

**Submission
No 20**

INQUIRY INTO WORKPLACE DRUG TESTING IN VICTORIA

Organisation: Victorian Equal Opportunity & Human Rights Commission

Date Received: 12 December 2023

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The Hon Trung Luu MLC
C/- Legislative Council Legal and Social Issues Committee
Inquiry into Workplace Drug Testing in Victoria

By email: workplacedrugtesting@parliament.vic.gov.au

Dear Hon Trung Luu

The Victorian Equal Opportunity and Human Rights Commission (**Commission**) welcomes the Legislative Council Legal and Social Issues Committee's Inquiry into Workplace Drug Testing in Victoria (**Inquiry**). This Inquiry is important due to the stigma and discrimination associated with the use of prescription medication used to treat a disability.

As an independent statutory authority, the Commission has functions under the *Equal Opportunity Act 2010 (the EO Act)*, the *Racial and Religious Tolerance Act 2001*, the *Charter of Human Rights and Responsibilities Act 2006* and the *Change or Suppression (Conversion) Practices Prohibition Act 2021*. Under the EO Act, Victoria's anti-discrimination law, the Commission has broad powers and functions including resolving complaints, undertaking research, education, advocacy, monitoring, investigation, and intervention in legal proceedings.

The Commission supports law reform to better protect people using prescribed medication or receiving treatment for a disability from discrimination, in all areas of public life, including in their employment.

Discrimination and stigma experienced by people using prescription medication or receiving medical treatment to treat a disability

This submission focuses on Term of Reference (4) – whether current workplace drug testing laws and procedures are discriminatory in nature and could be addressed by the addition of a further protected attribute such as 'medication or medical treatment', in Victoria's anti-discrimination laws.

It is unclear how widespread the impacts of workplace drug testing may be, but it may affect many people using prescribed medication to treat a disability, as outlined below. Despite amendments made in 2016 to state and Federal laws authorising medical practitioners to legally prescribe medical cannabis¹, people using prescribed medicinal cannabis have reportedly experienced stigma and discrimination at work. The Commission understands that this arises from workplace policies and testing regimes that prohibit staff having a detectable

¹ Department of Health, [Medicinal cannabis information for health professionals](#), (webpage, 25 October 2022) In Victoria, any registered medical practitioner or nurse practitioner can prescribe medicinal cannabis for any patient with any condition, if they believe it is clinically appropriate and have obtained any required Commonwealth and/or state approvals.

level of a psychoactive element, THC² in their bodies, regardless of whether they have an impairing effect. The Commission has heard that numerous medicinal cannabis patients have reported being caught up by workplace illicit drug testing regimes and treated as if they have tested positive for illicit drugs despite medicinal cannabis being increasingly lawfully prescribed³ to treat a range of medical conditions.⁴ Some workers in these circumstances have reported experiencing sanctions impacting their employment when they are tested or disclose that they take prescribed medicines, for example medicinal cannabis.⁵

The Commission has received enquiries and complaints about discrimination in employment faced by people taking prescription medication. The types of prescription medication involved in complaints include opioids for pain management or as an ingredient in sleeping pills, amphetamines under supervision from a psychiatrist and medicinal cannabis. Examples of discrimination include: despite being medically cleared to perform work, employers relying on 'health and safety' concerns to dismiss an employee who takes prescription medication; stigma and discrimination around disclosing using prescription medication; being denied employment in a new role or dismissed based on medical testing revealing a person is taking medication to treat a medical condition, including in cases where it is alleged that there were no side effects and it was safe for a person to perform the role.

Case study from our enquiries service

An enquirer's doctor prescribed him medicinal cannabis without THC, due to him taking anti-depressants. He advised his employer about the medication and his employer stood him down, saying that he cannot return to work unless he changes the medication, and it is illegal for him to drive. He argued that he is not impaired, and a mouth swab would confirm that he is not under the influence. His employer, however, did not accept his medical advice that he can fulfill the genuine and reasonable requirements of his role and that the medication will not have an impact on his cognitive function.

As outlined below, the EO Act already provides some protection from discrimination through the attribute of disability. However, the Commission recommends reform to the EO Act to more clearly protect discrimination experienced by people taking prescribed medication or receiving medical treatment for a disability.

In our view, there are two options for EO Act reform which would improve the level of protection provided:

- Option 1: amending the definition of discrimination in section 7 to clarify that where a person uses prescription medication or requires medical treatment for a disability, this is a characteristic that a person with that disability generally has; or

² THC (delta-9 tetrahydrocannabinol) is the psychoactive element in some medicinal cannabis: Australian Government, Department of Health and Aged Care, Therapeutic Goods Administration, [Guidance for the use of medicinal cannabis in Australia: Overview](#) (Web page, accessed 8 November 2023); Adeshola Ore 'This is a medicine': the Australians prescribed cannabis but left fighting to keep their jobs, *The Guardian Australia* (Online, 26 August 2023).

³ RACGP, News GP, [Research shows medicinal cannabis 'boom' in Australia](#), (Webpage, 18 May 2022).

⁴ (n 1); MacPhail SL, Bedoya-Pérez MA, Cohen R, Kotsirilos V, McGregor IS and Cairns EA (2022). These conditions include multiple sclerosis, palliative care patients, epilepsy, sleep disorders, anxiety, PTSD, cancer symptoms and chronic pain.

⁵ Parliament of Victoria, Legislative Council, Legal & Social Affairs Committee, (David Ettershank, 30 August 2023), 2774.

- Option 2: adding a new attribute to section 6, such as prescription medication or medical treatment.

These options are discussed in further detail below, including potential pros and cons. While the Commission supports both options, we recommend option 1. Any reform to the EO Act must be accompanied by resourced education so the community is aware of any changes to their rights and duties.

Current protection under the EO Act

Under the EO Act, persons with disabilities are protected from unlawful discrimination.⁶ Employers also have a positive duty to eliminate as far as possible, discrimination, sexual harassment and victimisation from their workplaces.⁷ Some exceptions apply that are discussed below at page 6, for example, discrimination reasonably necessary to protect health and safety.

Disability is defined broadly, to mean:

- (a) *total or partial loss of a bodily function; or*
- (b) *the presence in the body of organisms that may cause disease; or*
- (c) *total or partial loss of a part of the body; or*
- (d) *malfunction of a part of the body, including—*
 - i. a mental or psychological disease or disorder*
 - ii. a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or*

- (e) *malformation or disfigurement of a part of the body—*

and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability.

The definition of discrimination in section 7(2) confirms that the EO Act protects people from discrimination because of a characteristic that a person with that disability generally has, however it is not expressly clear in terms of how it may apply to people receiving prescription medication or treatment for a disability.

Section 7(2) of the EO Act sets out that:

- (2) *Discrimination on the basis of an attribute includes discrimination on the basis—*
 - (a) *that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;*
 - (b) *of a characteristic that a person with that attribute generally has;*

⁶ *Equal Opportunity Act 2010* (Vic) s 4 ('EO Act').

⁷ *Ibid*, ss 14-15.

(c) of a characteristic that is generally imputed to a person with that attribute;

(d) that a person is presumed to have that attribute or to have had it at any time.(3) For the purposes of subsection (2), if a person with a disability is accompanied by or possesses an assistance aid, being accompanied by or the possession of that assistance aid is taken to be a characteristic that a person with that attribute generally has.

It is arguable that the protection from discrimination of people with a disability extends to people with medical conditions requiring prescription medication or medical treatment, as this may be a characteristic that a person with that attribute generally has. For example, where a person is using prescribed medicinal cannabis, it is likely that they would not be eligible for a prescription if they did not have a disability requiring that prescription. However, this person must show that using prescribed medicinal cannabis is a characteristic that a person with their disability generally has – as required by section 7(2)(b).⁸ Depending on the disability, this may be challenging for a person to demonstrate, and it may not be expressly clear to an employer that this type of protection exists for persons with disabilities.

In contrast, section 7(3) clearly distinguishes the use of an assistance aid so that someone alleging discrimination does not need to show that the use of an assistance aid is a characteristic generally pertaining to a person with their disability.

EO Act reform

Option 1: Amendment to definition of discrimination in s 7

One option for reform in this area, is to amend section 7 of the EO Act to confirm that if a person is taking prescribed medication or receiving treatment for a disability, this is taken to be a characteristic that a person with that disability generally has.

For example, it could be amended to include a new subsection, such as:

(5) For the purposes of subsection (2) if a person with a disability is taking prescribed medication or receiving medical treatment for a disability then adhering to the prescription or treatment is taken to be a characteristic that a person with that attribute generally has.

For the avoidance of doubt the explanatory memorandum could give examples including medical marijuana to support interpretation of the provision.

The advantage of this amendment is that it would clarify that a person who takes prescribed medication or receives treatment for a disability is protected from unlawful discrimination. It would mean that the existing EO Act protections and exceptions relating to disability would also apply and there would be no need for further amendments to the Act to provide protection from unlawful discrimination to people receiving medical treatment or taking prescribed medication. In the Commission's view, this option is the simplest and most efficient way to reform the EO Act to clarify protection for people receiving medical treatment or using prescription medication in connection with a disability. This reform could be accompanied by education to ensure employers and workers understand how the clarified protection applies.

⁸ To see more visit: [Victorian Discrimination Law Guide](#), 'Characteristics of an attribute' (Austlii Communities Web page, 2023).

Option 2: Adding a new attribute to s 6 of the EO Act

A further option for reform, which is suggested by the Committee, could be adding a new attribute to section 6 to expressly cover taking prescribed medication or receiving treatment for a disability.

In our view, whilst this option would also clarify that persons using prescription medication or receiving medical treatment are protected from discrimination, adding an attribute would lead to a more convoluted pathway to reform than the more straightforward path of option 1. We are not aware of any comparable jurisdiction with a similar attribute. Further, we consider that if this option were preferred, further amendments to provisions of the EO Act setting out reasonable adjustments may be required to ensure that reform does not remove protection currently provided by the EO Act to employees, contract workers, people in work related areas like partnerships, people in education, or receiving goods or services who use prescription medication or receive medical treatment. The EO Act currently imposes obligations to make 'reasonable adjustments' in work, education or goods or services for a person with a disability and if breached, this amounts to unlawful discrimination. Sections 20, 22A, 33, 40 and 45 impose a duty to make reasonable adjustments to protect people with a disability from discrimination, but not people with other attributes.

Consequently, if the EO Act is amended to insert a new attribute without express amendment to the reasonable adjustment provisions, this could mean that people taking prescribed medication or receiving treatment for a disability may no longer be protected by the reasonable adjustment provisions which apply to people with a disability. These reasonable adjustment provisions may therefore need to be amended to protect people using prescribed medication or receiving medication treatment in connection with a disability.

Further, if option 2 is adopted and a new attribute inserted into the EO Act, some of the EO Act discrimination exceptions may also require amendments. In our view, exceptions in the EO Act regarding employment, work related areas, education, provision of a service and protection of health, safety and property may need to be amended with explicit reference to the new attribute because these currently specify when duty holders like employers, firms, educational authorities or service providers can discriminate against a person based on their disability. These sections include: sections 23, 34, 41, 46 and 86. For example, section 86(1) and (2) of the EO Act sets out when a person may discriminate against another person based on disability, physical features or pregnancy to protect health, safety or property. A new attribute of prescribed medication or receiving medication treatment in connection with a disability may reasonably need to be added to this exception.

We also note that an unintended consequence of including a broad attribute with the wording of 'medication or medical treatment' as suggested by the Committee, may potentially mean that a person who uses medication recreationally or not in the context of a disability could argue that they are protected by the EO Act. In the Commission's view, the protection should be limited to circumstances where a person is prescribed medication or receives medication in connection with a disability.

Given the potential complexity of option 2 and considering the same result could be achieved through option 1, the Commission supports option 1 as the preferred reform option.

Exceptions for discrimination on the basis of prescription medication or medical treatment

The Commission considers that existing exceptions in the EO Act sufficiently balance requirements on employers to provide workplace health and safety and the rights of employees to be protected from discrimination.

An employer who is considering imposing a drug testing regime on employees should consider:

- the statutory authority exception – section 75(1) – whether the discrimination is necessary to comply with, or is authorised by, a provision of a Victorian Act or enactment⁹, e.g., the *Occupational Health and Safety Act 2004* (Vic) which imposes positive duties on employers to provide safe working environments.
- the health and safety exception due to the potential side effects of medication if these pose a risk to health, safety or property – section 86(1) – whether the discrimination on the basis of disability or physical features is reasonably necessary:
 - (a) to protect the health or safety of any person (including the person discriminated against) or of the public generally; or
 - (b) to protect the property or of any person (including the person discriminated against) or any public property.

The scope of these provisions has been considered in several Victorian cases. An employer seeking to impose a drug testing regime to promote a safe working environment must consider whether their actions are “appropriately designed and commensurate measure of protection from an identified risk”¹⁰ and “reasonably necessary”¹¹ to secure the health and safety of employees.

In the case of *Hall v Victorian Amateur Football Association*¹², the Victorian Civil and Administrative Tribunal set out factors that must be balanced against each other to determine whether action is reasonably necessary to protect health and safety.

We therefore do not consider that further amendments to exceptions are necessary unless option 2 is preferred.

It is essential that any reform is accompanied by appropriate funding to ensure the community and organisations are educated about the changes to the law.

⁹ EO Act s 75.

¹⁰ [Slattery v Manningham City Council \[2013\] VCAT 1869 \[136\]](#).

¹¹ [Hall v Victorian Amateur Football Association \[1999\] VCAT 627](#).

¹² [1999] VCAT 627: These factors include considering whose health and safety is to be protected by the action, the risks and consequences, current measures, whether there are any non-discriminatory alternative measures available, whether a regime of drug testing and consequences is reasonably necessary to protect health and safety and the basis for this belief (*Matthew Hall v Victorian Amateur Football Association*).

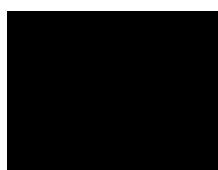
Recommendation

The Commission recommends that section 7 of the EO Act be amended to include a new subsection:

(5) For the purposes of subsection (2) if a person with a disability is taking prescribed medication or receiving medical treatment for a disability then adhering to the prescription or treatment is taken to be a characteristic that a person with that attribute generally has.



Yours sincerely



Ro Allen
Commissioner