



# Parliamentary Inquiry into workplace drug testing in Victoria

February 2024



## Drugs and the community

Like it or not, drugs are a part of every society.

It would be naive to think otherwise. And cruel to ignore it.

And, while we don't encourage drug use, there are other things that we will always encourage.

Understanding. Openness. Empathy. Communication.

Our default, as a society, has been to pour scorn on those who "use drugs" and judge them harshly by seeing their problems as self-inflicted.

Human beings are complex, and so is this issue. The reasons people use drugs, including alcohol and pharmaceuticals, are countless.

Risky behaviours are part of being human. We need to understand that, not condemn it.

Judging is easy. Helping is a bit more of a challenge.

So, how do we rise to that challenge?

At Penington Institute, we believe in approaching drug use in a safe, considerate and practical way. We seek solutions, not scapegoats. We strive for positive outcomes, not negative stereotypes. We follow evidence and data, but we temper it with compassion and empathy, to create change for the better.

Our focus is on making individuals and families safer and healthier.

Our goal is simple: to help communities and frontline services reduce harm and to make public policy work for the people, not against them.

We won't ever give up on that goal, or the people it exists to serve.

**John Ryan**

CEO, Penington Institute

## About Penington Institute

Penington Institute champions an open, rational, and compassionate approach to building and sharing knowledge to reduce drug-related harm. We advocate for an effective regulatory framework for cannabis defined by public health goals, with priority placed on targeted prevention, education, and treatment.

## Introduction

Penington Institute welcomes the opportunity to make a submission to the Parliamentary inquiry into workplace drug testing in Victoria. This inquiry comes at a time when rates of prescription medicinal cannabis use in Australia are rapidly accelerating. As more Victorians are prescribed these products, the issue of workplace drug testing will become even more pressing.

Overall, we believe that the current workplace drug testing framework in Victoria does not sufficiently protect medicinal cannabis patients from potentially discriminatory treatment by their employers and more needs to be done to ensure that employers are managing the risks of medicinal cannabis use fairly and appropriately.

This submission will address the Terms of Reference which are most relevant to our organisation's expertise: advocating for evidence-based policies to improve the management of drug use and improve the health and wellbeing of individuals and the community. First, we will explain how and why we believe medicinal cannabis is treated differently to other prescription medicines under the workplace drug testing framework (Term of Reference 2). Second, we will discuss the impacts of this unequal treatment on employees and the principles that we believe should guide reforms to the current framework (Terms of Reference 3 & 4).

## Term of Reference 2

### **The treatment of prescription medicinal cannabis as compared to other prescription medications, under that workplace drug testing framework**

Whether an employee may be subject to workplace drug testing depends on several factors, including their industry; their employer; their enterprise bargaining agreement; the tasks they perform at work; which work sites they attend; and the specific hazards and risks they are exposed to.<sup>1</sup> Therefore, there is room for significant variation in workplace drug testing policies across Victoria, and employees are subject to quite different policies, depending on their circumstances.

While employees are generally not required to disclose their personal medical information to their employer, WorkSafe Victoria encourages employees to notify their employer if they are taking

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<sup>1</sup> McEntee, A., Pointer, S., Pincombe, A., Nicholas, R. and Bowden, J. (2022). *Alcohol and other drug use: A focus on employed Australians: Part 2: Prevalence and consequences*. Adelaide, South Australia: National Centre for Education and Training on Addiction (NCETA), Flinders Health and Medical Research Institute (FHMRI), Flinders University: p.3.

medication that may have implications for workplace health or safety,<sup>2</sup> such as amphetamine-type substances, benzodiazepines, and opioids, and some workplace drug policies may require these disclosures as a condition of employment.

Employers have broad latitude in developing workplace drug policies, including policies that impact the use of prescription medicines. If there is a reasonable concern that the use of any medication could pose a risk to workplace health and safety, employers may require employees to provide documentation from their medical practitioner clarifying whether the employee is fit to perform their duties. This allows employers to assess if any changes need to be made to the employee's role or tasks, or if employees require additional monitoring and support.<sup>3</sup>

Although many medications have the potential to cause impairment, workplaces generally only test for the presence of alcohol and illicit substances. Other prescribed medicines that may result in impairment are generally not tested for, though they may be detected incidentally in some circumstances. This means that medications such as sedating antihistamines, which are available over-the-counter as sleeping aids, are unlikely to be identified despite presenting a potential risk to workplace safety.<sup>4</sup> Antidepressants are used by approximately 7% of Australian adults<sup>5</sup> and may cause dizziness, drowsiness, and blurred vision,<sup>6</sup> but these drugs are also not a focus of workplace drug testing. As with all medications, medicinal cannabis is not without risks; depending on the formulation, some patients may experience side effects including dizziness, drowsiness, and nausea, which can usually be avoided or minimised through appropriate dosing, titration, and monitoring.<sup>7</sup> These products are usually well tolerated and serious adverse events are not common.<sup>8</sup>

The vast majority of Australian medicinal cannabis patients are prescribed products that contain some amount of THC,<sup>9</sup> and will have THC metabolites in their body. Metabolites from prescription medicinal cannabis products are indistinguishable from those derived from illicit cannabis. Even in situations

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<sup>2</sup> WorkSafe Victoria (2017). *Information for employers: Guide for developing a workplace alcohol and other drugs policy*. Edition No. 1 March 2017.

<sup>3</sup> *Guide for developing a workplace alcohol and other drugs policy*. WorkSafe Victoria. (n.d.). <https://www.worksafe.vic.gov.au/guide-developing-workplace-alcohol-and-other-drugs-policy>.

<sup>4</sup> McDonald, K., Trick, L., & Boyle, J. (2008). *Sedation and antihistamines: An update. review of inter-drug differences using proportional impairment ratios*. *Human Psychopharmacology: Clinical and Experimental*, 23(7), 555–570. <https://doi.org/10.1002/hup.962>.

<sup>5</sup> Wylie, C. E., Daniels, B., Brett, J., Pearson, S., & Buckley, N. A. (2020). *A national study on prescribed medicine use in Australia on a typical day*. *Pharmacoepidemiology and Drug Safety*, 29(9), 1046–1053. <https://doi.org/10.1002/pds.5093>.

<sup>6</sup> Kelly, K., Posternak, M., & Jonathan, E. A. (2008). *Toward achieving optimal response: Understanding and managing antidepressant side effects*. *Dialogues in Clinical Neuroscience*, 10(4), 409–418. <https://doi.org/10.31887/dcms.2008.10.4/kkelly>.

<sup>7</sup> Sarris, J., Sinclair, J., Karamacoska, D., Davidson, M. & Firth, J. (2020). *Medicinal cannabis for psychiatric disorders: a clinically-focused systematic review*. *BMC Psychiatry*, 20(24). <https://doi.org/10.1186/s12888-019-2409-8>

<sup>8</sup> Arnold, J., Nation, T., McGregor, I.S. (2020). *Prescribing medicinal cannabis*. *Australian Prescriber*, 43(5): 152-159. <https://doi.org/10.18773/austprescr.2020.052>

<sup>9</sup> Therapeutic Goods Administration (TGA). (2023, September 22). *Medicinal cannabis: Access pathways and Patient Access Data*. <https://www.tga.gov.au/products/unapproved-therapeutic-goods/medicinal-cannabis-hub/medicinal-cannabis-access-pathways-and-patient-access-data>.

where an employee is taking a medicinal cannabis product which states that CBD is the only active ingredient, regulations permit these products to contain small amounts of THC<sup>10</sup> without disclosing this on the product label,<sup>11</sup> so a positive drug test may still result. Drug testing is unable to detect intoxication or impairment,<sup>12</sup> unable to accurately determine how recently cannabis was used,<sup>13</sup> and unable to distinguish prescription medicinal cannabis from illicit cannabis.

Other than alcohol, the *Occupational Health and Safety Act 2004* (Vic) (OHS Act) and *Occupational Health and Safety Regulations 2007* (Vic) (OHS Regulations) do not mention specific drugs and make no mention of cannabis, either as an illicit drug or a prescription medicine. Legislation and regulation for certain industries at the state or Commonwealth level may make such distinctions, but in general there should be no formal difference between how medicinal cannabis and other prescription medicines are treated under the legislative and regulatory drug testing framework in Victoria.

In practice, however, there is evidence that the framework has not prevented medicinal cannabis from being treated differently to other prescription medicines. According to Cooper Grace Ward Lawyers, “there is a common misconception among many employers that employees can be dismissed from their employment if they are taking medical cannabis”.<sup>14</sup> This widespread lack of knowledge among employers with regards to their rights and obligations is cause for concern. It suggests that many Victorians have or will be subject to unfair and potentially discriminatory treatment because of their use of medicinal cannabis.

Even employees who provide evidence from their healthcare professional that their use of medicinal cannabis poses limited risks to workplace health and safety may face adverse outcomes. If an employer has assessed the risk to workplace health and safety posed by the use of cannabis (medicinal or otherwise) and determined that such use should be entirely prohibited, they are not obliged to change that determination even at the recommendation of a medical professional. While similar considerations apply to other prescription medications, in practice employers appear to be more likely to implement such restrictions for medicinal cannabis compared to other medications.

This pattern occurs despite the fact that there is limited evidence that workplace drug testing is effective at reducing either drug use or workplace injuries,<sup>15</sup> and evidence that it may be discriminatory,

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<sup>10</sup> If the cannabinoid content of a product is 98% CBD, the remaining 2% may be comprised of other cannabinoids including THC. See Schedule 3 and Schedule 4 entries for CBD in Therapeutic Goods (Poisons Standard—February 2024) Instrument 2024. <https://www.legislation.gov.au/F2024L00095/latest/text>

<sup>11</sup> See labelling requirements in Therapeutic Goods (Standard for Medicinal Cannabis) (TGO 93) Order 2017. <https://www.legislation.gov.au/F2017L00286/latest/versions>

<sup>12</sup> Pidd, K, Roche, AM. (2011). *Workplace drug testing: Evidence and issues*. National Centre for Education and Training on Addiction (NCETA), Flinders University, Adelaide: p.vi.

<sup>13</sup> McCartney, D., Arkell, T. R., Irwin, C., Kevin, R. C., & McGregor, I. S. (2022). *Are blood and oral fluid Δ9-tetrahydrocannabinol (THC) and metabolite concentrations related to impairment? A meta-regression analysis*. *Neuroscience & Biobehavioral Reviews*, 134, 104433. <https://doi.org/10.1016/j.neubiorev.2021.11.004>.

<sup>14</sup> *Medical cannabis in the workplace – risks and challenges for employers*. Cooper Grace Ward. (2023, July 4). <https://cgw.com.au/publications/medical-cannabis-in-the-workplace-risks-and-challenges-for-employers>.

<sup>15</sup> McEntee, A., Pointer, S., Pincombe, A., Nicholas, R. and Bowden, J. (2022). *Alcohol and other drug use: A focus on employed Australians: Part 2: Prevalence and consequences*. Adelaide, South Australia: National Centre for Education and Training on Addiction (NCETA), Flinders Health and Medical Research Institute (FHMRI), Flinders University: p.viii. <https://nceta.flinders.edu.au/application/files/9916/8723/8263/DOH-Workplace-Report-Part2.pdf>

discourage employees from reporting safety incidents, and infringe on employees' rights to privacy.<sup>16</sup> For cannabis in particular, workplace drug policies are predicated on detecting the presence of cannabis without consideration for if or how cannabis may impact an employee's fitness for work.<sup>17</sup>

## Terms of Reference 3 & 4

**Whether the framework for occupational health and safety and workplace drug testing may be improved to benefit medicinal cannabis patients, ensuring due process and natural justice in workplace settings, balanced against risks to occupational health and safety;**

**Whether current workplace drug testing laws and procedures are discriminatory in nature and could be addressed by the addition of a further protected attribute such as 'medication or medical treatment', in Victoria's anti-discrimination laws;**

Penington Institute has previously drawn attention to the issue of seemingly discriminatory treatment applied to people prescribed medicinal cannabis, noting examples such as "a police officer being taken off the street and placed on desk duty, and another officer being stood down – all simply due to the medication that they were prescribed".<sup>18</sup> Other recent examples include a Victorian employer that amended their workplace drug policy to explicitly prohibit employees from being prescribed medicinal cannabis products containing THC<sup>19</sup> and a case brought before the Federal Court by a Western Australian employee who was dismissed from his work as a result of taking his prescribed cannabis medicine.<sup>20</sup>

The current framework for workplace drug testing means that employees may be dismissed or have their work tasks substantially altered at the discretion of their employers without regard to medical advice and without evidence that the employee is impaired. According to public statements made by Dave Henry, the National Work Health and Safety Coordinator for the Australian Manufacturing Workers' Union,

"We should never have a situation where employers are able to override medical practitioners who are prescribing medicinal cannabis because they believe it is in the best interest of their patients but that is what we are seeing ... We have workers who could be using opioids for a condition, but God help you if you move across to medicinal cannabis."<sup>21</sup>

Employees being discouraged from commencing medicinal cannabis treatments, or ceasing ongoing treatments, could potentially lead to worse clinical outcomes with no obvious benefits to workplace

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<sup>16</sup> Ibid. p.xi.

<sup>17</sup> Ibid. p.22.

<sup>18</sup> Penington Institute (2022). *Cannabis in Australia 2022: Technical Report*. Melbourne: Penington Institute: p.63. <https://www.penington.org.au/cannabis/cannabis-in-australia-2022/>

<sup>19</sup> Ore, A. (2023, August 26). 'This is a medicine': the Australians prescribed cannabis but left fighting to keep their jobs. The Guardian. Retrieved October 30, 2023, from: <https://www.theguardian.com/society/2023/aug/26/this-is-a-medicine-the-australians-prescribed-cannabis-but-left-fighting-to-keep-their-jobs>.

<sup>20</sup> *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331.

<sup>21</sup> Henry, D. (2023, August). *United in Compassion Symposium*. Brisbane; Australia.

health and safety. In fact, a situation where an employee's chronic health condition is not being treated effectively could *increase* workplace health and safety risks.

Given the issues identified, the Occupational Health and Safety and workplace drug testing framework could be improved to benefit medicinal cannabis patients and protect them against discrimination. Taking proactive steps to address these issues would be preferable, as one of the potential alternatives is to wait until a sufficient number of employees have sued for unfair dismissal or discrimination and policies must be reformed in response to case law.

Penington Institute does not have a position on whether improvements to the workplace drug testing framework should be made through amendments to anti-discrimination laws, nor can we make specific recommendations about how reforms might balance the competing objectives of due process, natural justice, and occupational health and safety. Our central point of emphasis is that medicinal cannabis should be treated the same way as other medications, and any reforms should be informed by evidence and consider the inherent technological and ethical challenges of workplace drug testing.

While drug testing may be an important component of some OHS policies, forcing employees to abstain from using their lawfully prescribed medicine, without adequate consideration of clinical need or evidence of impairment, is not justifiable, especially given the comparative risks posed by other drugs that are generally not subject to these conditions. We thank the Committee for their attention to this issue and its resolution.