call upon member States to:

Address the social and economic determinants that support or hinder positive health outcomes

²² 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.

related to drug use, including stigma and discrimination of various kinds, such as against people who use drugs.

These guidelines reinforce the importance of carefully examining the relationship between drug policy approaches and human rights.

Of course, the need to consider the relationship between human rights and drug laws is already a given in Victoria, by virtue of the *Charter of Human Rights and Responsibilities Act 2006* (“the Charter”). The Victorian government has a longstanding commitment to human rights generally through the Charter. This Charter has implications for the work of the Committee and the parliament. If legislative reforms were to be proposed because of this Inquiry, consideration would eventually need to be given to whether those reforms complied with the Charter. The Charter recognises several rights potentially relevant to workplace AOD testing, including the right to recognition and equality before the law (section 8), the right to life (section 9), the right to protection from torture and cruel, inhuman, or degrading treatment (section 10) and the right to privacy (section 13).

It is our view that this Committee should consider whether existing laws are compatible with human rights and whether reforms are needed to bring those laws into line with human rights. We say this for various reasons. These include:

- Over several years co-authors of this submission have undertaken research into how parliaments undertake rights assessments under the Charters. Our research is based on textual analysis of parliamentary documents including statements of compatibility, and interviews with parliamentarians and parliamentary advisers (including those based in Victoria), as well as human rights experts.²³ Through this work, we identify several themes. We have found inconsistencies in approaches to how human rights are assessed, including whether and in what circumstances rights might be ‘engaged’ (i.e. potentially limited) by a proposed measure, and whether those limitations are justifiable. In rights assessments, claims are often made about the effects of AOD, or the harms they may cause, to justify the proposed limitation on rights. Importantly, these claims are often unsubstantiated, or based on assertions that the presence or consumption of *any* alcohol or other drugs, in *any* amount, is inherently unsafe, that is, regardless of its practical impact. There are also problematic patterns in how these assessments are made, with AOD often centred as the key driver of various social and cultural problems, reflecting (and reinforcing) the highly stigmatised nature of much drug use, while other potentially relevant factors (such as gender, for instance) are sidelined or ignored entirely.²⁴ The overarching finding from our research is that there is often a lack of consistency, rigour and detail in human rights assessments, including inadequate evidencing for claims that regulation is needed and/or that rights limitations are justifiable. This is not to say that AOD are not the proper object of government regulation but, rather, that assessments of these issues under Charter schemes may

²³ See for example: Seear, K. (In press). Shifting solutions: Tracking transformations of drugs, health and the ‘human’ through human rights processes in Australia. *Health Sociology Review*; Seear, K. and Mulcahy, S. (Early online). Forging new habits: critical drugs scholarship as an otherwise to rights. *International Journal of Human Rights*; Mulcahy, S. and Seear, K. (2023). Backstage performances of parliamentary scrutiny, or coming together in parliamentary committee rooms. *Documenta*, 41(2), pp 255-281.

²⁴ Seear, K. and Mulcahy, S. (2023). Making rights and realities: How Australian human rights make gender, alcohol and other drugs. *Australian Feminist Studies*, 37(113), pp 347-364; Seear, K. and Mulcahy, S. (2022). Enacting safety and omitting gender: Australian human rights scrutiny processes concerning alcohol and other drug laws. *Contemporary Drug Problems*, 49(3), pp. 258-277.

be inadequate, and/or lacking in transparency, and that adjustments in how the law regulates AOD in certain contexts, including workplace settings, might be consequently needed.

- Many AOD laws were devised at a very different time, including before the Charter was implemented. Thus, some laws may never have been subjected to a Charter assessment for their human rights compatibility. Even when they were, as we note above, these assessments may not have been as comprehensive or rigorous as they could have been. Importantly, and as our research has also found, the nature of such assessments is highly contingent on a range of factors which can change over time. These factors include: how different drugs are understood to work; how the effects of different drugs are understood; social and cultural changes including in public perceptions of drugs; and the development of new understandings and practices regarding drugs, including changes in regulatory approach.²⁵ Some drugs that were considered to be inherently or invariably dangerous or even ‘evil’ in the past are now beginning to be viewed differently, decriminalised in some parts of the world (including Australia) and even legalised. The increasing use of various substances for therapeutic purposes, including the advent of legally available medicinal cannabis is one of the most prominent examples of these changes, although it is not the only one.²⁶ These developments have implications for how rights assessments should be approached. Best practice would entail these new knowledges and practices being fed into rights assessments and/or laws being re-evaluated with these developments in mind. As the first author of this submission has shown in recent research, there is some evidence of this happening in Charter jurisdictions in Australia with regards to the regulation of cannabis and medicinal cannabis.²⁷ This in turn can lead to new legal approaches.
- Knowledge in relevant fields is rapidly evolving and must take account of the latest jurisprudence. In this respect we want to draw the Committee’s attention to one particularly important decision that we believe is highly relevant to the terms of reference: Findings from the Inquest into the death of Veronica Nelson, which was decided by the Coroners’ Court in 2023. As the Committee may be aware, this is a complex and wide-ranging coronial decision that explored the circumstances leading up to Veronica Nelson’s death in custody in January 2020. The key point we highlight for the purposes of this submission is that the Coroner found that AOD-related stigma ‘causally contributed to Veronica’s passing’ (page 235, para 676). The Coroner went on to say that Veronica’s treatment was ‘inhumane, cruel and degrading’, that ‘drug-related stigma’ had shaped the nature of care she received and contributed to her death, and that these were human rights violations. In particular, the Coroner concluded that stigmatising treatment violated section 10 of the Charter. This is a landmark decision, as the first author of this submission has explained elsewhere, with potentially wide-ranging ramifications.²⁸ The findings position stigma as a legal problem which numerous agencies, departments and service providers are obliged to address in their work. By extension, we argue that this Committee and the Parliament needs to consider whether laws, policies and practices are stigmatising or potentially stigmatising, address stigma as a human rights issue under section 10,

²⁵ For a broad introduction to these ideas, see: Seear, K. (2020). *Law, drugs and the making of addiction: Just habits*. Routledge: London.

²⁶ Seear, K. (In press). Shifting solutions: Tracking transformations of drugs, health and the ‘human’ through human rights processes in Australia. *Health Sociology Review*.

²⁷ Seear, K. (In press). Shifting solutions: Tracking transformations of drugs, health and the ‘human’ through human rights processes in Australia. *Health Sociology Review*.

²⁸ Seear, K. (2023). Lessons from the inquest into the death of Veronica Nelson. Presented at: Judging Drugs Workshop, Paris, France, 5 September.

and take steps to ensure that such stigma is avoided. It is in this sense, as we flagged in the previous section, that concerns about AOD-related stigma and human rights dovetail and must be thought of as part of one larger problem.

Based on the above, we recommend that:

The Committee consider options for recommending reforms to legislation concerning workplace drug-testing to ensure a consistent legislative approach for workers from all industries and that laws and regulations are in accordance with the Charter, taking into account evolving concepts about AOD and use (including knowledge from those with lived experience of drug use), new knowledges and practices, and recent jurisprudence, including, in particular, insights on drug-related stigma as a human rights issue.

The Committee recognise that AOD testing has the potential to: generate benefits for communities as well as harms; limit human rights, whether justifiable under section 7(2) of the Charter or not; and generate stigma, and that stigma is now understood as both a legal/human rights and public policy problem which should be minimised or eradicated wherever possible.

Conclusion

We thank the Committee for the opportunity to make this submission and for their time and consideration and can be contacted via the corresponding author if any further details are required on our submission.

Yours sincerely,



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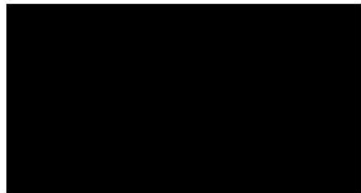


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