



## **SUBMISSION**

Prepared by South-East Monash Legal Service Inc. for the  
Parliamentary Joint Committee on Law Enforcement

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

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## **Our organisation**

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

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

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

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

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

## **Acknowledgement of Country**

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

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

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

## **Terms of Reference**

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

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

## **Scope of submission**

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

## **Acronyms**

SMLS	South-East Monash Legal Service Inc.
RSA	<i>Road Safety Act 1986 (Vic)</i>

## **Terminology**

### **Aboriginal and Torres Strait Islander peoples**

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

## Introduction

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

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

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

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

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

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

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<sup>1</sup> International Drug Policy Consortium, 2017, Policy Principals Statement, retrieved from: <http://idpc.net/about/policyprinciples/principle-2>

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

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

<sup>4</sup> References 1. Welfare AloHa (2010) National drug strategy household survey report. Canberra: AIHW.

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

The harms that emerge for people who are exposed to the criminal justice system are well documented. A criminal conviction has a significant impact on the lives of those convicted, their family and community, including possible difficulties with employment, accommodation and travel to certain destinations.<sup>5</sup> A criminal conviction has a significant impact on the lives of those convicted, their family and community, including possible difficulties with employment, accommodation and travel to certain destinations.<sup>6</sup> In addition, a criminal conviction is a significant disadvantage in subsequent criminal proceedings, in that a criminal conviction may influence a police officer to lay charges; people with prior convictions may be denied bail' a criminal conviction may be used to undermine a person's credibility; or it may result in more severe penalties.<sup>7</sup>

Our overarching recommendations to this committee are as follows:

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

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

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

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

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

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

This submission examines:

- a. Drug prohibition intersectionality with a range of other areas of law in addition to the criminal jurisdiction, including but not limited to: Family Law and/or Child Protection, Crimes Compensation, Social Security Law, Visa Cancellations
  - b. It also examines how to protect public health and public safety in relation to the use of cannabis in Victoria; and assess the health, mental health, and social impacts of cannabis use on people who use cannabis, their families and carers
  - c. The best means to implement health education campaigns and programs to ensure children and young people are aware of the dangers of drug use, in particular, cannabis use
  - d. Prevent criminal activity relating to the illegal cannabis trade in Victoria
2. Appendix B: ***Joint submission to the Senate Community Affairs References Committee inquiry into the current barriers to patient access to medicinal cannabis in Australia, Submission prepared by Associate Professor Kate Seear (Faculty of Law, Monash University; Australian Drug Lawyers Network) and Springvale Monash Legal Service, 17 January 2020***

This submission examines:

- a. Medicinal Cannabis in Australia

3. Appendix C: ***Inquiry into Drug Law Reform, Law Reform, Road and Community Safety Committee, 58th Parliament Received from the Legislative Council on 11 November 2015, Submission prepared by Monash Faculty of Law Students On behalf of Springvale Monash Legal Service, 17 March 2017***

This submission examines:

- a. A Human Rights Approach to drugs
- b. Drug Driving and Suggested reforms- legislative and policy-making framework surrounding drug driving infringements and offences and provides suggestions for amendments to current laws.
- c. Infringements and Suggested Reforms
- d. Drug Courts and Suggested reforms
- e. Victims of Crime Assistance
- f. Decriminalisation
- g. Suggested reforms

### **Summary of Recommendations**

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

### ***Summary of Recommendations from:***

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

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



SMLS takes the opportunity to endorse the submission of Dr Kate Seear.

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

***Summary of Recommendations from:***

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

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

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

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

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

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

***Summary of Recommendations from:***

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

1. Drug Concentration Threshold SS 49(1) (bb), (h) and (i) (RSA)

We recommended introducing an additional legislative requirement of a blood drug concentration threshold limit for section 49(1) (bb), (h) and (i) (RSA). This limit should be based on research establishing a correlation between impaired ability to drive and prescribed blood drug concentrations levels, much the same as current drink-driving provisions. There exists a significant body of international research which supports the introduction of threshold blood drug concentration limits. Studies have indicated that the mentioned illicit drugs have an influence on driving performance in a dose-dependent manner. There are slight variations between current recommendations of cut-off blood concentration thresholds. SMLS recommends that further independent research is conducted, building on current research findings, to determine a suitable threshold for adaption into Victorian law.

2. Subsequent Offences S48 (2) (RSA):

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

Under the s48(2) (RSA) 'blanket' provision, a previous drink driving offence will be considered a prior offence for a later drug driving charge, and vice versa. The practical effect of this provision is that it fails to distinguish between different levels of impairment and culpability of offenders.

Additionally, the provision has the potential to adversely affect offenders as the maximum penalty for a subsequent offence can be up to fifteen times that of a first offence.

We therefore recommend the removal of the s48(2) (RSA) 'blanket' provision in determining prior and subsequent offences. We further call for a new system of categorisation in accordance with culpability, starting with the offence type (refusal offences, driving with drugs present, driving with alcohol present etc). This new system of categorisation will need to consider the range of different levels of culpability within each offence type.

3. Availability of Special Circumstances Applications for Revocation at any stage:

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

4. A centralised fine management body It is recommended that a centralised body is established to manage both the enforcement of infringements and decisions regarding special circumstances applications. The adoption of a centralised body will assist in streamlining the complex infringement system, and aid those utilising special circumstances avenues.

Adopting the recommendation of the Sentencing Advisory council may bring Victoria's fine enforcement system more in line with that of the other states and territories in Australia.

5. Medicare Item Number:

It is recommended that a new Medicare Item Number is introduced for doctors to use when completing reports for special circumstances applications. The prohibitive fees some doctors

charge for these reports can act as a disincentive for clients to make special circumstances applications. An item number would acknowledge the time taken to prepare complex reports; however, the client would receive a rebate. This could also allow doctors to bulk-bill clients. This recommendation will incentivise both doctors to write comprehensive reports, and clients to obtain these reports for special circumstances applications.

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

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

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