T R A N S C R I P T

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into the Use of Cannabis in Victoria

Melbourne—Wednesday, 19 May 2021

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Necessary corrections to be notified to executive officer of committee

WITNESS

Dr Kate Seear, Associate Professor, Drugs, Gender and Sexuality research program, Australian Research Centre in Sex, Health and Society, La Trobe University *(via videoconference)*.

The CHAIR: Welcome back. We are very pleased to have with us Associate Professor Kate Seear from La Trobe University. Thank you very much for joining us today. On the screen we have Matthew Bach. We have Sheena Watt and David Limbrick, and I am Fiona Patten, the Chair.

Kate, I know you are aware of this, but all evidence taken is protected by parliamentary privilege as provided by our *Constitution Act* and the standing orders of the Legislative Council. This means that any information you provide during the hearing is protected by law and you are protected against any actions for what you say during this, but if you were to repeat the same things outside, you may not have the same protection. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

I am not sure if you can see on your screen, but we have a team in here recording and hanging onto every word you say. You will receive a transcript, and I would encourage you when you receive it to have a look. Ultimately it will go up on to the committee's website and form part of our report.

We would really welcome you making some opening remarks, and then I will open it up to a committee discussion.

Dr SEEAR: Thanks, Fiona, and thanks so much to the committee. I would like to begin by acknowledging the traditional owners of the land on which we meet and to acknowledge elders past and present. I want to thank the committee for the opportunity to speak with you all today and to have provided my written submission as well. I am not going to repeat everything in my written submission—it would take too long—but what I would like to do is just underscore a couple of issues that I think are particularly important and that I hope the committee will be able to consider in its report.

So the first point I make in my submission is that when assessing public health and safety, which is term of reference b in the committee's terms of reference, and also the impacts of cannabis use, which is term of reference e, the committee should adopt a broad understanding of key concepts such as the impacts or effects and forms of harm that are associated with cannabis. In my opinion the impacts of cannabis use are inherently tied up with, inseparable from and indeed shaped by law and policy itself. This is a subject about which much has been written, including work that I have published, examining the role that drug laws can play in producing the very kinds of problems that they seek to fix by exacerbating social disadvantage and generating problems as a consequence of criminalisation. Those include things like the persistent implications or effects of criminal records on employment, housing and welfare, but also how cannabis use intersects with various other areas of law. I have done some research on this, and I am happy to say more later on. I heard you talking about this earlier too, and I have heard David Limbrick's questions on those points in particular.

The other point I want to make is that when reflecting on whether reforms to our laws might be needed or justifiable, I want to emphasise once more the importance of human rights considerations. There is growing recognition domestically and internationally that drug policy and law need to take human rights considerations into account. We now have international guidelines on drug policy and human rights, which are quite fresh—from 2019. Human rights are especially important in Victoria of course given that we have the *Charter of Human Rights and Responsibilities Act*, which imposes obligations on the Victorian Parliament. So if reforms were to be considered as a result of your work as a committee, consideration must be given to whether those reforms would comply with the charter. As the committee well knows of course, the charter requires the Parliament to scrutinise every proposed law for its human rights compatibility. If laws breach human rights, they can still be allowed of course if the limitation can be said to be necessary, reasonable and proportionate.

Now, I am currently undertaking research on just these questions as part of a future fellowship which is generously being funded by the Australian Research Council, who I would like to acknowledge. Based on early findings from this work we know that human rights deliberations are informed of course by ideas about how drugs work and what they do and the harms that they might produce. So if one idea about drugs and the people who use them is that drugs are evil, a threat to relationships, families and communities, violations of people's human rights can be considered justifiable or might appear to be justifiable. But if drugs are instead understood

as having multiple effects, as we now understand cannabis does, including the potential to be valuable, pleasurable and therapeutic, such breaches might appear less justifiable. For example, recent developments suggest that drugs like cannabis can be therapeutic; they can provide vital relief to terminally ill people with cancer and to people suffering from PTSD or depression. Cannabis use might be lawful in this instance but not in others, such as when people use cannabis to process other kinds of life challenges, to deal with grief, to deal with the trauma of family violence or a serious sexual assault or to explore or expand one's consciousness or when they use cannabis for pleasure. Even where these consumptive practices differ, we do need to consider the conceptual or normative basis for, say, accepting consumption as legitimately therapeutic in one instance but not in others. These conceptual distinctions might be arbitrary or insufficiently principled, and they may lead to unjust results. They can also open up gaps in the system. From my work as a lawyer when I have represented people with terminal cancer, they can create new and unintended consequences.

I think in the past we have been less open to considering these issues than we might have been. Here our understanding of core concepts such as the different ways in which cannabis can be therapeutic or legitimately pleasurable is crucial. All of this has implications for how we interpret and apply rights, including whether rights limitations can be justified. This is why I say that the committee might wish to think about access to cannabis and its intersection with human rights in a broad way and to keep these questions at the front of mind in its work, because after all, as you well know and as I mentioned earlier, if any reforms are to be proposed, Parliament would need to consider human rights considerations anyway.

My final point: as the committee is aware, I have included a detailed summary in my written submission into research I conducted with colleagues on diversionary schemes in Australia and how the expansion of diversion options for cannabis could be easily achieved. I am happy to discuss any of that research of course in more depth, and I look forward to answering your questions.

The CHAIR: Thank you, Kate. It is an excellent submission, and your work in research around diversion is absolutely fascinating. We have been presented with various recommendations from a whole range of people, and certainly just even the last—Springvale Monash Legal Service—recommended that we adopt a modest system of legalisation. Now, there would be others that would talk about a decriminalisation. We spoke to the ACT about their decriminalisation or legalisation of use and possession. Would you suggest that there would be a human rights contradiction if we were to allow people to use and possess cannabis but did not give them the means to procure it? If you look at a legalisation model, you might have a system where you would be able to supply it, but in the other model you are allowing people to possess it but you are still creating the offence of supply.

Dr SEEAR: That is a very good question. The simple answer I think is yes, potentially it could create a new human rights problem. Also, I mentioned earlier that I have tuned in to some of the evidence today. I have not been able to see it all, but I listened with interest to the last presentation by Springvale Monash Legal Service and in particular the comments they made about fines and infringements. Of course if you went with something other than legalisation and you had some kind of de facto decriminalisation that retained an infringement system, that would certainly complicate things for a lot of people, especially people from disadvantaged backgrounds, Indigenous people and so on, and I think that does create, potentially, new human rights problems that the Parliament would need to think through and that I would be very concerned about.

The CHAIR: Thank you. You note in your submission the cost of charging an offender versus offering them a diversion, and I think you were saying it is six to 15 times more expensive. Are there any dollar figures available on that? Or is it a piece of string where someone might be caught up in the justice system for a long period versus a short period?

Dr SEEAR: Yes. I do not know the answer to that, Fiona, in terms of categorical research, but I do think it is a bit of a piece of string because, as your last presenters noted, and I think I mentioned this in my own submission too, a really important problem with the criminalisation of cannabis is not simply what happens within the criminal justice system but the way in which the existence of a criminal record or other implications then intersect with other areas of law and create a whole bunch of additional problems which are extremely expensive for the community but also have all kinds of social and health costs. I heard your previous speakers talking about issues in child protection, family law and so on. There are other areas too that are often forgotten.

I will mention one I have done research on before and which is of particular concern to me. It might feel like a niche area but I think it is very important and brings home the cost of criminalisation for us. That is that under the victims of crime assistance scheme there is a provision that allows the tribunal, the Magistrates Court sitting as the tribunal, when deciding whether or not to award a victim of crime compensation, to take into account anything about their past conduct, character and behaviour, or wording to that effect, in determining whether or not they are deserving of compensation. In the past we know, based on research that I have done with Professor Suzanne Fraser, that that provision has been used to deny people, victims of crime, compensation. This may be totally unrelated drug use from a person's past, they may have been a victim of any kind of crime—of random sexual violence, family violence, a robbery and so on—and to think that then that person would be left without the necessary supports, including counselling, loss of earning support and so on, is to me outrageous and a clear example of the way that then those costs end up spiralling and being borne by particular other sectors of the community that are not often costed or factored into these considerations about the effectiveness of criminalisation.

The CHAIR: It is a really good point, Kate. We saw, it would have been a few years ago now, that there were amendments to some of those compensation cases as a result of Carl Williams and the death of Carl Williams in the prison. They worked out that the family should not be paid compensation for that, and we amended legislation to further curtail compensation being paid to people with criminal histories.

Dr SEEAR: Yes. That is right. And I know that in the last few years the Victorian Law Reform Commission looked at these issues in depth, and I and other people gave evidence about this as an example of one of the problems with that scheme, but it is just one of many examples of the way that the current criminalisation of cannabis use intersects with other areas of law and creates new problems and has other, as I said, social and economic impacts that often are not taken into account or properly costed or identified.

The CHAIR: Thank you. I will let others join in. I will go to Sheena, then Matthew, then David.

Ms WATT: All right. I did have a question. Hold up. Thank you so much, Dr Seear. You have given us a lot to think about today, I must confess, after a big day of some very, very helpful submissions. So thank you for sticking with us. I wanted to ask a question particular to the Aboriginal and Torres Strait Islander community. You mentioned that a couple of times in your remarks—that for Aboriginal and Torres Strait Islander people there are sometimes ongoing issues around accessing drug diversion programs. Can you talk to me about what are some of the barriers that need to be removed to ensure that drug diversion programs are more accessible to Aboriginal and Torres Strait Islander people, and if you have any particular comments on the Koori Court, that would be most appreciated.

Dr SEEAR: Yes. Thanks, Sheena. I am very happy to expand on that point because I do think it is a very important one. In the report on diversion that I mentioned in my submission, which was a report undertaken by myself, Alison Ritter, Caitlin Hughes and Lorraine Mazerolle, we interviewed people from all of the jurisdictions, including police from each state and territory, about diversion schemes across the country. And a common theme within that research was that diversion is of course available to people across Australia, including in Victoria, but there are barriers to accessing diversion and some of those barriers operate differently for people from Aboriginal and Torres Strait Islander backgrounds.

In Victoria I would say that what we heard and what I would speculate is a serious problem for people from Aboriginal and Torres Strait Islander backgrounds is that in order to access diversion you are required under the cannabis caution program to admit the offence and to consent to participating in whatever it might be that you have been offered—usually to undergo a cannabis education session or the like. And we of course know that Indigenous people are often reluctant for cultural reasons and for reasons of history, including colonisation, to admit offences to police because of reasons which I am sure you are all well aware of, including concern about the implications for child protection, other systems and so on. So if you were to remove that requirement from the diversion program in Victoria and there was no longer a requirement to admit the offence, I think you would find Indigenous people would be more readily eligible for diversion programs and diverted of course out of the criminal justice system and all of the implications that flow on. I think that would be, for mine, the number one thing that you could do to ensure that the scheme essentially does not discriminate against or prohibit Indigenous people from taking up that opportunity. I do not have expertise on the Koori Court, unfortunately, and so there is not much more I can say about that.

Ms WATT: That is all right. I appreciate that. Thanks.

The CHAIR: Thank you. Matthew.

Dr BACH: Thanks very much, Chair. And thanks, Dr Seear. I was fascinated by your response to my colleague's question because I was actually going to ask exactly the same thing. It really jumped out at me in your submission that you were saying there were these barriers, quite specific barriers, for Aboriginal and Torres Strait Islander Victorians, and yet you have entirely answered that question. So thank you very much.

Keeping on diversion programs, because we have heard a lot today about an inability for a whole range of reasons for Victorians who offend against our current drug laws to then access diversion programs, you also spoke about in the same research you were just referring to increasing or removing the limit on the number of diversion opportunities permitted under Victoria's cannabis-cautioning program, currently capped at two per person. Now, I confess I was not aware that that was the case. Would you mind talking us through that particular issue in a little bit more detail? Other members of the committee may be across it. I am not, I confess.

Dr SEEAR: Yes, absolutely. I think it is a very important issue. Maybe I will just start by reiterating some general observations we made in the report, which I think are important, and that is to say that as I mentioned earlier each state and territory in Australia has a diversion scheme, but the specifics of those diversion schemes differ. There are procedural minutia or technical requirements that differ greatly between the states and territories, and those procedural differences have very significant flow on effects for then who becomes eligible for diversion.

In Victoria as you mentioned there is, under the cannabis caution program, a limit on the number of times that a person can avail themselves of a diversion opportunity. So you can only be offered diversion twice in Victoria for a cannabis offence. It has to also meet other criteria, including a limit on the quantity possessed, but there are only those two diversion opportunities made available to you. In other states and territories it differs, but there are some states that are far more generous than Victoria. So, as a consequence, if I were to be picked up for cannabis possession twice, I might get offered diversion the first time and then the second, and then the third time I would be charged with a criminal offence. And if we look at the proportion of offenders with a principal offence of drug use or possession—this is not just cannabis, this includes all drugs—in the research that we did we can see that in South Australia 98 per cent of people with a principal offence of use or possession are diverted whereas it is only 65.4 per cent of people in Victoria. Western Australia does the worst actually; they are down at 32.4 per cent. But Victoria is in the middle, and the jurisdictions that do better than Victoria in offering people diversion are Tasmania, the ACT and South Australia. That is largely because they do not have those restrictive criteria in place, they do not limit the number of diversions that a person can have in the same way and so they are able to divert people.

One observation I would make if I can about that is that to me it has always been internally sort of inconsistent or incoherent. In many instances the logic is that a person might have a problem that requires some support or guidance or education, and to say to that person, 'You are able to receive support and guidance, education and help if you need it twice but then on the third occasion we are going to treat you as a criminal' to me does not really make much logical sense, and it is something that I think could be readily and easily fixed and would see a lot more people in Victoria have the opportunity to take up diversion.

Dr BACH: All right. That is fascinating. Thank you very much, Dr Seear.

The CHAIR: Thank you. David.

Mr LIMBRICK: Thank you, Chair. Thank you, Dr Seear, for appearing today and your submission. I think one of the unique things that you have done that I really like is relating the issue of drugs to human rights and in particular to the Victorian charter of human rights, despite my deep disappointment in the operation of this charter during the pandemic. Nonetheless I would like to pose what I hope is an interesting hypothetical to you: if we imagine that cannabis was currently legal, that we had no restrictions, and what we were actually discussing was prohibition of cannabis, in what way would that be infringing on the human rights of Victorians—if that was in fact what we were doing?

Dr SEEAR: There are a few possibilities. I think in my submission, and I just have to find the particular section, I do list and number of rights that exist under the Victorian charter that are potentially engaged by the

prohibition of cannabis. They are, first of all, under section 8 of the charter, that is the right to recognition and equality before the law. The second is the right to life under section 9. The third is the right to protection from torture and cruel, inhuman and degrading treatment under section 10 and finally the right to freedom of thought, conscience, religion and belief.

I think in my submission I talk a little bit about section 14, that is the freedom of thought, conscience, religion and belief, and I make the point that in November 2015 the Supreme Court of Mexico ruled that the prohibition on producing, possessing or consuming cannabis for personal use violated Mexico's human right to the free development of one's personality. That is obviously different wording to the wording used in the Victorian charter, but it is in my view sort of analogous to our section 14. The court made the point that the right to the free development of one's personality is not absolute and that the consumption of certain substances can be regulated but that in their view there was no justification for an absolute prohibition on the use of cannabis. I think that is an argument that could potentially be made in Victoria, or at the very least perhaps the way I would put it is this: that as you would know, under section 7(2) of the charter if there is a proposal to limit rights, the obligation falls on the Parliament to demonstrate how that limitation would be justifiable, necessary, proportionate and for a legitimate objective. And so the obligation would be on Parliament to demonstrate why that right is being legitimately breached, and I think the Mexican precedent shows that it potentially is a difficult hurdle to overcome.

Mr LIMBRICK: Thank you, Dr Seear. I note that you did not mention section 19, cultural rights—

Dr SEEAR: Oh, yes.

Mr LIMBRICK: I would have thought that this could possibly also be engaged. I am not sure about that, but some people claim it as part of their religion, I suppose, or their cultural practices. Is that something that is possible as well?

Dr SEEAR: Yes, absolutely it is, and you are right, it is something that I did not go into in my written submission, but I think that is a possibility too.

Mr LIMBRICK: Thank you. I am also interested in your views. I am not sure whether you saw before—we were discussing roadside drug testing, and it is certainly my view and I know it is the view of others that it is quite unjust at the moment because people are receiving sanctions who may not be actually impaired and endangering other people. How do you see this type of law that we have in operation at the moment with its interaction with the human rights of Victorians? I feel like there is some sort of deep injustice happening here.

Dr SEEAR: I think the law is hugely problematic, and I have previously argued in fact in front of Fiona Patten and colleagues in the 2017–18 parliamentary Inquiry into Drug Law Reform that that provision should be repealed or should be substantially amended, and my view has not changed on that. I do not have in front of me exactly what I said in that submission back in 2017, but for me there is no justification for a provision that does not have any temporal connection to a problem, which in this case would be impairment and road safety and the safety of other drivers. In my opinion it appears to be a sort of backdoor way of catching people who have previously consumed drugs, so therefore it has a purpose that differs from its implementation, if you get my drift.

Mr LIMBRICK: Yes.

Dr SEEAR: And so I think it is problematic and also problematic on human rights grounds because it does not meet a necessary or legitimate objective.

Mr LIMBRICK: Thank you. And another area which I am very interested in which is relevant here—and we have mentioned diversion and barriers to diversion—is your view on discretion and how that is exercised. What are the implications of having that discretion, and is discretion appropriate?

Dr SEEAR: This is something that we did write about in that report. When we interviewed people from around the country, police from around the country, we sought their views on it. What we heard consistently from police across Australia was that they thought that their discretion to charge people or to divert people should be removed, which surprised me, but that was a very clear finding in that research. What we heard from police was that there were a couple of things, and I think perhaps a previous speaker today may have touched

upon this—I recall hearing somebody say something about it. First of all, of course if a discretion is removed and they have no option but to divert people, then they will divert people, but if they are given the discretion and it requires additional paperwork or there are other barriers for them in offering people diversion, which we heard consistently there were, they will not offer people diversion. What they really need to do at the very least is implement some kind of police monitoring method so that police are required to report on the number of people that they offer diversion to. But the clear view of stakeholders from that research was that discretion should be removed, and I think that would obviously have an immediate and significant effect on how many people were diverted in Victoria of course.

Mr LIMBRICK: Thank you.

The CHAIR: Thank you. Do other members have further questions? Matthew? Sheena does. Sheena, you go next, and I might just have a quick final question.

Ms WATT: Yes, I will be very quick. Did you have any thoughts to add about how the structuring of drug diversion programs could be refined with a view to ensuring they are as effective as possible? Is there anything out there about how we could improve division programs, really?

Dr SEEAR: I think the answer to that question depends on what effects you are looking for and how you determine or define effectiveness. I think I talk a little bit about that in my written submission. We know this from the research that we did on diversion too that people's views about the effectiveness of diversion depend on what they think the problem is that they are trying to address and then whether or not they have an appropriate suite of options for people available. Some people would say—and in the research that we undertook we found this—that any kind of drug use at any level of any drug is a health problem and therefore must be met with a medical response with available treatment, and effectiveness therefore needs to be judged on the basis of whether the treatment worked. By that they might mean the treatment works if it stops that person taking drugs. But other people interviewed had a different view and judged effectiveness in terms of simply, 'Does it get people out of the criminal justice system?'.

In my view I think it is hugely problematic to treat any form or every form of drug use as a medical problem because that, first of all, is just simply not accurate. People do use drugs for a wide range of reasons, including for pleasure and for therapeutic reasons, as we have discussed and as you would all well know. So in my view I think the first question that needs to be decided or defined is how you would judge effectiveness and what it is that you are trying to achieve. In my view what we should be trying to achieve is diverting people out of the criminal justice system—avoiding criminalisation, avoiding criminal records and other sanctions—and expanding diversion as much as possible, in the way that South Australia has done. As I mentioned earlier, South Australia is able to divert 98 per cent of people.

It is also in the national drug strategy, of course, that the expansion of diversion is a national priority, and so if you judge effectiveness simply by the extent of expansion, then I think the easiest way to do it is to remove some of those barriers to diversion that we talked about earlier.

Ms WATT: Thank you.

The CHAIR: Or some of the laws.

Dr SEEAR: Yes, exactly. Of course. Yes, legalise first and then address diversion second.

The CHAIR: Thanks, Kate. I know you have done a lot of work on this, and in fact Ashleigh from the Monash legal service mentioned to talk to you about the relationship between drug law and stigma. I am just wondering if you just wanted to briefly expand on your views in this area.

Dr SEEAR: Yes, I would love to because I think it is a very important issue. Traditionally we have not tended to think about drug law as stigmatising or to consider the stigmatising effects of drug law, and increasingly both domestically and internationally there is recognition that drug law produces stigma and that that stigma is very harmful and a very significant problem in its own right and that we should do everything we can in order to alleviate stigma.

The need to reduce the stigma that is associated with drug use is now something that is mentioned in national policies in Australia. At the international level it has been something that has been talked about by the chief executives board of the United Nations, and it is now the common position of the heads of all 31 United Nations agencies that we need to move away from current approaches to drug use and towards a human rights approach and also to reduce stigma.

We know that research shows that consistently drug-related stigma produces a range of problems. It impacts people for life. It generates shame. It makes them less likely to seek help if they need it and to be up-front about their drug use if they have a problem. Those practices and the existence of stigma very much produce the kinds of problems that we then see associated with drug use that we often assume are just aspects of the biological properties of drugs themselves. Stigma is a key problem and very much arises from criminalisation. If we can move away from a criminal model, that will do a lot to reduce the stigma associated with drugs and to alleviate the forms of harm associated with drug use.

The CHAIR: Thank you. That was beautifully put. Kate, I really appreciate it. Are there any final comments you would like to make? Is there anything we have missed?

Dr SEEAR: No, nothing that I can think of. I know you have had many submissions that you have been going through. As I said, I tuned in to parts of the inquiry and have seen some of the discussions. I think much of what I would be interested in covering I have had the opportunity to cover today. So I am grateful for the opportunity and really look forward to seeing the committee's report.

The CHAIR: Thank you. We are at that final end; we will be presenting the report in the first week of August. Kate, thank you very much for your time today but also for the time that you took to provide the submission to us. As I mentioned at the outset, you will receive a transcript of today. Please have a look and make sure we have not misheard you or misrepresented you. Thank you to the committee, thank you to Kate, thank you to Hansard, thank you to the recording teams, thank you to the committee teams. We can now close this public hearing.

Committee adjourned.