Submission of Associate Professor Kate Seear

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

September 2020

My qualifications and expertise

I am currently Associate Professor in the DruGS (drugs, gender and sexuality) research program at the Australian Research Centre in Sex, Health and Society, and Associate Professor in Law in the Faculty of Law, Monash University. I am a practising solicitor. I have previously held a competitive research fellowship from the Australian Research Council in the form of a Discovery Early Career Researcher Award (DECRA) Fellowship, and in 2021, I will take up another competitive research fellowship in the form of an Australian Research Council Future Fellowship. Through these fellowships, I am undertaking extensive international research on drug law, and human rights and drug policy. I am also a member of the editorial board of the international specialist journal *Contemporary Drug Problems*, and regularly peer review 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*, and have delivered several invited talks and keynote addresses on drug law and drug policy, both in Australia and internationally. I am also the Founder and Convenor of the Australian Drug Lawyers' Network. I have honours degrees in arts and law, and a PhD. I am the author of multiple technical reports, including reports for government, peer reviewed journal articles, and other popular publications (e.g. pieces for the academic website *The Conversation*) on alcohol, other drugs and the law. I am also the author *of Law, drugs and the making of addiction: Just habits* (published through Routledge), which is the winner of the 2020 UK Socio-Legal Studies Association's history and theory book prize. I am also the author (together with Professor Suzanne Fraser) of the world's first full-length social science book examining hepatitis C and injecting drug use (*Making disease, making citizens: The politics of hepatitis C*, published through Ashgate).

This Inquiry

My submission addresses the terms of reference of the ***Inquiry into the use of cannabis in Victoria***. These terms of reference are to report on '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;

and further requires the Committee to assess models from international jurisdictions that have been successful in achieving these outcomes and consider how they may be adapted for Victoria.

My submission does not address all of the terms of reference in detail; only those within my specific areas of expertise. I focus specifically on terms of reference b and e in this document.

Summary

My recommendations are as follows:

1. When assessing public health and safety (term of reference b) and the impacts of cannabis use (term of reference e), the Committee should adopt a broad understanding of key concepts such as the 'impacts', 'effects' and 'forms of harms' associated with cannabis, and to include, in particular, critical reflection on the role of law and policy in shaping such impacts, effects and forms of harm;

2. When considering legal approaches to cannabis in Victoria, give consideration to human rights obligations. This should include taking into account developments in key concepts that are relevant to rights considerations;

3. In undertaking its work, the Committee should take into account international developments over recent years, including growing calls for the decriminalisation of drug use;

4. If considering reforms, the Committee should give consideration to 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.

More details on each of these appear below.

Further information in support of recommendations

Recommendation 1

When assessing the use of cannabis in Victoria, a helpful starting point might be to reflect on how we understand the 'effects' and 'forms of harms' typically understood to be associated with the drug. Traditionally, the effects of cannabis and the forms of harm associated with it are understood to be effects of the properties of the drug 'itself'.[1] A number of scholars, including me, have noted instead that the 'effects' of other drugs including cannabis are not consistent, stable, predictable or singular, noting instead they

[1] Some aspects of my submission draw upon aspects of other submissions I have made, as sole author or co-author, to other inquiries. I acknowledge the assistance and work of my collaborators including Professor Suzanne Fraser, Professor David Moore, Associate Professor kylie valentine and Associate Professor Helen Keane.

are inconsistent, plural, unpredictable, multiple and 'emergent' in action.[2] Various other factors and forces shape the apparent 'impact' of drugs including cannabis. Crucially, these factors include drug law and policy itself.

This is a subject about which much has been written, including work I have published examining the role that drug laws can play in producing the very problems it hopes to address, by exacerbating social disadvantage, and generating problems as a consequence of criminalisation, such as the persistent effect of criminal records on employment, housing, welfare and so on.[3] These developments are particularly relevant, I argue, to the final term of reference, through which the Committee will 'assess the health, mental health, and social impacts of cannabis use on people who use cannabis, their families and carers', but also to term of reference (b), which focuses on health and safety.

In short, the impacts of cannabis use are inherently tied up with, inseparable from and shaped by law and policy itself. As such, I encourage the Committee to think broadly about cannabis 'impacts' and related issues (such as health and safety), since these matters cannot be investigated without also reflecting on the way that legal and policy frameworks shape how we come to understand cannabis and what it does to people and to communities.

The complexity of these issues has been recognised, to some extent, by an important decision of the Victorian Supreme Court of Appeal: *R v Pidoto & ODea* [2006] VSCA 185. That decision was concerned with the question of whether the 'harmfulness' of a drug could or should be taken into account when fixing a sentence for a person found guilty of drug trafficking. The court determined that the legislative scheme did not permit or require 'harmfulness' to be taken into account but also – of more importance for present purposes – that determining the 'relative harmfulness' of different drugs was a 'practically impossible task'. In reaching this conclusion, the court said:

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[2] See, for example: Barratt, M. J., Seear, K., & Lancaster, K. (2017). A critical examination of the definition of 'psychoactive effect' in Australian drug legislation. *International Journal of Drug Policy, 40*, pp. 16–25; Fraser, S., Moore, D. & Keane, H. (2014). *Habits: Remaking Addiction*. Basingstoke: Palgrave Macmillan; Seear, K. & Moore, D. (eds.) (2014). Complexity: Researching Alcohol and Other Drugs in a Multiple World. (Conference Special Issue). *Contemporary Drug Problems, 41,* (3), pp. 293-484; Seear, K. (2013). What do we really know about doping 'effects'? An argument for doping effects as co-constituted 'phenomena'. *Performance Enhancement and Health, 2,* (4), 201-209; Seear, K. (2013). Beyond the Boundary: Drugs, the body and sport. *Contemporary Drug Problems*. Vol. 40, Issue 2; Fraser, S. & Moore, D. (2011). *The drug effect: Health, crime and society*. Melbourne: Cambridge University; Fraser, S., & valentine, k. (2008). *Substance and substitution: Methadone subjects in liberal societies.* Basingstoke: Palgrave; Demant, J. (2013). Affected in the nightclub. A case study of regular clubbers' conflictual practices in nightclubs. *International Journal of Drug Policy*, 24(3), 196–202; Hart, A.C. and Moore, D. (2014). Alcohol and alcohol effects: Constituting causality in alcohol epidemiology. *Contemporary Drug Problems, 41,* (3), pp. 393-416; Dwyer, R. and Moore, D. (2013). Enacting multiple methamphetamines: The ontological politics of public discourse and consumer accounts of a drug and its effects. *International Journal of Drug Policy, 24,* (3), pp. 203-211.

[3] See, for example: Seear, K. (2020). *Law, drugs and the making of addiction: Just habits.* Routledge: London; Seear, K. (Early online, 2020). Drug policy's past, present and future: Where should Australia head now? *Alternative Law Journal.* Available at: https://doi.org/10.1177%2F1037969X20938488; Seear, K. (2020). Addressing alcohol and other drug stigma. Where to next? *Drug and Alcohol Review*, 39, 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), 596-606; Seear, K. and Fraser, S. (2014). Beyond criminal law: The multiple constitution of addiction in Australian legislation. *Addiction Research & Theory,* 22, (5), 438-450; Seear, K. and Fraser, S. (2014). The addict as victim: Producing the 'problem' of addiction in Australian victims of crime compensation. *International Journal of Drug Policy,* 25, (5), 826–835.

> […] we think it wholly impracticable — and undesirable — for any sentencing judge to attempt to form views about the (relative) harmfulness of the particular drug of dependence the subject of the trafficking charge. This is so whether or not expert evidence is led. The practical impossibility of the task reinforces our conclusion that Parliament did not intend that it be undertaken. The difficulties involved in a judge assessing the seriousness of trafficking in a particular drug of addiction, based upon the characteristics of the substance involved, are numerous. It is necessary to draw attention to only a few.

The findings in *Pidoto & O'Dea* have been cited with approval in subsequent Victorian cases and by the High Court of Australia.[4] It is important to note that despite this seemingly unequivocal statement about the difficulties associated with assessing harm, one passage in *Pidoto & O'Dea* does imply that assessing harmfulness might be possible. In particular, the Court stated that this task would require 'specialist expertise, involve detailed investigation and must be based on extensive information on a range of issues'. However, even if the law did require or permit an assessment of the 'relative harmfulness' of different drugs, there is actually some disagreement among experts on these issues, including whether such an assessment is possible. This suggests that it is important to give consideration to other values, principles or normative frameworks, including human rights (discussed in more detail below), but also the persistent and pressing challenge of drug-related stigma, to which I now turn.

On the specific question of stigma, I note for the Committee's benefit that our understanding of stigma and its relationship with drug law and policy has developed in recent years. Recent research suggests that alcohol and other drug-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.[5] There is a growing recognition that when considering both how drugs 'work' and whether to reform our approaches to them, it is important to give detailed consideration to how policies and laws can shape (i.e. produce, exacerbate or reduce) stigma. I have previously given evidence about these matters to the Victorian Parliamentary Inquiry into drug law reform (in 2017) and repeat for this Committee's benefits some of the background observations I made in my submission to that Inquiry. I noted among other things that: stigma can delay or impede people's willingness to seek help or health care.[6] A number of 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

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[4] *Haddara v The Queen* [2016] VSCA 168; *Adams v The Queen* (2008) 234 CLR 143.

[5] C. Lloyd *Sinning and sinned against: the stigmatisation of problem drug users.* (London: UK Drug Policy Commission (UKDPC), 2010); C. Lloyd, "The stigmatization of problem drug users: A narrative literature review". *Drugs: Education, Prevention, and Policy, 20*(2), (2013): 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, 192-201; Hatzenbuehler, M. L., Phelan, J. C., & Link, B. G. (2013). Stigma as a Fundamental Cause of Population Health Inequalities. *American Journal of Public Health, 103*(5), 813-821.

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

has come into increasing focus as a result of these insights.[7] 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.[8] In the 2016 *World Drug Report,*[9] 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. I have previously undertaken research on these issues and how we might assess the relationship between drug law and stigma and am happy to provide more information for this Committee if it is of use.[10]

Together, these various factors and forces suggest that we must think about the health and safety dimensions of cannabis use and its impacts, effects and forms of harm differently and ensure that these are the subject of analysis and assessment in this Inquiry, too. These matters can and should, in my opinion, be given priority by this Committee, especially in light of the broad knowledge base we now have about the harms of drug law and policy. In recent work, based in part on my research and in part on my reflections giving evidence to parliamentary inquiries and commissions over the years, I argued as follows:

> The policy landscape is dominated by a concern with the problem of *what changes to drug law might do* rather than a concern for *what drug law presently does*, including the numerous and widely documented harms generated and/or exacerbated by existing approaches. In other words, policy and law reform debates often focus on the fear of a future without prohibition rather than seriously addressing the clear and present problems of failed prohibition. This is not to say that what happens into the future is unimportant. There is an urgent need to arrest the rising tide of overdose deaths. Nevertheless, debates about drug policy and law are frequently dominated by an acute sensitisation towards *what a new or imagined drug law might one day do* rather than a sensitisation towards or concern for *what drug law is already doing*. This article therefore invites reflection not only on what risks might follow a departure from the status quo, but *what risks might flow from steadfastly holding to it*.[11]

Taking all of this together, therefore, my first recommendation is to encourage the Committee to engage with work which problematises the assumption that forms of harm are the product of cannabis 'itself' and to ensure the forms of harm produced by criminalisation are not neglected or forgotten as part of the Committees' work. In particular, I recommend that:

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[7] 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), 596-606

[8] 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).

[9] United Nations Office on Drugs and Crime, *World Drug Report 2016,* (United Nations publication, Sales No. E.16.XI.7). https://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf (accessed 24th February 2017).

[10] 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.

[11] Seear, K. (Early online, 2020). Drug policy's past, present and future: Where should Australia head now? *Alternative Law Journal*. Available at: https://doi.org/10.1177%2F1037969X20938488;

> *When assessing public health and safety (term of reference b) and the impacts of cannabis use (term of reference e), the Committee should adopt a broad understanding of key concepts such as the 'impacts', 'effects' and 'forms of harms' associated with cannabis, and to include, in particular, critical reflection on the role of law and policy in shaping such impacts, effects and forms of harm.*

Recommendation 2

In 2019, a set of *International Guidelines on Human Rights and Drug Policy* was released. These guidelines were produced by the World Health Organization, UNAIDS, UNDP and the International Centre on Human Rights and Drug Policy. Among other things, these guidelines call for changes to drug policy and law. They 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 position drug-related stigma as a human rights issue and an obstacle to the right to the highest attainable standard of health.[12] In doing so, the guidelines call upon member States to:

> Address the social and economic determinants that support or hinder positive health outcomes related to drug use, including stigma and discrimination of various kinds, such as against people who use drugs.

These guidelines lend weight to the importance of considering the relationship between existing drug policy approaches and human rights.

Of course, human rights considerations are particularly pertinent in Victoria because of the *Charter of Human Rights and Responsibilities Act 2006* (hereinafter 'the Charter'). The Charter has implications for the work of the Committee and the parliament. If reforms are to be proposed as a result of the Committee's work, consideration will need to be given to whether such reforms comply with the Charter. The Charter recognises a number of rights potentially relevant to cannabis, 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 freedom of thought, conscience, religion and belief (section 14).

In January 2020, colleagues from the Springvale Monash Legal Service and I made a submission to the Commonwealth Senate Committee's inquiry into current barriers to patient access to medicinal cannabis in Australia. Although we were focussed on medicinal cannabis, many of our observations about human rights apply in the present context. I would argue that when thinking about human rights in Victoria, it is worthwhile to think holistically, by which I mean considering some of the intersections between access to and use of medicinal cannabis and access to and use of cannabis sourced and consumed illicitly. I argue that it is also relevant to reflect on the various reasons why people consume cannabis. A holistic consideration of these matters raises some rights concerns and I would encourage the Committee to review my submission to the Commonwealth Inquiry in its entirety for that reason. I also repeat and adapt some of my key observations here, and ask the Committee to give serious consideration to how human rights relates to the regulation of cannabis in Victoria.

[12] 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 *Victorian Charter*[13] (and similar provisions elsewhere) allow for freedom of thought, conscience, religion and belief. This section was adapted from Article 22 of the UN's *Universal Declaration of Human Rights*[14], which Australia ratified in 1948, asserting that economic, social and cultural rights are indispensable for human dignity and development of the human personality[15]. 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.[16] 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.[17]

This ruling was influenced by similar decisions in Uruguay[18] and Canada[19], which legalised the use of cannabis for personal use in 2013 and 2015 respectively. There is evidence that many people who consume cannabis do so for reasons connected to freedom of thought, conscience, religion and/or belief. There is therefore an important preliminary question to be asked here, about whether a prohibition on cannabis use in Victoria falls foul of the Charter. Secondly, it is important to consider both the wide range of reasons that people use cannabis and the wide range of people who do so. Some of those who use cannabis illicitly do so for reasons that might be thought of as connected to freedom of thought, conscience, religion or belief. Unless they are currently eligible to use cannabis through the medicinal cannabis access scheme, however, such use is criminalised. Even if such a person is also experiencing an illness, they may be ineligible for access under the scheme for one reason or another including because they lack the financial means).

When considering these matters, it becomes important to reflect critically about the concepts, definitions and understandings that guide our thinking, including the way we might categorise cannabis use. This is best explained with a few examples. For people facing terminal illness, for instance, there is sometimes a need to process one's pending death, and to address spiritual issues, existential crises or other psychological suffering. Depending on one's perspective and approach, these might be considered to be 'medicinal' uses (and thus legal under prescription) or to be 'non-medicinal' uses (and thus unlawful). Even people not dealing with chronic or terminal conditions may see benefit in consuming cannabis for similar reasons, including in order to process life experiences, deal with anxiety or stress, navigate life challenges, to expand one's mind, or

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[13] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14.
[14] *Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('UDHR').*
[15] UDHR, UN Doc A/810, Art 22.
[16] 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>
[17] Ibid.
[18] Simon Maybin, 'Uruguay: The world's marijuana pioneer', BBC News (Online, 4 April 2019). <https://www.bbc.com/news/business-47785648>
[19] Government of Canada, *Cannabis Laws and Regulations,* (2 October 2019) <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations.html>.

for pleasure. Some of these individuals may be eligible for access to medicinal cannabis under the relevant scheme, but others may not.

Importantly, the boundary between these categories and concepts is in fact slippery, as colleagues and I have argued elsewhere.[20] To give just one example, the decision to use cannabis to process the existential crisis of one's own death, may not be all that dissimilar from the decision to use it to process other life challenges (such as a relationship breakdown or other personal challenges), or to explore or expand one's 'conscience', or to use it for pleasure. Even where these consumptive practices differ, we need to consider the conceptual or normative basis for, say, accepting consumption as legitimately 'therapeutic' in one instance but not in another. These conceptual distinctions may be arbitrary, or insufficiently principled or nuanced. They may be unjust. A good example of this conceptual complexity is that for people living with cancer who may have lost their appetite, being able to regain their appetite, socialise with friends over dinner and enjoy food may be *both pleasurable and medically beneficial*. Similarly, for those who have trouble sleeping, the improved sleep that may come with cannabis use may also be considered to be *both pleasurable and medically beneficial*. The boundary between 'medical' benefits and uses, pleasure and belief, mind and body, becomes unstable.

In the past, we have perhaps been less open to considering these issues than we might have, and here, our understandings of core concepts (such as medicine vs pleasure) are crucial. Our concepts need to be updated and adapted, reflecting these new approaches and understandings. All of this has major implications for how we interpret and apply rights, including which rights are relevant and which are not. Ultimately, of course, all of this is important because it brings us back to whether the criminalisation of cannabis is an unacceptable infringement on rights. This is why I say the Committee should think about access to cannabis and its intersection with human rights in a broad and holistic way.

I note for the Committee that this is an understudied area and is the subject of the Future Fellowship I have recently been awarded. I am thus happy to provide further advice to the Committee on this particular issue in due course. For all of these reasons, my second recommendation is as follows:

> ***When considering legal approaches to cannabis in Victoria, give consideration to human rights obligations. This should include taking into account developments in key concepts that are relevant to rights considerations.***

Recommendation 3

In January 2019, the Chief Executives Board of the United Nations – a board comprising the heads of 31 UN agencies – released a document summarising recent meeting "deliberations".[21] The board had committed, among other things, to promoting "alternatives to conviction and punishment in appropriate cases, including the decriminalisation of drug possession for personal use" and to what it called a "rebalancing" of policies. They also noted that "health and human rights" should be

[20] Lancaster, K., Seear, K & Ritter, A. (2017). Making medicine; producing pleasure: A critical examination of medicinal cannabis policy and law in Victoria, Australia. *International Journal of Drug Policy,* vol. 49, pp. 117–125.
[21] Details can be found here: https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf

placed at the centre of this work. Decriminalisation is defined as 'the removal of criminal offences for specific penalties'.[22] As the Committee will be aware, decriminalisation is distinct from legalisation and may occur in a variety of ways.[23] 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).

Importantly, the development I describe above means that moving towards decriminalisation is now the common position of the UN's various agencies. Numerous other international actors have similarly called for change. In 2016, for example, the Global Commission on Drug Policy advocated for a model of decriminalisation that eradicates punishment of drug use.[24]

Such calls are grounded in a growing understanding that the forms of harm traditionally attributed to drugs 'themselves' are more complex and less stable than we might have believed, as I have already described, but also the recognition that drug law and policy themselves shape these outcomes. I am sure the Committee is familiar with key literature in this regard, much of which will have been analysed by the Victorian Parliamentary Inquiry into drug law reform, which reported in 2018. I will therefore not repeat all of that work here. Nevertheless, I argue that in considering its work the Committee should take into account these international developments. My third recommendation, therefore, is that:

> ***In undertaking its work, the Committee should take into account international developments over recent years, including growing calls for the decriminalisation of drug use.***

Recommendation 4

If the Committee is to consider some reforms to cannabis laws, there are of course several options. In this section I want to focus on what I think might be possible and how reforms could be achieved. Research from the Drug Policy Modelling Program based at the University of New South Wales suggests that Victoria already has a form of *de facto* decriminalisation in relation to cannabis and other illicit drugs.[25] They note that there is a range of options for further reform of drug use and possession, including:

1. Adoption of de jure decriminalisation for cannabis in all jurisdictions;

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[22] 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.
[23] 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.
[24] Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminlization* (2016) <http://www.globalcommissionondrugs.org/reports/advancing-drug-policy-reform/>.
[25] 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.

2. Adoption of de jure decriminalisation for drugs other than cannabis;

3. Amendment of de jure decriminalisation to remove criminal sanctions for non-compliance;

4. Amendment of de facto decriminalisation by removing strict eligibility requirements;

5. Amendment of de facto decriminalisation to remove criminal sanctions for non-compliance.[26]

The first and most comprehensive option would be to consider a formalised (*de jure*) system for the decriminalisation of cannabis. In the alternative, the Committee may wish to consider expanding *de facto* decriminalisation through the removal or adaptation of strict eligibility requirements in place in Victoria (e.g. those pertaining to diversion programs) and through removing barriers to the expansion of diversion. Research suggests a number of benefits associated with decriminalisation. These include financial savings from reduced law enforcement activities[27] and improved social outcomes,[28] although the specifics of such benefits would obviously differ depending on which models were to be implemented. There is evidence, for example, that charging an offender for cannabis use/possession is six to 15 times more expensive than offering them diversion.[29] More information on the various cost savings associated with alternatives to existing approaches can be found on pages 12-14 of our diversion report.[30] Moreover, the *National Drug Strategy 2017-2026*[31] includes a commitment to expanding/upscaling diversion. In this section I want to focus in more detail on diversion in Victoria. This is because one of the simplest and quickest ways to develop or expand administrative responses to drug use using less punitive mechanisms would be through the expansion of drug diversion.

In recent years, colleagues and I undertook a major piece of research on drug diversion in Australia, funded by the Commonwealth Department of Health.[32] The aims of the

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[26] 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 5.

[27] 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

[28] 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; Shanahan, M., Hughes, C., McSweeney, T. (forthcoming). Australian police diversion for cannabis offences: Assessing program outcomes and cost-effectiveness. Canberra, National Drug Law Enforcement Research Fund; 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.

[29] Shanahan, M., Hughes, C., & McSweeney, T. (2017). *Police diversion for cannabis offences: Assessing outcomes and cost-effectiveness. Trends and Issues in Crime and Criminal Justice No. 532*. Canberra: Australian Institute of Criminology.

[30] Hughes, C., Seear, K., Ritter, A., & Mazerolle, L. (2018). *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. A report for the Commonwealth Department of Health*. Sydney: NDARC, UNSW.

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

[32] 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

project were as follows:

- To outline current Australian laws and approaches taken to illicit drug use and possession in each jurisdiction (including programs on alternatives to arrest);

- To assess the scale of criminal justice responses to use/possession in Australia over the period 2010-11 to 2014-15, including the number of people detected, prosecuted and/or sentenced for use/possession, the number of people diverted away from criminal justice proceedings, and the populations that are most and least likely to receive a drug diversion by state/territory and demographic factors;

- To identify barriers and facilitators to the diversion of use/possess offenders in Australia (e.g. legal barriers, program design, resourcing).

The full report contains considerable detail about diversion across Australia and is publicly available. Here I extract and summarise some of the key points from that report that I believe are relevant to the work of this Committee. Some of our key findings were:

- There was universal support among the participants in our study for expanding diversion across Australia;

- Approaches to cannabis diversion vary dramatically across Australia. This is so in a few senses, including in terms of both the policies on offer and their specifics of how they work, but also in terms of how people in different jurisdictions understand what problems diversion schemes are trying to 'cure' or 'correct', and thus what the minimum requirements of such a scheme should be;

- The lack of consensus and uniformity across Australia when it comes to deciding what diversion is and what it means is important because it has multiple implications for potential reforms including in terms of system costs, logistics and practicalities. If every person caught in possession of cannabis were treated as an 'addict' who needed treatment, for instance, there might be both an explosion in the number of treatment places required, the costs thereof, and the logistics of managing this. And if Victoria was to require both treatment and specific kinds of treatment (e.g. in person, multiple sessions), this could quickly introduce new problems and issues, especially for those in regional and remote communities, but also people from diverse backgrounds, including Indigenous people, mothers and pregnant women;

- For all of these reasons, it is important to ensure that any revised system has a suite of diversion options available in recognition of the fact that people use and possess cannabis do so for a range of reasons, and that not all drug use takes the form of a medical problem;

- Each jurisdiction has diversion programs on offer and these are detailed at pages 23-27 of our report. They have different features, requirements and eligibility criteria and these differences play an important role in the vastly different rates of diversion across the country. Victoria's approach to diversion is detailed on pages

Policy Modelling Program Monograph Series; National Drug and Alcohol Research Centre, University of New South Wales, Sydney.

26-27 of our report;

- Differences in policies and other practical aspects of these policies have major implications for who is able to be offered diversion, what proportion of offenders is able to be offered diversion, whether they are then at risk of prosecution or receiving a conviction, and so on;

- Western Australia (WA) has the lowest incidence of police diversion in any jurisdiction – with just 32.4% of offenders with a principal offence of use or possession being given a police drug diversion. In contrast, South Australia (SA) offers diversion to the highest proportion of offenders with a principal offence of use of possession – that figure is 98% (see page 5 of our report);

- Victoria falls in the middle. A total of 65.4% of offenders with a principal offence of use/possession are given a police drug diversion. This is for all drugs, not just for cannabis;

- In this sense, Victoria does not do the worst job of diverting offenders in Australia but it could be offering diversion to many more people than it currently does;

- Our report lists a series of key facilitators that would enable expansion of diversion across Australia, many of which are relevant to Victoria. These include:

    - Streamlining referral systems for police, increasing feedback mechanisms to police about drug diversion (this is because police are the main gatekeepers to diversion and some believe it is a soft option so are reluctant to use it, are skeptical of its benefits, aren't sure if people comply, see only stories of non-compliance and so on);

    - Moving from a discretionary basis for diversion to a legislative basis (as in the SA PDDI) or for it to have a hybrid legislative basis. More details appear in our report but there are strengths and weaknesses to each approach, including that entrenching it as a legislative requirement will make it easier for police to justify diversion and remove discretion and other attitudinal barriers, but depending on how this is drafted it might be too rigid or lock specific programs or approaches to diversion in that then become difficult to change without legislative reform;

    - Increasing or removing the limit on the number of diversion opportunities Victorians are permitted under the Cannabis caution program, or considering 'resetting' the limit after a certain period. In Victoria, the limit is currently 2, whereas in South Australia it is unlimited, and in Tasmania the limit is 3 within the past 10 years;

    - Considering whether any threshold quantity limits that apply in diversion policies are too low, in that they are out of step with people's consumptive practices. My understanding is that the most up to date and potentially relevant research on these issues comes from a 2014 project

undertaken by Hughes, Ritter, Cowdery and Phillips.[33] This research did not examine the relationship between thresholds for personal use in diversion policies and personal drug use/possession and purchasing practices. Rather, it explored the relationship between threshold quantities for drug trafficking and personal practices in relation to drug use/possession and purchasing. Despite the different emphasis, the findings of that research tell us something important about people's drug use/possession and purchasing practices. The purpose of that research was to establish whether existing threshold quantities for trafficking were 'proportionate, equitable and just' in light of what we know about people's drug practices. The authors found that patterns of drug use/possession and purchasing often do not align with threshold quantities for drug trafficking. For instance, for cannabis, the maximum heavy session for us is 27 grams. In Victoria, a person can have no more than 50 grams of cannabis in their possession in order to be eligible for diversion. On the face of things, it seems that the threshold limit might not operate to prevent people from being offered diversion in Victoria. However, it is also important to note that the 2014 data are now several years old, and drug practices and patterns of consumption change. It is possible, for instance, that the maximum in a heavy session of use has increased since these data were last collected and analysed. As such, the Committee may wish to consider commissioning Hughes et al. to provide an up to date analysis of these data for the purposes of reconsidering the threshold limits for diversion purposes;

- It is also worth noting that there was evidence that some eligibility criteria requirements for diversion could be a barrier for Indigenous people, especially where there was an expectation that the offender admit the offence or admit guilt. In Victoria, there is a requirement to admit the offence and consent to participate in diversion and this might be worth reconsidering.

Taking all of these factors into account, I reiterate that one of the simplest and easiest ways to change Victoria's approach to cannabis use would be to reform our approach to cannabis diversion including by considering some of the changes outlined above. Thus my fourth and final recommendation is:

> ***If considering reforms, the Committee should give consideration to 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.***

[33] Hughes, C., Ritter, A., Cowdery, N. and Phillips, B. (2014a) *Evaluating Australian drug trafficking thresholds: Proportionate, equitable and just?* Report to the Criminology Research Advisory Council, Canberra; Hughes, C., Ritter, A., Cowdery, N. and Phillips, B. (2014b). *Australian threshold quantities for 'drug trafficking': Are they placing drug users at risk of unjustified sanction?* Trends and Issues in Crime and Criminal Justice no. 467, Canberra: Australian Institute of Criminology.

Conclusion

I thank the Committee for the opportunity to make this submission and for their time and consideration. I would be more than happy to appear before the Committee to answer any questions or to elaborate on my submission should this be of use.

Yours sincerely,

Dr Kate Seear
BA (Hons), LLB (Hons), PhD
Associate Professor
Australian Research Centre in Sex, Health and Society,
La Trobe University
Convenor, Australian Drug Lawyers Network
Faculty of Law,
Monash University

Email: [redacted]