

**Submission
No 32**

**INQUIRY INTO THE DRUGS, POISONS AND CONTROLLED
SUBSTANCES AMENDMENT (REGULATION OF PERSONAL ADULT
USE OF CANNABIS) BILL 2023**

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Submission to the Inquiry into the Personal Adult Use of Cannabis Bill

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Our background and expertise

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

Kate Seear is Professor at the Australian Research Centre in Sex, Health and Society at La Trobe University. An Australian Research Council Future Fellow, she is a practising lawyer, and founder and convenor of the Australian Drug Lawyers Network. Professor Seear is the corresponding author for this submission.

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Overall statement

We welcome the opportunity to provide feedback on the Bill. In 2020, the lead author of this submission, Kate Seear, made a submission to the Victorian inquiry into the use of cannabis. For the benefit of this committee, we have attached that submission as Appendix A, as it contains relevant information for the purposes of the current inquiry. We otherwise confine our comments in this submission to the features of the **Personal Adult Use of Cannabis Bill** and to some relevant recent developments in human rights law that we consider to be highly relevant to this committee's work.

Provisions of the Personal Adult Use of Cannabis Bill

While we welcome the Bill overall and agree that a move away from punitive approaches to drug use, possession and supply is needed, there are some specific aspects of the Bill that could generate unintended consequences and need separate and accompanying action to be ameliorated. In particular:

Proposed section 69X of the Bill authorises cultivation of cannabis plants at a person's 'principal place of residence', and proposed section 69Z authorises possession at that residence. This focus could have unintended consequences for people experiencing homelessness or otherwise sleeping rough for whom the capacity to cultivate and/or possess cannabis at home is limited. We encourage consideration of reforms that would mitigate against this. While we welcome proposed section 69ZE, which permits the owner or occupier of land or premises to permit another person to use that land or premises for the cultivation of plants, we do not believe this section goes far enough in protecting the needs of people experiencing homelessness.

Proposed section 69ZD confirms that a person over the age of 18 is authorised to publish a document containing instructions for the cultivation or manufacture of cannabis or tetrahydrocannabinol for personal use, but that publication of documents containing instructions for trafficking are not authorised. Sub-section 3 clarifies that instructions for manufacturing are not instructions for trafficking. What is left unclear is whether instructions on the provision of a gift in accordance with the permissions set out in proposed section 69ZB of the Bill constitute 'instructions for trafficking'. For the avoidance of any doubt, we recommend amendments to protect people in these circumstances.

As the name of the Bill indicates, it removes all penalties for possession of a small quantity of cannabis, except for children, who are still at risk of incurring a penalty. This may raise human rights issues and risks intensifying the stigmatisation and criminalisation of younger people who are not eligible to receive a cannabis caution under

the Victoria Police Manual. Instead, young people who are charged with use and possession offences may be diverted away from the criminal justice system by way of a ‘youth caution’ under what is now part 4.3 of the *Youth Justice Act 2024*. Notably, the previous cannabis inquiry recommended the establishment of this now legislated Youth Caution program and ‘shifting towards drug diversion programs as the default law enforcement response for minor cannabis offences committed by young people.’ Whilst the Bill proposes some amendments to section 73(1)(a) of the Principal Act, we recommend further amendments to insert a legislative note that a youth caution may be given to a child for an alleged offence in accordance with section 103 of the *Youth Justice Act*, and that the Victoria Police Manual be updated to reflect that this should be the default approach to small quantity cannabis possession offences by young people.

The Bill sets the small quantity at 50g, whether fresh or dried; however, the ACT Drugs of Dependence (Personal Use) Act 2022 sets it at 50g for dried and 150g for harvested (not dried). We recommend amendments to schedule 11 part 2 of the Principal Act to increase the small quantity for fresh or harvested cannabis permitted, in line with the ACT Drugs of Dependence (Personal Use) Act 2022.

The previous cannabis inquiry made certain recommendations about improving access to drug diversion programs that are not picked up in the Bill including: not requiring police to consent to offering an offender drug diversion; alternatives to admitting the offence which do not result in a finding of guilt; and reviewing the cap on the number of diversions a person can receive where a minor drug/cannabis offence is the sole or primary offence. This may require amendments to section 59 of the *Criminal Procedure Act 2009*, which allows diversion if ‘it appears appropriate to the Magistrates’ Court’ alongside other eligibility criteria, as well as to the policy underpinning the cannabis cautioning program, to reflect the recommendations of the previous cannabis inquiry. Whilst this may be outside the scope of this Bill, we recommend that the Government review the eligibility requirements of diversion programs, to ensure that they are operating effectively and are, wherever possible, codified in law.

Human rights and stigma

As we have explained in previous work, including our recent co-authored submission (with colleagues) to the Victorian *Inquiry into workplace drug testing*, there is a need to consider the implications of any proposed cannabis law in terms of both human rights and stigma. The Victorian Charter of course necessitates consideration of the former, but there is an increasing appreciation of the way that drug law can generate, exacerbate, or magnify stigma, and the need for these possibilities to be considered in the design of any new laws. We therefore reiterate the importance of these issues for this Committee and want to make a few overarching statements about their relevance and relationship for the purposes of this Inquiry. In so doing, we are here repeating many of the issues we have raised in previous submissions to this parliament and others, including in the aforementioned *Inquiry into workplace drug testing*, so we acknowledge those previous submissions and our various collaborators on those submissions here.

Stigma considerations:

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

- Recent research suggests that alcohol and other drug (AOD)-related stigma arises from a wide range of sources, that it can be long lasting (including across a person’s lifetime), and that it carries a range of adverse health, social and economic consequences.¹ It can, for instance, delay or impede people’s

¹ C. Lloyd. (2010). *Sinning and sinned against: the stigmatisation of problem drug users*. UK Drug Policy Commission: London; C. Lloyd. (2013). The stigmatization of problem drug users: A narrative literature review. *Drugs: Education, Prevention, and Policy*, 20(2), pp 85-95. See also: Fraser, S., Pienaar, K., Dilkes-Frayne, E., Moore, D., Kokanovic, R., Treloar, C. and Dunlop, A. (2017). Addiction stigma and the biopolitics of liberal modernity: A qualitative analysis. *International Journal of Drug Policy*. 44, pp 192-201; Hatzenbuehler, M., Phelan, J.,

willingness to seek help or health care.² For instance, recent research found that approximately two-thirds of people who inject drugs had delayed accessing health care, not attended follow-up appointments and not disclosed drug use in order to avoid negative treatment by health services.³

- People who use drugs are profoundly stigmatised, in part due to negative stereotypes of this group as erratic and violent, and perceptions that substance use is within an individual's control and thus that all forms of harm that might be thought to be associated with it are their fault (as opposed, for instance, to being the product of complex forces in combination).⁴
- There is a growing recognition that when considering how drugs 'work' and whether to reform our approaches to them, we should consider how policies and laws shape stigma.⁵ For instance:
 - Many international organisations, key stakeholders and bodies are becoming increasingly attuned to stigma, its adverse effects, the need to understand its origins and to tackle them. The law has come into increasing focus as a result of these insights.⁶ For example, in the 2008 *World Drug Report*, the United Nations Office on Drugs and Crime described stigma as one of the 'unintended consequences' of the international drug control system and its application.⁷ In the 2016 *World Drug Report*,⁸ it was noted that people who use drugs are often subject to stigmatisation and discrimination. Other international bodies have raised similar concerns.
 - Various national and state strategies acknowledge the importance of minimising stigma and discrimination. For example, the *National Drug Strategy* calls for a reduction in drug-related stigma, and emphasises the importance of avoiding policies and practices that 'unintentionally further marginalise or stigmatise' people.⁹ Stigma has also been a key concern of recent major inquiries into drug use, such as the Victorian Coroner's inquest into a death in custody in which drug stigma associated with opioid dependency was found to be a causal contribution to a preventable death. A consistent theme across these inquiries and strategies is that stigma is not just a form of harm in its own right, or something which has the capacity to exacerbate and magnify harms, but that it can contribute to or be a causal factor in death.

Human rights considerations:

In recent years, alongside this heightened focus on stigma, a global shift in understandings of human rights and drug policy has emerged. This has significance for all Bills and laws that deal with drugs, including the current Bill, and in ways that dovetail with and reinforce the importance of a focus on stigma minimisation.

& Link, B. (2013). Stigma as a Fundamental Cause of Population Health Inequalities. *American Journal of Public Health*, 103(5), pp 813-821.

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

³ Broady, T., Brener, L., Cama, E., & Treloar, C. (2023). Stigma snapshot: People who inject drugs 2023. Sydney: Centre for Social Research in Health, UNSW Sydney. <http://doi.org/10.26190/cpyt-yz29>.

⁴ Broady, T., Brener, L., Cama, E., & Treloar, C. (2023). Stigma snapshot: People who inject drugs 2023. Sydney: Centre for Social Research in Health, UNSW Sydney. <http://doi.org/10.26190/cpyt-yz29>; R Room, J Rehm, R Trotter, A Paglia and T Üstün (2001) 'Cross-cultural views on stigma valuation parity and societal attitudes towards disability' in T Üstün, S Chatterji, J Bickenbach, R Trotter, R Room, & J Rehm, et al. (Eds.), *Disability and culture: Universalism and diversity*. Hofgrebe & Huber, pp 247-291.

⁵ Seear, K. (2020). *Law, drugs and the making of addiction: Just habits*. Routledge: London; Seear, K. (2020). Addressing alcohol and other drug stigma. Where to next? *Drug and Alcohol Review*, 39, pp 109-113; Seear, K., Lancaster, K. and Ritter, A. (2017). A new framework for evaluating the potential for drug law to produce stigma: Insights from an Australian study, *Journal of Law, Medicine and Ethics*. 45(4), pp 596-606.

⁶ For a more detailed discussion, see: Seear, K., Lancaster, K. and Ritter, A. (2017). A new framework for evaluating the potential for drug law to produce stigma: Insights from an Australian study, *Journal of Law, Medicine and Ethics*. 45(4), pp 596-606

⁷ 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).

⁸ United Nations Office on Drugs and Crime, *World Drug Report 2016*, https://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf (accessed 24th February 2017).

⁹ Commonwealth Department of Health. (2017). *National Drug Strategy 2017-2026*. Commonwealth of Australia: Canberra.

In 2019, the *International Guidelines on Human Rights and Drug Policy* were released. These were authored by a consortium of organisations: the World Health Organization, UNAIDS, UNDP and the International Centre on Human Rights and Drug Policy and 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 note that drug-related stigma is a human rights issue and an obstacle to the right to the highest attainable standard of health.¹⁰ 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 reinforce the importance of examining the relationship between drug policy approaches and human rights.

As we noted above, and as the Committee knows, the need to consider how proposed drug laws engage human rights is already understood in Victoria, as a consequence of the scrutiny process that is articulated in the *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’). This Charter has implications for the work of the Committee. If legislative reforms were to be proposed because of this Inquiry, consideration would eventually need to be given to whether those reforms complied with the Charter. Of course, as the Bill has already been tabled in parliament, a statement of compatibility with human rights has already been produced, such that some rights issues have already been considered. We will return to that statement shortly.

It is our view that this Committee should consider whether the proposed Bill is compatible with human rights. We say this for several reasons, including:

- We have undertaken research into how parliaments undertake rights assessments under the Charter over several years. Our research is based on textual analysis of parliamentary documents including statements of compatibility, and interviews with parliamentarians and parliamentary advisers (including those based in Victoria), as well as human rights experts.¹¹ We identify several themes, including, as we explained in our submission to the inquiry on workplace drug testing, the following:

We have found inconsistencies in approaches to how human rights are assessed, including whether and in what circumstances rights might be ‘engaged’ (i.e. potentially limited) by a proposed measure, and whether those limitations are justifiable. In rights assessments, claims are often made about the effects of AOD, or the harms they may cause, to justify the proposed limitation on rights. Importantly, these claims are often unsubstantiated, or based on assertions that the presence or consumption of *any* alcohol or other drugs, in *any* amount, is inherently unsafe, that is, regardless of its practical impact. There are also problematic patterns in how these assessments are made, with AOD often centred as the key driver of various social and cultural problems, reflecting (and reinforcing) the highly stigmatised nature of much drug use, while other potentially relevant factors (such as gender, for instance) are sidelined or ignored entirely.¹² The overarching finding from our research is that there is often a lack of consistency, rigour and detail in human rights assessments, including inadequate evidencing for claims that regulation is needed and/or that rights limitations are justifiable. This is not to say that AOD are not the proper object of government regulation but, rather, that assessments of these issues under Charter schemes may be inadequate, and/or lacking in transparency [...].

¹⁰ 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.

¹¹ See for example: Seear, K. (2024). Shifting solutions: Tracking transformations of drugs, health and the ‘human’ through human rights processes in Australia. *Health Sociology Review* 33(3): 257-272; Seear, K. and Mulcahy, S. (2024). Forging new habits: Critical drugs scholarship as an otherwise to rights. *International Journal of Human Rights*, 8-9: 1329-1352; Mulcahy, S. and Seear, K. (2023). Backstage performances of parliamentary scrutiny, or coming together in parliamentary committee rooms. *Documenta*, 41(2), pp 255-281.

¹² Seear, K. and Mulcahy, S. (2023). Making rights and realities: How Australian human rights make gender, alcohol and other drugs. *Australian Feminist Studies*, 37(113), pp 347-364; Seear, K. and Mulcahy, S. (2022). Enacting safety and omitting gender: Australian human rights scrutiny processes concerning alcohol and other drug laws. *Contemporary Drug Problems*, 49(3), pp. 258-277.

- Many laws were devised long before the Charter was implemented. Thus, some laws have not been subjected to a Charter assessment for their human rights compatibility. Even when they were, as we note above, these assessments may not have been as comprehensive or rigorous as they could have been. Importantly, and as our research has also found, the nature of such assessments is highly contingent on a range of factors which can change over time. These factors include: how different drugs are understood to work; how the effects of different drugs are understood; social and cultural changes including in public perceptions of drugs; and the development of new understandings and practices regarding drugs, including changes in regulatory approach.¹³ Some drugs that were considered to be inherently or invariably dangerous or even ‘evil’ in the past are now beginning to be viewed differently, decriminalised in some parts of the world (including Australia) and even legalised. The increasing use of various substances for therapeutic purposes, including the advent of legally available medicinal cannabis is one of the most prominent examples of these changes, although it is not the only one.¹⁴ These developments have implications for how rights assessments should be approached. Best practice would entail these new knowledges and practices being fed into rights assessments and/or laws being re-evaluated with these developments in mind. As the first author of this submission has shown in recent research, there is some evidence of this happening in Charter jurisdictions in Australia with regards to the regulation of cannabis and medicinal cannabis.¹⁵ This in turn can lead to new legal approaches, or can provide a stronger rights-based foundation for reforms, including reforms of the kind proposed here.
- Knowledge in relevant fields is rapidly evolving and must take account of the latest jurisprudence. In this respect we want to draw the Committee’s attention to one particularly important decision that we believe is highly relevant to the terms of reference: Findings from the Inquest into the death of Veronica Nelson, which was decided by the Coroners’ Court in 2023. As the Committee may be aware, this is a complex and wide-ranging coronial decision that explored the circumstances leading up to Veronica Nelson’s death in custody in January 2020. The key point we highlight for the purposes of this submission is that the Coroner found that AOD-related stigma ‘causally contributed to Veronica’s passing’ (page 235, para 676). The Coroner went on to say that Veronica’s treatment was ‘inhumane, cruel and degrading’, that ‘drug-related stigma’ had shaped the nature of care she received and contributed to her death, and that these were human rights violations. In particular, the Coroner concluded that stigmatising treatment violated section 10 of the Charter. This is a landmark decision, as the first author of this submission has explained elsewhere, with potentially wide-ranging ramifications.¹⁶ The findings position stigma as a legal problem which numerous agencies, departments and service providers are obliged to address in their work. By extension, we argue that this Committee and the Parliament needs to consider whether laws, policies and practices are stigmatising or potentially stigmatising, address stigma as a human rights issue under section 10, and take steps to ensure that such stigma is avoided. It is in this sense, as we flagged in the previous section, that concerns about AOD-related stigma and human rights dovetail and must be thought of as part of one larger problem.

This brings us to the question of how to scrutinise the current Bill in accordance with the Charter. We note that in her statement of compatibility with human rights accompanying the present Bill, the Bill’s proponent, Rachel Payne MLC, said the following:

Human rights protected by the Charter that are relevant to the Bill:

The Drugs, Poisons and Controlled Substances Amendment (Regulation of Personal Adult Use of Cannabis) Bill 2023 does not limit any human right, rather it engages and promotes the right to equality before the law set out in section 8 of the Charter and the right to liberty as set out in section 21 of the Charter.

¹³ For a broad introduction to these ideas, see: Seear, K. (2020). *Law, drugs and the making of addiction: Just habits*. Routledge: London.

¹⁴ Seear, K. (2024). Shifting solutions: Tracking transformations of drugs, health and the ‘human’ through human rights processes in Australia. *Health Sociology Review* 33(3): 257-272.

¹⁵ Seear, K. (2024). Shifting solutions: Tracking transformations of drugs, health and the ‘human’ through human rights processes in Australia. *Health Sociology Review* 33(3): 257-272.

¹⁶ Seear, K. (Forthcoming). Remembering Poccum: Stigma, suffering, torture and rupture after the death of Veronica Nelson. In: Flacks, S. and Seear, K. (eds.) *Judging Drugs: International case law in context*. Cambridge: Cambridge University Press; Seear, K. (2023). Lessons from the inquest into the death of Veronica Nelson. Presented at: Judging Drugs Workshop, Paris, France, 5 September.

Consideration of reasonable limitations – section 7(2):

As the Bill does not limit any human rights, it is not necessary to consider section 7(2) of the Charter.

Conclusion

I consider that the Bill is compatible with the Charter.

While we agree with aspects of this assessment, we argue that the current Bill also engages and promotes the right to be free from cruel, inhuman and degrading treatment as set out in section 10 of the Charter, and in the sense articulated by the Coroner in the inquest into the death of Veronica Nelson. We say this because we argue that the ongoing criminalisation of cannabis is cruel, inhuman and degrading, and thus that the current Bill would help ensure protection of that Charter right. It does not, however, guarantee that protection for all people, as we noted earlier, and further consideration needs to be given to the Bill's impact on children and people experiencing homelessness. There may be Charter grounds for extending the Bill's protections to these groups, or it may necessitate consideration of accompanying reforms including an expansion of diversionary options for younger people.

Finally, we would bring to the Committee's attention the first author's recent analysis of medicinal cannabis Bills and the ACT Personal use Act.¹⁷ As she explains in that analysis, the scrutiny processes throw up different rights interpretations, including ones that could be relevant for present purposes. This includes assessments of shifting community attitudes towards cannabis, views on the relationship between cannabis and health and wellbeing, and perspectives on children and the right to equality. We recommend that the Committee review that work and the ACT Act's statement of compatibility with human rights in particular, in its consideration of the present Bill.

Conclusion

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

Yours sincerely,



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¹⁷ Seear, K. (2024). Shifting solutions: Tracking transformations of drugs, health and the 'human' through human rights processes in Australia. *Health Sociology Review* 33(3): 257-272.