

# TRANSCRIPT

## LAW REFORM, ROAD AND COMMUNITY SAFETY COMMITTEE

### Inquiry into drug law reform

Melbourne — 28 June 2017

#### Members

Mr Geoff Howard — Chair

Mr Bill Tilley — Deputy Chair

Mr Martin Dixon

Mr Khalil Eideh

Ms Fiona Patten

Ms Natalie Suleyman

Mr Murray Thompson

#### Witness

Ms Meghan Fitzgerald, Social Action, Policy and Reform Manager, Fitzroy Legal Service.

**Necessary corrections to be notified to  
executive officer of committee**

**The CHAIR** — We are next going to hear from a representative from the Fitzroy Legal Service.

**Ms FITZGERALD** — Thank you for the opportunity.

**The CHAIR** — Meghan Fitzgerald, thank you for coming along today. As I mentioned before, we have had a number of written submissions — 220 — come to this inquiry, and we thank Fitzroy Legal Service for providing your submission. You are aware that Hansard is recording our discussion today so that we will have a written transcript of the discussion after you have had a chance to approve it. When it comes back to you, it will be part of the public record and form part of the inquiry material that will determine our recommendations. I think that is all I need to say. In regard to your contribution this morning, we are hoping you will outline some of the key focuses of your submission, and then we will obviously want to enter into some discussion with you on that. Over to you. Thanks, Meghan.

**Ms FITZGERALD** — Thank you. My understanding is that the committee is particularly interested to hear more about diversion mechanisms out of the criminal justice system in Victoria, so I have focused some supplementary research on that. A move away from criminal justice processes can happen at any stage in a proceeding, but there are quite serious issues at both ends of the spectrum in terms of resourcing, so any diversion requires resourcing and services. Our impression and experience is that it is on the more serious end of offending that there is a more sophisticated approach, and so the subject that I was going to address specifically this morning was pre-charge diversion and also diversion mechanisms prior to the entry of a plea in the Magistrates Court.

Significant issues, as raised in our submission, are the generally one-off availability of a diversion outcome, the absence of a structured referral program for tailored treatment in relation to those diversions, the discretionary nature of the recommendation for a diversion and the costs that might be associated with a matter progressing through the courts as opposed to having quite a structured process prior to a charge being laid, a brief being generated and a matter going to court.

Why is diversion so important? In Victoria under current police policy any finding of guilt, including a no-conviction record, will be released for 10 years if you are sentenced as an adult and five years if you are sentenced as a child. If you have a new prior, all of your priors will be released. One of the issues is that if somebody has a finding of guilt for an illicit drug offence, that is highly stigmatising, even though it might be quite a poor indicator of future risk for an employer, and it is also a quite inaccurate indicator of who does and does not use drugs.

One of the issues with that is that any rehabilitation really requires positive reintegration into the community for employment and voluntary opportunities, and those are fairly reduced if you have priors for drug offending.

In relation to court diversions, I will provide a little bit of detail because it has changed so much over the last 10 years but also quite a lot in the last two years. The changes are unfortunate for people who were not able to access diversion outcomes because for those people they sit with the prior, but it is still a very important harm reduction measure that should be subject to continued reform.

One of the issues just generally is that acceptance for responsibility of offending is a central component of a diversion scheme, and that can raise issues. In the Magistrates Court it is now legislated that that acceptance of responsibility does not remove your privilege against self-incrimination, but I think for legal educators and for accused persons it is very unclear what saying, ‘Yes, I did it’ means, and a lot of legal education recommends that you make no comment; you do not put yourself in it. But at the same time that works strongly against a diversion recommendation from a police informant at that early stage. That is confusing for lawyers, so I imagine it is extremely confusing for people.

**Ms PATTEN** — Because they feel like they have had to plead guilty to get a diversion.

**Ms FITZGERALD** — I guess for the drug diversion, which is a discretionary option that police informants have, acceptance of responsibility is something that needs to happen in situ. There are a lot of reasons why that might not happen, which are not that people are not sorry or do not regret that they have done it. It might just be their sense of, ‘Oh, I’ve heard that I should say no comment, so that’s what I’m going to say’, and then they are excluded from that opportunity.

The other thing is that the drug diversions are discretionary, so by admitting the responsibility you are not necessarily going to get a drug diversion. Anecdotally for us, we have met very few people who have been offered a drug diversion. My understanding, through my work — we have done work with Harm Reduction Victoria's DanceWize — is that that may be an operational decision that happens around raves and that sort of thing, but there is no presumption towards issuing a drug diversion within the police force. It is just an option that is available. One of the recommendations we have made is that it becomes a directive; that in certain circumstances there would be a presumption for a drug diversion. That might eliminate some of the confusion and give people an understanding in situ of what the consequences of admitting liability are. That is one of the things.

For the drug diversion and the cannabis cautioning, there are two chances. The cannabis cautioning, from my perspective, is a bit more mainstream, but the drug diversion is less, and there are not very solid structured referral processes in place. Some are in place at a local level but not across the state, or they have been experimented with during the course of my career. In the courts, if you have got priors, you generally cannot get a diversion. One of the issues that we have raised in our submission is that that does not recognise that drug dependence does tend to be a longer term, recurring incident. There is also a consideration of likelihood of future offending. So for people who have got drug dependence that may be an ongoing issue. A lot of what I am speaking about is really directed towards possession and use, which is the vast majority of offences, but people can be excluded where there is coexisting offending as well of a more serious nature. But it remains the case that that is a discretionary matter and you only get one chance at diversion as an adult.

The children's process is a little bit different. Children get more than one go at drug diversion. I am sorry this is a bit complicated, but it actually is a little bit of a complicated area because it has developed in a piecemeal way as trials in different courts and then rolled out. Currently we do have legislation in the Magistrates Court that enables magistrates to provide a diversion, provided the prosecution, the accused and the magistrate all agree with that process. It used to be that the informant was the key decider on whether diversion would be granted in the courts, and that raised issues in terms of it could be based on a very personal interaction with a person as opposed to something that is ostensibly able to be looked at objectively. In recent times, as of October 2014, the police prosecutors developed an actual matrix which would support the way they made decisions about whether to grant a diversion or not.

In relation to the Children's Court, it has also been very piecemeal, but there is legislation before the Parliament at the moment that would actually legislate the considerations that a prosecutor would take into consideration. So they are the court processes. Our recommendation is that diversion for illicit drug use and possession should be available on more than one occasion, mainly because of that issue that having a prior will really close the door on recovery in a very meaningful way.

Just one further point about that is there might be particular professions where this is highly relevant. There are about 40 professions that have a character test where you need to disclose absolutely everything. Also working with children checks look at your criminal history generally. That does not need to be a concern. We are really talking about standard criminal record checks which you need to work in Coles or to do really standard cleaning jobs in hospitals and any kind of work more and more.

Then in relation to the drug diversion program, the policy has been in place for around 20 years, but as I said, we have seen very few people receiving a drug diversion by police in situ. The most recent research I have been able to find is from the National Drug and Law Enforcement Research Fund, which I understand is not funded anymore, but that was from 2000 to 2005. That showed that Victoria Police were picking up the drug diversion at a much lower rate than South Australia and Tasmania, which both had different models in place.

Our recommendations for change around drug diversion for police would be that there would be a removal of the requirement for no priors or the one to two-time chance. That would really be looking at the fact that people who have drug issues tend to relapse at some stage, even if they are doing really well. It is also a really positive opportunity. I think the police would agree we could take a more constructive, proactive approach in relation to that very low-level offending and also that the police discretion would not be at large, but it might be more structured and be a directive that in these circumstances this is the preferred course, unless you have serious concerns that that is not appropriate for some reason.

**Ms PATTEN** — Community safe or — —

**Ms FITZGERALD** — Yes. And that would not be a highly complex change. It would be a cultural change but potentially would be welcomed by many police because it is a cost-saving measure for the police if we have appropriate referral mechanisms in place and it is also a cost-saving measure at the court stage. Sometimes a matter that goes to court will require two or three mentions, and that will involve duty lawyers, magistrates and prosecutors and the generation of a brief. So I think there are quite a few reasons why that would be supported.

The other component of that is that there would be an opportunity to reinvest some of that funding to have the treatment options that would support people in the complexity of what their need is. There are also examples of where this has been very effective that we outlined in our submission. In South Australia there is a structured referral where police do not have a discretion, and there is no limitation put on the number of times that that can occur. The rates of recidivism within that program are very low, with only one-quarter of people diverted more than once; 15 per cent, twice; 5 per cent, three times; and 4 per cent, four or more times.

There are also programs in the US which are looking at similar structured referral to rehabilitative services. They are not so focused on abstinence but more looking at the social framework that people's drug use is occurring within. Overall, our view is that there are more sophisticated ways to deal with low-level drug offending that could actually really improve outcomes in the longer term. The current process really is onerous and can create a situation where people are really, really hampered in their long-term recovery. When I have to give advice to someone and they have got a drug prior — that person might be 22 — and they say, 'How long is this going to be on my record?', and I say, 'Ten years', that is a very depressing conversation to have, because the reality is that the stigma is a huge factor in people gaining employment and even voluntary opportunities.

**The CHAIR** — I understand diversion programs can be quite varied. Can you give an overview of the general features of an effective diversion program?

**Ms FITZGERALD** — Pre charge, you pick someone up and they are in possession of drugs. You might have a relationship with a treatment facility where you would make a direct referral. That person needs to attend for an assessment and a treatment session. If they attend, then no charge would be laid. That would be an effective model. It depends on having the relationship. If they do not attend, then it would be referred back to the police station, and charges would be laid. That is ostensibly what we could be doing if we were focusing on this as a directive as opposed to an option, and we do do it in some operational contexts. That would be pre charge.

In terms of the court process it is much more onerous. I think an effective diversion mechanism would allow for the longer term needs that people might have. The model at the moment is on the deterrent-type basis: if you get one diversion, you are never going to end up back in court on a drug possession charge. It is not necessarily realistic, and it also depends on you never having offended in the past.

The more effective approach would be to say, 'This is very low level but highly stigmatised offending. We're going to give you an opportunity to engage in treatment rather than reactivating your criminal record, which will put you out of work for another 10 years. We are going to not count this as a finding of guilt, and we will let you engage with some treatment'.

**The CHAIR** — Can you give me a bit of a sense of, in terms of the clients that might go through Fitzroy legal centre on drug-related charges, what percentage would be solely charged for possession only, or is that possession often linked to other actions, whether that be theft, violence or something like that?

**Ms FITZGERALD** — I think to get an accurate indicator of that you would need to go to Victoria Police, but there are reasons for that. We have a drug outreach lawyer program, which is funded by the health services. That lawyer would see a lot of people on possession and use charges. But on the other hand we have a criminal practice in legally aided matters that do not include possession and use. That is another secondary issue, which is a lot of people are not receiving — —

**Ms PATTEN** — Sorry, did you say legal aid does not cover use and possession?

**Ms FITZGERALD** — No, you can access the duty lawyer service, but in terms of accessing a grant of legal aid, you need to be facing an imminent term of imprisonment. Then you will only be seeing high-level offending where diversion is generally completely off the table. We do have duty lawyers who work at the

Neighbourhood Justice Centre. We do a variety of things, and we will see different things in different contexts, but I do not think that would be representative of what is happening overall, if that makes sense.

In terms of our clients there are often very complex issues — homelessness and mental health — and there will be a multiplicity of possession charges. They would be knocked out of diversion on that basis as well — long-term dependence or relapse.

**Ms SULEYMAN** — Your submission notes an initiative by Victoria Police in Melton, out in the west, that aims to rehabilitate people who use ice via intensive treatment programs as an alternative to prison. Can you elaborate on this program and how successful it has been and how it could be replicated throughout Victoria?

**Ms FITZGERALD** — I cannot, I am sorry. I could take that question on notice and provide the evidence that is available. What I could say is that the options that are available again are piecemeal. The Drug Court has had its evaluation, and that is for offending in Dandenong. There is a real question around equality under the law — under the Charter of Human Rights and Responsibilities — because of this piecemeal development of initiatives. Some of them have been very effective. That is what I would say about that.

I think where there have been effective pilot programs they ought to be expanded as quickly as possible. So even, for example, with the Children’s Court it was only in a certain region that you were able to get a diversion. All the other children have got the priors. There are real issues around fairness with this type of thing, even though of course we welcome any initiative that explores in a more intensive way harm-reduction approaches.

**Ms SULEYMAN** — Thank you. Chair, is it possible to get further information in relation to that specific initiative and whether or not it has been successful?

**Ms FITZGERALD** — We can provide the material that we have got, absolutely.

**Ms SULEYMAN** — Thank you.

**The CHAIR** — That would be good. Thanks, Meghan.

**Ms PATTEN** — Thank you for this submission. It is really good.

**Ms FITZGERALD** — Wonderful.

**Ms PATTEN** — Congratulations. It is a great submission. I am hoping you might be able to answer it, but — —

**Ms FITZGERALD** — You never know.

**Ms PATTEN** — I know. That is right. You do not know until you ask. I am trying to get a dollar figure on the cost of going to court, particularly for a low-level possession charge. I suppose this is going into your recommendations around decriminalising use and possession. You mentioned cost savings in your submission. I am wondering if you would know of any research that can actually identify how much it costs to take someone to court — to do the brief and for the two or three mentions.

**Ms FITZGERALD** — I could undertake to look for that, but I could say that it is a lot of money. Putting a brief together takes hours. The negotiations around a diversion for duty lawyers can take time. Generally it will involve adjournments. It also requires the diversion coordinator to make an assessment. We support some of those measures, but the idea that they could be done at an earlier stage without that additional resource would free up resources that could be utilised at an earlier stage. For our lawyers two to three mentions would be not uncommon for negotiating an outcome.

The other issue is that if people do not obtain the services of a duty lawyer, they may not be able to negotiate a diversion. They might not have enough knowledge to request one or to push for it. So there are a lot of reasons why court is not the ideal place for a very low-level offending-type diversion to progress to before treatment.

The other thing I would say is that there may be an impression that going to court itself creates the fear and the deterrent effect, but I think also policing. For a lot of people, getting picked up by the police on use or

possession is an extremely intimidating process and would have as much of a deterrent impact as going to court would.

**Ms PATTEN** — Obviously we are aware of the Portugal model, and some of us are going to Portugal to see firsthand how that works. Are you aware of that model? It is kind of a diversion model, really; it is just that everyone gets diverted. You are talking about diversion. Diversion versus decriminalisation of use and possession, do you have a comment on that?

**Ms FITZGERALD** — Fitzroy is supportive of decriminalisation, but we have made submissions that are within the current political framework as we perceive it. Drug use and possession is generally harmful to the person affected, and any resources that can be reallocated towards their recovery is preferable to policing and criminal justice resources being put towards that.

From my perspective it is quite clear that we have not been effective in stamping out drug use through the criminal justice system, and it is unlikely that we will be. I think also that what we have seen are just shifts in drug use trends, types of offending and the impact on the community of property offences. The cost to the community of imprisonment as a result of that is an additional factor of the illegal status of drugs. I think also, considering the extremely high levels of drug dependence generally in the community — not on illicit drugs — it becomes increasingly arbitrary that we are separating out particular drugs without an evidence-based analysis of harms to the person that are caused through the use of those drugs and criminalising those. That would be my personal perspective.

**Ms PATTEN** — One final question. We heard from the AMA the effect of the stigma around drug use and the negative impacts that has on occupation, on everything, and you raise the issue of stigma around drug use in your submission. Do you have any solutions for us or ways that we could try to reduce that stigma?

**Ms FITZGERALD** — Because I am a lawyer I am going to talk from a legal perspective. I think there has been an approach — for example, in relation to homosexuality — where priors have been expunged on the basis of a shift in perspective. I think acknowledging the extraordinarily stigmatising impact of a prior for illicit drug use and possession, which may be really not representative of a person in the whole of their being and their contribution to the community, is one option. Also reviewing the way we mainstream diversion, both pre charge and at court, for drug use and possession would be two very effective ways, legally, of allowing people the maximum opportunity to engage back into the community, have meaningful employment and that sort of thing, which is central to recovery in the longer term.

**Mr THOMPSON** — Meghan, thank you for your evidence. How long have you been at the Fitzroy Legal Service?

**Ms FITZGERALD** — A little over 10 years. I have stopped counting, but that long.

**Mr THOMPSON** — And in that extensive journey is there a pattern of drug use that you have observed based upon the legal cases that you have gone to court for — heroin, ice, cannabis — is there a trend in anecdotal terms that you could refer to?

**Ms FITZGERALD** — It reflects the landscape, so we have certainly had more methamphetamine-related cases, more cases of the newly regulated synthetic drugs as well, but I think we have a very long-term cohort of opiate-dependent clients who have extremely complex needs, complex health issues, who experience homelessness and who are polysubstance users. That would be the long-term cohort that our drug outreach lawyer, for example, would see, but the shift reflects the nature of the drug market as well. So you see more.

**Mr THOMPSON** — Where is the overlap with mental health among long-term users?

**Ms FITZGERALD** — The long-term users that I have worked with over the course of my career invariably have mental health conditions and often have experienced significant disadvantage and harm from childhood, so we do tend to deal with the pointy end of recidivist long-term drug users. It is not necessarily representative of the entire drug-using community, but mental health is a serious issue, and often people's drug use is connected to their inability to cope in a variety of ways. Poverty is also a very significant factor, so the visibility of our clients because they do not have homes is a reason why they might get picked up a lot more than somebody

else. A lot of their stories are extremely — I do not want to say tragic, because that is an end point, and we are always hoping that things will move, but their situations are very, very distressing.

If you were in a similar position yourself, you might consider using drugs. Sometimes I look at our clients and think, ‘You’re doing very well because you aren’t hurting anybody else. You haven’t committed horrific acts of violence towards another person. You’re just using drugs and coming before the courts for that reason’. So the health, the mental health and the historic experience of violence and trauma are all very, very connected in the clients that we work with.

**Mr THOMPSON** — One of the earlier youth workers in Fitzroy was Doug Nicholls, who helped people who had addictions to maybe alcohol and/or drugs, as I understand. Do you have any stories of people that have been able to work through these issues to develop a sense of self-worth and move forward from their addiction?

**Ms FITZGERALD** — I do, but so often as a lawyer you see people at the time when things are not going well. But I do sit on various committees — at Harm Reduction Australia, and I have been on the board of Harm Reduction Victoria — and I think the key driver is people developing a sense of self-worth. I think a second one is employment or some way of making a contribution back into the community. They are the types of things that will move people towards better health outcomes, and treatment services are involved in that, but also reducing the stigma by not reinforcing it through these criminal record checks and legal processes would be of great assistance.

**The CHAIR** — Thank you very much, Meghan. There are so often other questions that keep going around in your mind, but thank you for your contribution this morning.

**Ms PATTEN** — And again, a great submission.

**Witness withdrew.**

**Proceedings in camera follow.**