

## **Inquiry into the use of Cannabis in Victoria**

Dr Louis Schetzer

**Organisation Name:** Australian Lawyers Alliance

**Your position or role:** Manager, Policy and Advocacy

### **SURVEY QUESTIONS**

**Drag the statements below to reorder them. In order of priority, please rank the themes you believe are most important for this Inquiry into the use of Cannabis in Victoria to consider::**

Accessing and using cannabis, Public health, Criminal activity, Public safety, Mental health, Young people and children, Education, Social impacts

**What best describes your interest in our Inquiry? (select all that apply) :**

Academic and research, Advocacy body, Working in law enforcement

**Are there any additional themes we should consider?**

**Select all that apply. Do you think there should be restrictions on the use of cannabis? :**

Personal use of cannabis should be decriminalised.

(Decriminalised: there are no criminal or civil penalties instead a person is referred to a drug diversion program or other health/ treatment service)

### **YOUR SUBMISSION**

**Submission:**

Please find the submission from the Australian Lawyers Alliance Victorian branch attached.

**Do you have any additional comments or suggestions?:**

### **FILE ATTACHMENTS**

**File1:**

**File2:**

**File3:**

**Signature:**

Louis Schetzer

# Inquiry into the Use of Cannabis in Victoria

Submission to the Victorian Legislative Council Legal and  
Social Issues Committee

5 August 2020



# Contents

- Who we are ..... 4
- Introduction..... 5
- The problems of criminalisation..... 5
- Access to medicinal cannabis ..... 7
- The international perspective ..... 8
- Human rights implications..... 10
- International models of harm minimisation ..... 10
  - Norway ..... 11
  - Portugal ..... 12
  - United States ..... 13
  - Other European countries ..... 15
  - Central and South America..... 15
- Approaches in other Australian states/territories ..... 16
  - Australian Capital Territory ..... 16
  - New South Wales ..... 16
  - South Australia ..... 16
  - Northern Territory ..... 17
  - Western Australia..... 18
- Alternative approaches ..... 18
  - Depenalisation..... 18
  - Decriminalisation..... 19
  - Legalisation..... 19
  - Regulation..... 19
- Conclusion ..... 20

## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> <[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)>.

## Introduction

1. The ALA welcomes the opportunity to have input into the Victorian Legislative Council Legal and Social Issues Committee ('the Committee') Inquiry into the Use of Cannabis in Victoria.
2. The ALA submits that current Australian cannabis policy is clearly ineffective, serving to criminalise drug users rather than facilitate their treatment, and denying chronically ill Australians legal and affordable access to a drug that is proven to have countless health benefits.
3. This submission will address the following issues:
  - The problems associated with criminalisation of cannabis possession and use;
  - Access to medicinal cannabis;
  - International perspectives on harm minimisation;
  - Human rights implications for criminalisation of illicit substance possession and use;
  - International models of harm minimisation;
  - Harm minimisation approaches in Australian states/territories; and
  - Alternative approaches to criminalisation.

## The problems of criminalisation

4. The ALA submits that the emphasis on a punitive criminalised approach to drugs in Australia has inhibited advances in research into the therapeutic and health benefits of cannabis use. The ALA considers that a change in this attitude could have huge health advantages and assist the many people who would benefit immediately from access to legal, less expensive and more readily available cannabis that is subject to quality control.
5. The ALA strongly submits that the possession and use of cannabis should be decriminalised at the very least, and preferably legalised. It is evident that decriminalising or legalising drugs does not increase use but instead allows harm minimisation policies to be put in place that produce better outcomes for users.

6. The criminal justice system carries the major burden of drug policy in Australia. Funding for health and social services is diverted into law enforcement, prosecution and incarceration. As a result, significantly more public resources are expended on criminal law enforcement as opposed to health or treatment.<sup>2</sup>
7. Ironically, the prohibition of the use of cannabis is ignored by many in Australia with research showing that in 2016, 35 per cent (or approximately 6.9 million people) had used cannabis in their lifetime and 10.4 per cent (or 2.1 million) had used cannabis in the previous 12 months.<sup>3</sup>
8. The ALA strongly submits that the use of drugs and drug dependence must be treated as a health, public health and/or social issue, rather than primarily a criminal issue.<sup>4</sup> The ALA considers that the criminalisation of some drugs that are deleterious to one's health, but not others, is inconsistent and illogical. The ALA advocates for a shift in focus from law enforcement to the broader health and social issues associated with the harmful use of drugs.<sup>5</sup>
9. The criminalisation of drug use also has a disproportionate adverse effect on those who are socially and economically disadvantaged. According to the former Director of Public Prosecution for NSW, Nicholas Cowdery AO QC, problematic drug use is more likely to arise with people who are disadvantaged or who have issues with education, employment, health, housing, social pressures, poverty, impulsiveness, addiction and mental illness.<sup>6</sup> Health and social problems for drug users often remain unaddressed and can result in death or disease from unregulated use.<sup>7</sup> Prosecuting such people in criminal proceedings is likely to exacerbate these issues.<sup>8</sup>

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<sup>2</sup> Ben Mostyn, Helen Gibbon and Nicholas Cowdrey, *Contemporary Comments – The Criminalisation of Drugs and the Search for Alternative Approaches* (24:2, Report, 2012) 265.

<sup>3</sup> Australian Institute of Health and Welfare, *Alcohol, tobacco and other drugs in Australia*, <<https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/drug-types/cannabis>>, viewed 5 March 2020.

<sup>4</sup> Special Commission of Inquiry into the Drug 'Ice' (2019), *Decriminalisation Roundtable, Brief to Participants*, 9.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, 261.

<sup>8</sup> Mostyn et al, n 2 above, 264–265.

10. The criminalisation of substance use also increases the level of stigma associated with drugs and further marginalises and excludes people who use illegal drugs.<sup>9</sup> The law has immense influence on social beliefs. It therefore should promote a fair and unbiased legal system so that drug users do not become marginalised. Prohibiting certain drugs is inherently stigmatising because it conveys a message that certain drugs are bad and therefore so too are the people who use them. In addition, specific drug-related law enforcement practices may disproportionately target certain groups.<sup>10</sup> Stigma, due to the criminalisation of drug use, has been identified as a barrier to the person engaging in problematic drug use or their family seeking help or accessing services, as someone is less likely to seek assistance if what they are doing is illegal.<sup>11</sup>

## Access to medicinal cannabis

11. Over the last few years, medicinal cannabis has finally been made accessible to patients in Australia through a highly regulated scheme. While this is a step in the right direction, the number of people who have been able to access medicinal cannabis is low compared to many other countries. The current regulatory model makes it difficult for many people to access the system and a new and fit-for-purpose framework is needed.

12. As a result of the challenges in the scheme, patients often must resort to self-medication using illicitly obtained cannabis. Families are desperate to provide the best possible medical treatment and pain relief for their loved ones. The cost, the regulatory burdens and the outdated approaches of some medical practitioners means that these families are often forced to source illegal, black market cannabis, which puts them at risk of serious criminal charges.

13. Black market cannabis is considerably more inexpensive than lawfully manufactured medicinal cannabis, which continues to deter patients from accessing medicinal cannabis lawfully. This will continue if the issue of cost is not addressed.

14. In 2020, the Senate Community Affairs References Committee reported that it had received evidence of inequitable access to medicinal cannabis across jurisdictions, with patients in rural

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<sup>9</sup> James D Livingston, Teresa Milne, Mei Lan Fang, Erica Amari, 'The effectiveness of interventions for reducing stigma related to substance use disorders: a systematic review' (2011) 107 *Addiction* 39, 40 discussed in Decriminalisation Roundtable, Brief to Participants, n 4 above.

<sup>10</sup> Special Commission of Inquiry into the Drug 'Ice', n 4 above, 598.

<sup>11</sup> SBS News, 'Australian teen swallowed pills, "to avoid detection", inquest hears' (2019).

and remote communities finding it difficult to access medicinal cannabis if their local health professional is unwilling to consider prescribing medicinal cannabis or does not have sufficient knowledge of it. In situations described as ‘postcode lottery’, the Committee received reports of patients unable to meet the costs of travelling into cities to access health services, or having to relocate to other regions in order to access medicinal cannabis.<sup>12</sup>

15. To help address this issue the ALA recommends that medicinal cannabis prescribing rights be extended to nurse practitioners, particularly in rural and remote communities.
16. The Committee also received reports from patients who chose not to access medicinal cannabis legally due to the significant cost and the complexity of the legal access system. These patients preferred to self-medicate with illicit cannabis. The Committee heard that the estimated number of people in Australia self-medicating with cannabis is around 100,000.<sup>13</sup> This was in spite of the fact that the people who are choosing to access illicit cannabis for self-medication could be subject to criminal charges for possession or cultivation of a controlled substance.
17. The current barriers to patient access to medicinal cannabis in Australia have had a detrimental impact on the mental and physical wellbeing of patients and their families who are struggling to access medicinal cannabis.

## The international perspective

18. In 2012, the United Nations estimated that there were 250 million illicit drug users worldwide.<sup>14</sup> Globally, there is increasing recognition of the need to keep non-violent drug users out of the criminal justice system.<sup>15</sup>

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<sup>12</sup> The Senate Community Affairs References Committee (2020), *Current barriers to patient access to medicinal cannabis in Australia*, March 2020, 44–45.

<sup>13</sup> *Ibid*, 84.

<sup>14</sup> Beckley Foundation, *Public Letter in The Times and Guardian calling for a new approach to Drug Policy* (19 November 2011) discussed in Ben Mostyn, Helen Gibbon and Nicholas Cowdrey, *Contemporary Comments – The Criminalisation of Drugs and the Search for Alternative Approaches* (24:2, Report, 2012).

<sup>15</sup> Mostyn et al, n 2 above, 267.

19. In 2010, the Special Rapporteur on the Right to Health released a report to the UN Human Rights Council calling for a move away from drug criminalisation because of the health and human rights consequences:<sup>16</sup>

‘A human rights-based approach to drug control must be adopted as a matter of priority to prevent the continuing violations of rights stemming from the current approaches to curtailing supply and demand, and to move towards the creation of a human system that meets its own health-related objectives.’<sup>17</sup>

17. In 2011, the Global Commission on Drug Policy published a report calling for an end to the criminalisation of the drug trade, calling it ineffective.<sup>18</sup> The report stated:

‘The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and 40 years after President Nixon launched the US government’s war on drugs, fundamental reforms in national and global drug control policies are urgently needed ... Vast expenditures on criminalisation and repressive measures directed at producers, traffickers and consumers of illegal drugs have clearly failed to effectively curtail supply or consumption.’<sup>19</sup>

18. The report called for the end of ‘criminalisation, marginalisation and stigmatisation of people who use drugs but who do no harm to others.’ It called on governments to experiment with models of legal regulation of drugs to undermine the power of organised crime and safeguard the health and security of their citizens.<sup>20</sup>

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<sup>16</sup> Ibid, 266.

<sup>17</sup> UN GA, 65<sup>th</sup> sess, Agenda Item 69(b), UN Doc A/65/255, Grover A, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (6 August 2010) discussed in Mostyn et al, n 2 above.

<sup>18</sup> Mostyn et al, n 2 above, 266.

<sup>19</sup> Global Commission on Drug Policy, ‘War on Drugs: Report of the Global Commission on Drug Policy’ (2011) 2 discussed in Mostyn et al, n 2 above.

<sup>20</sup> Ibid, 262.

## Human rights implications

19. As acknowledged in the United Nations Development Programme's International Guidelines on Human Rights and Drug Policy,<sup>21</sup> all aspects of the policy response to managing the use of drugs have human rights implications.
20. In particular, any discussion of medicinal cannabis should be underpinned by the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>22</sup> which states that everyone has the right to the highest attainable standard of physical and mental health, and to the Australian Charter of Healthcare Rights,<sup>23</sup> which provides that all Australian patients have the right to receive safe and high-quality care in an effective continuum. When people are suffering, governments have an obligation under the International Guidelines to amend 'laws, policies, and practices that inhibit access to controlled substances for medical purposes.'<sup>24</sup>
21. The ALA submits that the Victorian Government should adopt a human rights framework to make decisions about drug policy. Such a response would be consistent with the fostering of a human rights culture in Victoria as envisaged by the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

## International models of harm minimisation

22. It is estimated that around 25–30 countries have implemented some form of decriminalisation in the last decade or so.<sup>25</sup> While the form of decriminalisation varies widely between countries,

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<sup>21</sup> United Nations Development Programme, *International Guidelines on Human Rights and Drug Policy* (2019) <<https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/international-guidelines-on-human-rights-and-drug-policy.html>>.

<sup>22</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>23</sup> Australian Commission on Safety and Quality in Health Care, *Australian Charter of Healthcare Rights* (2nd ed, August 2019) <<https://www.safetyandquality.gov.au/australian-charter-healthcare-rights>>.

<sup>24</sup> United Nations Development Programme, n 19 above.

<sup>25</sup> Rosmarin A and Eastwood N, 'A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe' (Publication Release, 2012) discussed in Mostyn et al, n 2 above; Stoicescu C, *The Global State of Harm Reduction: Towards an Integrated Response* (Harm Reduction International, 2012) Mostyn et al, n 2 above.

each incident represents recognition by governments that criminalisation is causing significant problems and that alternative approaches are preferable.<sup>26</sup>

## Norway

19. In December 2019, a proposal for a new drug policy was tabled by the Drug Reform Committee ('DRC'). The report, *From punishment to help*, proposed a human rights approach towards the use and possession of illicit substances in the state. The report strongly advocated for harm minimisation.<sup>27</sup> The Committee noted that that 'punishment is counterproductive' and that 'from a perspective of the law it is problematic to agitate for prosecution when the premises on which it is based have been refuted.'<sup>28</sup>

23. The DRC recommended that Norway decriminalise the use and possession of drugs, as criminalisation is an obstacle to providing good health care to vulnerable groups in the community. It emphasised that the intention of the drugs policy should be 'to promote health and welfare':

'These international recommendations indicate that changing the orientation of national drug policy from punishment to health, through decriminalisation of use and possession and the introduction of health-orientated measures in response to drug use, will make Norway better respect the citizens' right to health.'<sup>29</sup>

24. The DRC adopted a strong human rights framework in its report, stating that:

'The human rights perspective is key to most recommendations. One of the main objectives is to prevent human rights violations arising from drug control policy, such as arbitrary imprisonment and disproportionate penalties for drug crimes.'<sup>30</sup>

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<sup>26</sup> Mostyn et al, n 2 above, 267.

<sup>27</sup> NOU 2019, Norges offentlige utredninger 2019:26, *Resreform – fra strff til hjelp (Drug law reform – from punishment to help)*, Oslo 2019.

<sup>28</sup> Ibid, 26.

<sup>29</sup> Ibid, 180.

<sup>30</sup> Ibid, 18.

25. The report also notes that decriminalisation is a measure that fulfils Norway's international obligations under the Convention on the Rights of the Child (CROC).<sup>31</sup>

## Portugal

20. In 2001, Portugal became the first country in the world to decriminalise low-level drug use. Possession and drug use continue to be prohibited, but violations of those prohibitions are deemed to be exclusively administrative violations. The Portuguese model of decriminalisation was one part of Portugal's National Strategy for the Fight Against Drugs. Portugal also extended its health care services network and needle and syringe exchange program, increased scientific drug research and specialist training, and significantly increased the budget allocated to drug-related harms.<sup>32</sup>

21. The Global Commission has noted the positive health outcomes that have taken place in Portugal since decriminalisation. These include a decline in illicit substance use in Portugal over the last decade, a decreasing trend in the total number of notifications of HIV infection and AIDS cases since the early 2000s, and that the drug-induced mortality rate among adults (ages 15–64) is lower than the most recent European average.<sup>33</sup> Since 2001, in addition to trends consistent with regional trends, there has been a reduction in problematic drug users and a reduction in the burden of drug offenders on Portugal's criminal justice system.<sup>34</sup>

26. In 2015, the president of the International Narcotics Control Board described Portugal's policy as 'a model of best practices in light of these achievements'.<sup>35</sup>

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<sup>31</sup> Ibid, 181.

<sup>32</sup> Greenwald (Cato Institute, 2009) *Drug Decriminalization in Portugal: Lessons for creating fair and successful drug policies*, 1; Gonçalves, Lourenço & Nogueira da Silva, 'A social cost perspective in the wake of the Portuguese strategy for a fight against drugs' (2015) 26 *International Journal of Drug Policy*, 201.

<sup>33</sup> Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalization* (2016) 1, 19; European Monitoring Centre for Drugs and Drug Addiction, *Portugal Country Drug Report 2017*, 5–9.

<sup>34</sup> Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalization* (2016) 1, 20.

<sup>35</sup> Ibid.

## United States

27. The landscape in the US with respect to decriminalisation of marijuana for medical and recreational use has been truly unique, with many states moving to decriminalise the drug despite federal condemnation.
28. In the 1970s, the so-called 'War on Drugs' emerged as a government-led initiative aiming to stop illegal drug use by drastically increasing prison sentences for the users, sellers and producers of illegal drugs. The message thoroughly drilled into the public mind at the time was that drug addicts were serious criminals and posed a threat to the nation's peace and security.<sup>36</sup> However, over the past few decades, states have responded to the growing social and political response against the continued criminalisation of marijuana by contravening federal prohibition and legalising marijuana for medical use. The movement began in 1996 when California passed 'Proposition 215' and became the first state in the US to legally allow medical practitioners access to marijuana for pain treatment.<sup>37</sup> Since then nearly 28 states have followed suit, decriminalising marijuana for both medical and health-related purposes. The explosion of marijuana law reform has witnessed a domino effect of states authorising, regulating and taxing marijuana, although the federal government continues to firmly prohibit it for any purpose. At the beginning of 2020, 11 US states had fully legalised marijuana and another several had committed to consider legalising it throughout the year. The involvement of more traditionally conservative states, such as Arkansas, Texas, Nevada and Alabama, has been particularly noteworthy. Other states including Arizona, Florida, New Jersey, New Mexico and New York are also likely to legalise marijuana for adult use only.
29. The divide between federal and state law places the legal status of marijuana in the US into a contested existence.<sup>38</sup> Essentially, federal law allows states to draft their own marijuana regulations even when they contravene federal prohibition. While explicitly prohibiting marijuana at every angle, the *Controlled Substances Act 2001* (US) also disclaims any federal

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<sup>36</sup> Doris Marie Provine, 'Race and Inequality in the War on Drugs' (2011) 7 *Annual Review Law and Social Sciences*, 43.

<sup>37</sup> Zachary Ford, 'Reefer Madness: The Constitutional Consequence of the Federal Government's Inconsistent Marijuana Policy' (2019) 6(671) *Texas A&M Law Review*, 677.

<sup>38</sup> Syuzanna Martirosyan, 'The Decriminalization of Recreational Cannabis in California: Commercial Cultivation Could Cost Growers an Arm, a Leg and Their Freedom' (2017) 27(187) *San Joaquin Agricultural Law Review*.

intention to openly intervene with or block inconsistent state law.<sup>39</sup> Although the federal government is unable to require states to recriminalise marijuana or enforce federal law when it is not written into state legislation, the federal position will be prioritised by the courts in the instance of conflict.<sup>40</sup> Despite this clear position, the statute does not prevent states from liberalising their marijuana regulations. Therefore, the federal government is unable to order states to recriminalise marijuana, yet states are unable to escape the boundaries of federal prohibition.<sup>41</sup>

30. State government involvement in the marijuana industry has largely been shaped by the 2013 US Department of Justice Cole memorandum, which establishes that the only conditions in which the federal government would intervene on states' marijuana laws is if they failed to prevent criminal activity in the market, sales to young persons and the diversion of the drug to other states.<sup>42</sup> This has encouraged states to maintain strong political involvement in their marijuana industries in order to avoid federal regulations and to establish a minimum purchasing age.

31. In addition, state regulators have also invested in marijuana education programs focused on reducing the risk for youths and educating adults on responsible use and state marijuana laws.<sup>43</sup>

32. There is limited systematic evaluation of the impacts of decriminalising marijuana available uniformly across US states.<sup>44</sup> While making finite conclusions have been cautioned, early evidence has suggested that the legalisation of marijuana has been either positive or neutral.<sup>45</sup> A Drug Policy Alliance report in 2018 confirmed that marijuana arrests for possession, cultivation and distribution were down in all states that had legalised as well as Washington D.C. The report cited the total number of court filings in Washington had fallen by a phenomenal 98 per cent

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<sup>39</sup> Sam Kamin, 'Legal Cannabis in the U.S: Not Whether But How?' (2016) 50(617) *U.C Davis Law Reform*, 621 at 627.

<sup>40</sup> *Ibid*, 624.

<sup>41</sup> *Ibid*, 628.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

<sup>44</sup> *From Prohibition to Progress: A Status Report on Marijuana Legalisation* (January 2018) 4 <[drugpolicy.org/legalization-status-report](http://drugpolicy.org/legalization-status-report)>.

<sup>45</sup> *Ibid*.

between 2011 and 2015.<sup>46</sup> Since Colorado legalised marijuana in 2012, the number of marijuana-related court filings declined by 81 per cent between 2012 and 2015.<sup>47</sup> The number of marijuana arrests in Oregon dropped by 96 per cent from 2013 to 2016 after the state decriminalised marijuana in 2014, similar to Alaska, which experienced a 93 per cent drop in arrests from 2013 to 2015.<sup>48</sup>

33. In Washington and Colorado, where marijuana has been decriminalised, crime clearance rates increased for both violent crimes and property crimes, confirming that as a result of decriminalisation police and law enforcement have more time and resources to solve other crimes.

### **Other European countries**

34. Several European countries have adopted harm minimisation drug strategies, including Switzerland (which explicitly supports harm reduction and has introduced medically supervised injecting centres), Armenia, Estonia, Kyrgyzstan, Poland, Croatia and the Czech Republic (all having implemented decriminalisation policies).<sup>49</sup>

### **Central and South America**

35. Across Central and South America there has been increased consideration of alternative strategies to address drug-related violence, with the governments of Colombia, Mexico and Belize demanding a broader debate on the issue of relaxing punitive drug laws.<sup>50</sup> In 2013 the Uruguayan Government legalised the possession and use of marijuana.<sup>51</sup>

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<sup>46</sup> *Safe Streets Alliance v Hickenlooper* (2017) 859 (F.3d, 2017) 865, 5.

<sup>47</sup> *From Prohibition to Progress: A Status Report on Marijuana Legalisation* (n 48) 5.

<sup>48</sup> *Ibid.*

<sup>49</sup> Mostyn et al, n 2 above, 267.

<sup>50</sup> Cave D, 'South America Sees Drug Path to Legalisation' (*The New York Times*, 29 July 2012) discussed in Mostyn et al, n 2 above.

<sup>51</sup> Mostyn et al, n 2 above, 267.

## Approaches in other Australian states/territories

### Australian Capital Territory

36. Last year the Australian Capital Territory (ACT) became the first jurisdiction in Australia to legalise the possession, use and cultivation of small amounts of cannabis. Under the *Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019*, which came into effect on 31 January 2020, adults will be able to grow a maximum of two cannabis plants and possess up to 50 grams of cannabis per person. However, the sale or supply of cannabis is still a criminal offence.

### New South Wales

37. Current approaches to the enforcement of illicit cannabis possession and use currently employed in NSW are the Cannabis Cautioning Scheme and the Criminal Infringement Notice provisions. The Cannabis Cautioning Scheme is a de facto model, meaning it has no legislative basis but is governed by the Cannabis Cautioning Scheme Guidelines issued by NSW Police. In this practice, a police officer has discretion to issue a caution for possession of up to 15 grams of cannabis, rather than charge and prosecute the person. The Criminal Infringement Notice provisions is a de jure model and is regulated by the *Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019*.

### South Australia

38. A Cannabis Expiation Notice ('CEN') Scheme was first introduced in South Australia in 1987. This was the first *de jure* model of depenalisation related to cannabis offences introduced in Australia. Under the 1987 scheme, an adult alleged to have committed a 'simple cannabis offence' (including possession or consumption within a prescribed amount not in a public or a restricted place, under the *Controlled Substances Act 1984 (SA)*), would be issued an expiation notice before prosecution was commenced. If the prescribed expiation fee was paid, the alleged offender was not liable to prosecution for that offence.

39. According to a report prepared for the Irish Department of Justice and Equality and the Department of Health, the South Australian CEN scheme had two perverse effects in its early years:

- Net-widening, as evidenced by a 2.5-fold increase in expiable cannabis offences: from 6,231 in 1987 to over 17,170 in 1996. This was attributed to the ease with which a CEN could be issued (in contrast with arrest and charge procedures); and
- Low rates of compliance in paying expiation notices (i.e. 45 per cent). This was attributed to a lack of knowledge of the law and the financial difficulties experienced by a substantial proportion of those detected for minor cannabis offences, which led to more cannabis users being incarcerated for non-payment of fines.<sup>52</sup>

40. In 1996, new payment options were introduced (including payment by instalments and substitution of community services for fines) and there was an effort to educate the public about the reforms. These measures led to a reduction in net-widening and increased payment. This scheme was regarded as more cost-effective than prosecuting simple cannabis offences and to be associated with significant social benefits, including reduced loss of employment and less relationship disruption. The Irish Review Report notes that there is some disagreement about the impacts of the CEN scheme on drug use, but ultimately reports that an analysis of prevalence of use in other states has shown stable trends or reductions, supporting the evidence that removal of criminal sanctions does not lead to an increase in use.<sup>53</sup>

## Northern Territory

41. Under the Northern Territory's Cannabis Expiation Scheme, police may issue an infringement notice requiring payment of a prescribed expiation fee for an 'infringement notice offence', which includes possession of up to 50 grams of cannabis. A person may avoid any further action in relation to the offence by paying the prescribed expiation fee. Self-administration remains a criminal offence.

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<sup>52</sup> Dr Caitlin Hughes, Professor Alex Stevens, Shahn Hulme and Dr Rebecca Cassidy (2018), *Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences*, UNSW Australia and the University of Kent, September 2018, 47.

<sup>53</sup> Ibid.

## Western Australia

42. The Western Australian Cannabis Infringement Notice Scheme involves notices requiring payments of a civil penalty to be issued for offences involving up to 30 grams of cannabis (except resin, derivatives and plants).

## Alternative approaches

### Depenalisation

43. Depenalisation retains as criminal offences the use or possession of prohibited substances and introduces as an alternative to criminal prosecution a range of civil and administrative measures to deal with the offence.<sup>54</sup> These measures may include civil penalties (fines); cautions; educational responses (such as the requirement to attend an education session); and health responses, such as referrals to counselling or treatment.<sup>55</sup>
44. Depenalisation models can be *de jure* (involving a rightful entitlement or claim) or *de facto* (relevant to the specific facts of the case, but with no legal rights attached). Examples of depenalisation currently employed in NSW are the Cannabis Cautioning Scheme and the Criminal Infringement Notice provisions. The Cannabis Cautioning Scheme is a *de facto* model, as it has no legislative basis but is governed by the Cannabis Cautioning Scheme Guidelines issued by NSW Police. The Criminal Infringement Notice provisions is a *de jure* model and is regulated by the *Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019*. Depenalisation models may also rely on eligibility criteria to determine who, or in what circumstances, a person will be charged with a criminal offence or receive a civil or administrative response.<sup>56</sup>

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<sup>54</sup> Special Commission of Inquiry into the Drug 'Ice', n 4 above, 6 [1.1.2].

<sup>55</sup> Ibid, 7 [1.1.2].

<sup>56</sup> Ibid, 18 [3.1.2].

## Decriminalisation

45. Decriminalisation removes the use or possession of a prohibited substance from criminal offences and implements a range of civil and administrative measures to deal with the conduct.<sup>57</sup> The use or possession of a prohibited substance would be a civil or administrative offence, or a regulatory offence. As a result, a person cannot be charged, convicted or sentenced for the conduct. Rather, there is a state response designed to deter the conduct from occurring again (for example, similar to a traffic violation, where a fine may be issued to deter the conduct). Engagement in the conduct will not be recorded on a person's criminal history. The similarities between these two offences is that neither have the necessary component to deem it 'a crime'. Unlike the flexibility of depenalisation models, all decriminalisation models are *de jure* as they require the removal of the criminal offence from legislation. There may be a basis of eligibility criteria in a decriminalisation model that exempts only certain people from criminal liability (for example, where a statute may exempt from criminal liability a person possessing and administering a small quantity of a prescribed substance in a licensed supervised injection centre).
46. The ALA supports decriminalisation as an important measure to change the focus from law enforcement to the broader health and social issues associated with the harmful use of drugs.

## Legalisation

47. Legalisation removes the criminal offence for use or possession of substances and does not replace it. Under such a model the use or possession of substances are not prohibited in any manner and executive bodies are not allowed to convict or prosecute individuals who engage in these conducts.<sup>58</sup>

## Regulation

48. Regulation of the use and possession of substances involves a regulatory model of prescription, pharmacy or licensed sales. A regulatory model may co-exist with other models, such as

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<sup>57</sup> Ibid, 7 [1.1.2].

<sup>58</sup> Ibid.

legislation, or with prohibition, decriminalisation or depenalisation, in which exemptions for use and possession apply for persons who are lawfully prescribed the substance.<sup>59</sup>

49. A model for a regulated market in cannabis and ecstasy in Victoria was proposed by Emeritus Professor David Penington AC when he chaired the Victorian Premier's Drug Advisory Council in 1999. Under the Penington proposal, cannabis and ecstasy would be distributed through a government-approved supplier, such as a pharmacy, in regulated quality and quantities and subject to conditions. Such a regulated approach would operate in conjunction with other public health initiatives. Products would contain health warnings and pharmacists would discuss the health consequences of drug use with the consumer.<sup>60</sup>

## Conclusion

50. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the Committee's Inquiry into the Use of Cannabis in Victoria.

51. The ALA submits that the social problems that arise from illicit drug consumption, including financial hardship and the development of mental illness such as depression, are not adequately addressed through a criminalisation framework. The ALA submits that harm minimisation is best served through a system of decriminalisation and regulation of cannabis.

52. The ALA is available to provide oral testimony in relation to any of the matters raised by this submission or matters of interest to the Committee.

**Jeremy King**

**Victorian President**

**Australian Lawyers Alliance**

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<sup>59</sup> Ibid.

<sup>60</sup> Mostyn et al, n 2 above, 268.