

**Inquiry into use of Cannabis in Victoria  
Legislative Council Legal & Social Issues Committee  
(September 2020)**



**A Community Legal Centre  
Incorporating the Darebin Community Legal Centre**

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## **About the Fitzroy Legal Service**

Fitzroy Legal Service (FLS) provides legal services (advice, casework, community legal education, court appearances, systemic advocacy) in the following substantial areas of law – tenancy, employment, family violence, family law, crime, infringements, victims of crime. We have practitioners working across Victorian Courts, including family violence duty lawyers present at Heidelberg Magistrates Court, and cross jurisdictional duty lawyers present at the Neighbourhood Justice Centre. We provide services to approximately 5,000 Victorians per annum, and our Law Handbook Online is the most relied upon legal resource in the state.

Relevantly for the purposes of this submission, FLS has operated a drug outreach lawyer (DOL) program for over 20 years, providing specialist legal services for Victorians whose engagement with the legal system is underpinned by drug use. This program provides health/ social support and improved access to justice for highly marginalised community members through partnerships with YSAS, Uniting Care Regen, North Richmond Community Health, Living Room, Co-health, Odyssey House, Quinn House, supporting clients through a wide catchment of metro Melbourne.

FLS also provides services to Victorians impacted by drug use in a variety of ways through our other program areas, in particular, criminal law and family law/ family violence services.

## **Recommendations**

Recommendation 1 – That future social investments and justice responses supported by government for managing cannabis use (and other drugs) in Victoria are:

- evidence-based,
- personal/ structural trauma informed,
- human rights compliant, and
- driven by a public health perspective.

Recommendation 2 - That the use and possession of cannabis is decriminalized by the Victorian Parliament. That cannabis is legalised by the Victorian Parliament with attendant controls and regulatory mechanisms.

Recommendation 3 - That ‘spent convictions’ legislation is passed by the government in Victoria consistent with terms proposed by the Parliamentary Committee.<sup>1</sup> Specifically, that such legislation excludes ‘no conviction’ records, and ‘proven and dismiss’ dispositions, from disclosure.<sup>2</sup>

Recommendation 4 - That legislative amendments are made to ensure drug possession,<sup>3</sup> and low-level property offences,<sup>4</sup> no longer trigger presumptions against bail,<sup>5</sup> that result in custodial episodes. That

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<sup>1</sup> Parliament of Victoria, Legislative Council Legal and Social Issues Committee, [‘Inquiry into a legislated spent convictions scheme - A Controlled Disclosure of Criminal Record Information framework for Victoria’](#), Victorian Government Printer, August 2019.

<sup>2</sup> [Ibid](#), see pp 31-36. Committee Recommendation – ‘Any findings or orders imposed by Courts that do not result in conviction should be immediately protected from disclosure, subject to completion of any conditions.’ p 36.

<sup>3</sup> *Drugs, Poisons & Controlled Substances Act 1981* (Vic), section [73](#).

<sup>4</sup> *Crimes Act 1958* (Vic), Division 2 – Theft & Similar or Associated Offences, see for example section [74](#) (theft), section [88](#) (handle stolen goods), section [81](#) (obtain property by deception), as well provisions such as section [197](#) (damage property), section [192C](#) (possession of identification information).

<sup>5</sup> *Bail Act 1977* (Vic), section [4AA](#), [4A](#), [4C](#) & [Schedule 2](#) offences.

the purpose of bail and parole reforms are reviewed, and unintended impacts on Victoria’s remand prison populations are addressed as a matter of urgency.

Recommendation 5 – That the charge of ‘drive whilst impaired’<sup>6</sup> is accepted by the Parliament of Victoria as adequate protection against unsafe use of cannabis in connection with handling of a motor vehicle.

## **Introduction**

We are grateful for the opportunity to make submissions to the Legal and Social Issues Committee, and limit our scope to the interface of health / justice as reflects our knowledge and service commitments in the community.

Our submission relates to each of the sub-paragraphs (a) through to (e) of the terms of reference insofar as we assert that the criminal justice system fails, and manifestly has done so over decades, despite enormous and blind commitment and investment, to deliver to Victorians meaningful public health outcomes in the context of the ‘war on drugs’. Conversely, we draw attention to the persistent and cumulative ways in which the criminal justice instead drives harmful public health outcomes, many of which we believe, in the context of cannabis use, are perhaps unintended, and disproportionate to public expectations and norms.

We acknowledge the potentially devastating risks to health of excessive use of cannabis, particularly for young people, bearing in mind the complex and evolving nature of that research,<sup>7</sup> and strongly encourage exploration of mechanisms to provide meaningful evidence-based education and promotion of harm reduction strategies to young Victorians in association with the risks of drug and alcohol use.

We also acknowledge the risks to the public of permitting organised crime to flourish through the illicit trade in cannabis, and commend the Victorian Parliament for all actions directed to exploring effective mechanisms to regulate that market away from crime syndicates that serve no positive public function whatsoever.<sup>8</sup>

We submit the introduction of alternative and more nuanced means to manage the fact of drug use in our society in ways that limit engagement with the criminal justice system is a political impetus that is overdue, and every step away from criminalisation will free significant resources to support broader health objectives, which the accepted social determinants of health dictate require the greater attention.<sup>9</sup> The disconnect between social harm and punitive justice responses is particularly acute in the case of cannabis, where use is so widespread, and logically, the attention of enforcement and

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<sup>6</sup> *Road Safety Act 1986* (Vic), Offences involving Alcohol or other Drugs section 49.

<sup>7</sup> See for example, Chapter 6 Mental Health and Psycho Social Outcomes of Long Term Cannabis Use in *‘The Health and Social Effects of Non-Medical Cannabis Use’*, World Health Organisation, 2016.

<sup>8</sup> We recommend the Committee explore the trend of criminal syndicates exploiting migrants, women, students and gambling debtors to operate ‘grow houses’.

<sup>9</sup> ‘The World Health Organization (WHO) has described social determinants as: ...the circumstances in which people grow, live, work, and age, and the systems put in place to deal with illness. The conditions in which people live and die are, in turn, shaped by political, social, and economic forces (CSDH 2008). According to WHO, the social conditions in which people are born, live and work is the single most important determinant of good health or ill health. As factors that affect health, social determinants can be seen as ‘causes of the causes’—that is, as the foundational determinants which influence other health determinants.’ Extracted from *‘Australia’s Health: Chapter 4 Determinants of health’*, Australian Institute of Health and Welfare, Australian Government. See also *‘Australia’s Health 2020’*, Australian Institute of Health and Welfare, Australian Government.

prosecution agencies must target individuals on some differentiating basis, whether or not that is conscious or purposive (for example, poverty, visibility, youth, race, prior engagement).

### ***Our clients***

The DOL program supports people whose drug dependence, use or addiction<sup>10</sup> underpins their engagement with legal processes. Historically and currently our primary focus is to provide holistic adapted services to meet the extremely complex needs of our clients – mental health, homelessness, compromised cognitive function, intergenerational trauma, victimisation, experiences of child sexual assault and family violence. The DOL program seeks to bridge access to justice through integrated health justice partnerships that streamline supports to clients facing legal proceedings in a flexible, and highly focussed way. The DOL program through partnerships is also focussed on supporting young people and clients strongly engaged in recovery.

A proportion of clients referred to FLS through treatment and counselling agencies identify cannabis use as the primary health/ drug use issue for which they are engaged with partner agencies. A significantly larger proportion of DOL clients identify polydrug dependence, with cannabis use as an incidental of their primary drug of dependence. Of these, cannabis is rarely identified as a problem contributing to social and legal harms, and is frequently anecdotally reported to be assisting in abstinence or reduction from other, more problematic, drug use,<sup>11</sup> and as a calming mental and physical health management tool. It is our observation that criminal offending affecting third parties is out of the ordinary in relation to cannabis as a scheduled substance, and there is growing evidence of the therapeutic benefits of regulated cannabis as a treatment for a variety of conditions.

The vast majority of DOL clients' offending does not involve violence, and may be characterised as acquisitive offending (theft, burglary), and/ or offending that is a direct concomitant of dependence and visibility (possession).<sup>12</sup> For most of our clients, repeat engagement with criminal justice systems is the norm, and rarely equates with the eradication of use/ dependence/ addiction, regardless of the severity of sentence. For some, particularly young people and those who have social supports supportive of better health and legal outcomes, the DOL lawyers are focussed on providing holistic support in non-legally aided matters that support recovery and legal outcomes that support future training, employment (and associated rehabilitative/ social integration) opportunity for our clients. Again, the impact of the criminal justice system is a substantial barrier to be overcome in that context.<sup>13</sup>

Positive health supporting outcomes rather depend on cross referrals and supports that limit the role of the criminal justice system in the lives of our clients. The disproportionate consequences of use/ dependence/ addiction as compared with the general public is usually directly referable to the complexity of circumstances and psycho social health conditions, leading to greater policing attention, challenges to compliance with court orders, and diminished opportunities to avoid remand. Every attempt is made on behalf of our clients to limit periods of incarceration. DOL lawyers observe severe

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<sup>10</sup> We acknowledge the language of 'addiction' and 'dependence' and 'use' is the subject of critical discourse and rights-based advocacy. We cite these inclusively as a descriptor to acknowledge the stigma that can attach to language, and also to reflect the different views conveyed by our clients in relation to their engagement with the justice system.

<sup>11</sup> Anecdotally our clients report use of cannabis to withdraw from heroin, reduce on methadone, suboxone, or buprenorphine, and methamphetamine.

<sup>12</sup> See for further general context, '[Characteristics of Chronic Offenders](#)', Crime Statistics Agency Victoria, Fact Sheet 7, April 2018.

<sup>13</sup> See below section, *Criminal Records and Drug Charges*, pp 8 – 9.

deterioration in the condition of some of our most health compromised clients (particularly those with psychiatric conditions) during periods spent on remand.

*Case-study 1 - R is attended by police on a welfare check. He is searched (person and possessions) by police. He is subsequently charged with possession of a small quantity of cannabis. R has an acquired brain injury, significant mental health challenges, and has had a stroke. R has a child and is engaged with AOD services to support access to supervised visits with his child. R cannot be diverted out of the criminal justice system because he has priors. He will have a criminal record for the next ten years as a result of the charge. His rehabilitative progress as a result of the welfare check and cannabis charge has been severely damaged.*

*Case study 2 - X is pulled over by police, and his car is searched. Police discover cannabis THC oil and valium in the vehicle (personal use) for which X is charged. X has significant trauma and mental health issues, including diagnoses for acquired brain injury and post-traumatic stress disorder, with features of anxiety, depression, insomnia, memory loss, judgment impairment. X is homeless. X uses cannabis as a form of self-medication and is open about that with support workers. X has not been engaged with the justice system for a prolonged period. X's charges cannot be dealt with by a diversion because of prior offending. The stress of multiple hearings to negotiate charges and have the matter dealt with by the court has a significant deleterious effect on X's mental health.*

We know the vast majority of people who use drugs in Australia who are not captured in the criminalisation and justice processes the DOL Lawyer responds to, and believe it is important to reiterate on behalf of our clients that these processes do not impact Victorians equally. Of the approximately 200 clients supported by the DOL program each year, approximately 80 % have a diagnosed mental illness, 50 % are experiencing primary homelessness, and a further 25 % are in unstable accommodation. Approximately 15 to 20 % of DOL clients identify as Aboriginal or Torres Strait Islander ('Aboriginal'), and approximately 30 % of clients identify as being of first or second-generation migrant refugee background. Approximately 30 % of DOL clients are women. The structural disadvantage many DOL clients face - discrimination/ stigma, socio-economic deprivation, visibility, exclusion from health enhancing supports – lead directly to higher levels of engagement with criminal justice systems, and poorer legal outcomes.

The central commonality in the experiences of DOL clients is a background inclusive of significant personal trauma and structurally driven intergenerational trauma. Our clients routinely carry devastating experiences of childhood neglect/ harm, family violence, sexual violence, substantial mental health and cognitive impairment issues, stigma, intergenerational trauma, including specific impacts of colonisation on Aboriginal communities, and specific impacts of war, displacement & discrimination on refugee communities. The relationship of substance use/ dependence/ addiction to trauma is well established,<sup>14</sup> and the characterisation of use as a survival mechanism is central to the cohort. As such,

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<sup>14</sup> For example, Sarah E. Ullman, Ph.D. Mark Relyea, M.A. Liana Peter-Hagene, M.A. and Amanda L. Vasquez, M.A., '[Trauma Histories, Substance Use Coping, PTSD, and Problem Substance Use Among Sexual Assault Victims](#)' *Addict Behav.* 2013 Jun; 38(6): 2219–2223. Lamya Khoury, Yilang L Tang, Bekh Bradley, Joe F Cubells, and Kerry J Ressler '[Substance use, childhood traumatic experience, and Posttraumatic Stress Disorder in an urban civilian population](#)', *Depress Anxiety.* 2010 Dec; 27(12): 1077–1086. Amy Bombay, MSc, Institute of Neuroscience, Carleton University, Kim Matheson, PhD, Department of Psychology, Carleton University, Hymie Anisman, PhD, Institute of Neuroscience, Carleton University, '[Intergenerational Trauma, Convergence of Multiple Processes among First Nations People in Canada](#),' *Journal de la santé autochtone*, novembre 2009. Laurel E Pickel, Supervisor Dr. Susan Rodger, '[The aftermath of Intergenerational Trauma: Substance Use Risk and Resiliency](#)', University of Western Ontario, Electronic Thesis and Dissertation Repository, 2012. Emeritus Professor Judy Atkinson AM,

there is an extremely strong moral imperative from our perspective to bring commonsense and humanity to the questions of social investment in coercive punitive responses to dependence/ addiction, particularly use and possession. It is unquestionable from our point of view that the more effective allocation of resources to address drug use as a social harm requires investment in social infrastructure (education, housing and treatment) whereby community awareness, and for the most vulnerable, improved general health, and recovery from trauma and associated use, is at least made possible.<sup>15</sup>

Recommendation 1 – That an evidence-based, personal/ structural trauma informed, human rights compliant, public health perspective is reflected in the future social investments and justice responses for managing cannabis use (and other drugs) in Victoria.

### ***Prevalence and persistence of use***

We note a substantial summary of the prevalence of cannabis use has been outlined in Hansard.<sup>16</sup> We specifically note the reference to 13,000 arrests for possession of cannabis in Victoria in 2015-2016,<sup>17</sup> and of an estimated 8 billion-dollar industry with associated links to organised crime.<sup>18</sup> In addition to this, we cite the following as evidence in support this recommendation.

The 2019 National Drug Strategy Household Survey reveals that close to half of all Australians have used illicit drugs in their lifetime, with 16.4% admitting to use in the last 12 months.<sup>19</sup> Cannabis was reported to be the most commonly used illicit drug (36% of the proportion of Australians who use drugs).<sup>20</sup> Cannabis was also used most frequently, with 37% of people who consumed or had consumed cannabis doing so at least once a week.<sup>21</sup> The 1993 national survey indicated that 96 per cent of cannabis users did not go on to try other illicit drugs.<sup>22</sup> Today, 41% of Australians supported legalisation of cannabis.<sup>23</sup>

There is no credible longitudinal evidence locally or internationally that surveillance, law enforcement and imprisonment lead to lower levels of drug use, and in particular, harmful drug use. *The International Drug Policy Consortium (IDPC), made up of 170 international NGOs, published findings that the United Nation's goal to eliminate illegal drug market by 2019 has had minimal impact on global supply, but has had significant negative effects on 'health, human rights, security and development'*.<sup>24</sup> As the Committee is aware, increasingly legalisation, regulation and diverted investments rapidly gather an evidence base

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*'Trauma Trails – Recreating Song Lines - The Transgenerational Effects of Trauma in Indigenous Australia,'* Spinifex Press Victoria, 2002.

<sup>15</sup> United Nations Office on Drugs & Crime, World Health Organisation, *'Treatment and care for people with drug use disorders in contact with the criminal justice system - Alternatives to Conviction or Punishment'*, March 2018.

<sup>16</sup> Parliament of Victoria, Parliamentary Debates (Hansard) Legislative Council Fifty Ninth Parliament First Session Wednesday 29 May 2019, pp 1506-07.

<sup>17</sup> Ibid p 1507

<sup>18</sup> Ibid p 1507

<sup>19</sup> [National Drug Strategy Household Survey 2019](#), Australian Institute of Health and Welfare, Australian Government

<sup>20</sup> [National Drug Strategy Household Survey 2019 in Brief](#), Australian Institute of Health and Welfare, Australian Government

<sup>21</sup> Ibid, p 14.

<sup>22</sup> Maurice Rickard / Social Policy Group *'Reforming the Old and Refining the New: A Critical Overview of Australian Approaches to Cannabis'* Research Paper 6 2001-2002, 10 October 2001, Parliamentary Library, Australian Parliament.

<sup>23</sup> National Drug Strategy Household Survey 2019 in Brief, Australian Institute of Health and Welfare, Australian Government.

<sup>24</sup> *'Taking Stock: A Decade of Drug Policy. A Civil Society Shadow Report'*, International Drug Policy Consortium Publication 2018.

suggesting positive and improved public health outcomes for communities (including reduced crime, increased supports, decreased use and frequency of use in young people).<sup>25</sup>

### ***Criminalisation, carceral investment & social harm***

We also cite the June 2020 report of the National Drug Research Institute 'Quantifying the Social Costs of Cannabis Use to Australia in 2015/16'.<sup>26</sup> Of the 4.5 billion in social costs,<sup>27</sup> over half were allocated to the costs to the community of criminalisation processes (police, courts, lawyers, corrections, imprisonment, victims of crime).<sup>28</sup> Of the 2.4 billion allocated to the costs of criminalisation, the division of costs is as follows - 1.1 billion imprisonment, 475 million police, 407 million personal crime victim, 257 million household crime, 62 million court, 52 million legal aid prosecution, 25 million community correction.<sup>29</sup> By a significant margin clearly the largest investment nationally in addressing cannabis use is not only in criminalisation, but specifically in imprisonment. The vital question to be answered is, what public health outcomes are served by this investment?

The Institute estimated a further 11 billion dollars of social costs, associated with loss of quality of life, impaired quality of life for partners and children living with a family member with dependence, disability (depression and schizophrenia), and purchase costs.<sup>30</sup> We note that the costs associated with criminalisation processes to affected communities are not incorporated into the social cost analysis either as a formal or informal cost. We cite as two major interrelated streams criminal record discrimination and the structurally driven stigma attached to drug use. We submit that both of these streams of social harm require significant attention.

Criminal record discrimination results in unemployment and underemployment for hundreds of thousands of Victorians who have never gone on to re-offend. For Aboriginal communities, there are specific challenges in terms of kinship arrangements, onerous exclusion from positions in government funded organisations, and the discriminatory impacts of criminalisation processes.<sup>31</sup> Where a criminal record relates to a drug offence, the discriminatory and excluding impacts are high, though the social harm associated with the offending may be extremely low (e.g. possession and use). Criminal record discrimination is dealt with further below.

Drug dependence is the most stigmatised health condition according to the World Health Organisation.<sup>32</sup> Criminalisation processes and investment, in response to what we submit should be classified as a public health issue, underpins in an inviolable way that framing and experience. The approach of demarcating individuals as less deserving of social support (and conversely as requiring coercive, punitive intervention) as a result of illicit drug use, fails to account for the social determinants of health that are known to largely drive problematic use. In addition, we submit the ongoing

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<sup>25</sup> At the Heart of the Matter, NZ Drug Foundation, 'Taking Control of Cannabis – A Model for Responsible Legislation,' 2020, extracted from the [Health Not Handcuffs](#) website.

<sup>26</sup> Published by the National Drug Research Institute, Curtin University, supported by funding from the Australian Government under the Drug and Alcohol Program.

<sup>27</sup> Ibid, p (vi).

<sup>28</sup> Ibid, p (vi).

<sup>29</sup> Ibid, p (vii).

<sup>30</sup> Ibid, p (v) These costs were not included in the overall formal estimate of social cost of cannabis use.

<sup>31</sup> Legal and Social Issues Committee, 'A Controlled Disclosure of Criminal Record Information framework for Victoria', August 2019, pp 23 – 26.

<sup>32</sup> 'Alcohol and other drugs: Stigma - A background paper,' Alcohol and Drug Foundation 2019, Victorian Government: Health and Human Services, p 3.



commitment to policing and justice investments exercised through targeting of specific populations (whether consciously or unconsciously) with increases in net social harm involves a collective abdication of the responsibility to adopt evidence based, human rights framed, public health driven approach for all Victorians.

### ***Limitations of caution schemes, diversion, 'ropes' & decriminalisation more broadly***

We note that each of the caution, diversion and 'ropes' schemes rely on the exercise of police discretion. In each of these programmatic responses, the development of a framework around exercise of the relevant discretion has been piecemeal, and is not treated by justice players as independently reviewable by a court of law. [check] Naturally all effort to divert health and dependency related offending, or first offending, out of the courts is a shared objective of justice workers (police, courts, legal practitioners). However, it is unrealistic and inaccurate to believe that structural bias and discrimination do not play out in the exercise of discretions at different stages of the criminal justice system. For this reason, we submit that reliance on discretionary powers to ameliorate the impacts of the criminal justice processes is not the appropriate mechanism to rely on in relation to cannabis possession and use. This view is underpinned by the submissions outlined above in relation to net social harms and public health objectives relevant to the specific subject matter.

We cite in this context the recent release of New South Wales data between 2013 and 2017 which shows that, despite discretions in the form of 'cautions' designed to keep cannabis offending out of the court system, '82.55% of all Indigenous people found with a non-indictable quantity of cannabis were pursued through the courts, compared with only 52.29% of non-Indigenous people', and non-Indigenous people were four times more likely to receive a caution.<sup>33</sup> We further cite evidence national evidence that finds Indigenous women are more likely to receive harsh prison sentences for drug possession offences, "including triple the rate of prison sentences".<sup>34</sup>

We further note that laws such as those operating in the ACT do not address supply within the frame of legalisation as purchase and sale remain strictly illegal. We note critiques that a decriminalisation model operates on the presumption of a black market of drug supply, the maintenance/ consolidation of that supply chain including associated criminal networks, and the continued absence of protections and information that might support the public health of consumers.

We raise as a matter of concern also the breadth of current trafficking laws as they impact cannabis possession and use (and other drugs).

*DOL Lawyer – "Unfortunately we have a number of clients every year who are charged with trafficking due to sharing and pooling funds. They are charged with trafficking through complicity, covered in s323 and 324 Crimes act by 'assisting, directing or encouraging the offending.' Just pointing a finger at the direction of the dealer and helping a person to meet the client has been enough to be assisting and encouraging the sale. In another client's case, they organised to go halves in a buy to get a better deal, arranged personally with the dealer and they were charged with trafficking."*

### ***A pragmatic harm reduction approach***

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<sup>33</sup> Michael McGowan and Christopher Knaus, '[NSW police pursue 80% of Indigenous people caught with cannabis through courts](#)', The Guardian, 10 June 2020

<sup>34</sup> Ibid.



It would seem irrefutably clear that cannabis use requires a pragmatic, harm reduction approach, to reflect the reality of persistent consumption. It would also seem irrefutably clear that criminalisation processes attendant on cannabis use do not reflect the attitudes or actions of ordinary Australians, and do not impact Victorians equally. It is incumbent on responsible leaders to counter the discriminatory operation of the law and decisively curtail opportunities for unequal application and outcomes to flourish. This is an especially significant moral duty when those impacted are those most vulnerable within a public health frame. We are supportive of approaches adopted in New Zealand to underpin the referendum on legalisation, and endorse the development of an evidence-based, human rights, public health driven framework to support consideration of best practice principles to underpin regulatory changes.<sup>35</sup>

Recommendation 2 - That the use and possession of cannabis is decriminalised. That cannabis is legalised in Victoria with attendant controls and regulatory mechanisms to be established by Parliament.

### ***Criminal records & drug charges***

For some DOL clients, particularly young people and those who have social supports supportive of better health and legal outcomes, the DOL lawyers are focussed on providing holistic support in non-legally aided matters that support recovery and good legal outcomes to support future employment (and associated rehabilitative/ social integration) opportunity for our clients.

The stigma of a criminal record is a major barrier to social opportunities – employment, study, kinship care. There are many work forces that are subject to specialised criminal record checks under policy or legislative schemes, wherein boards are empowered and guided to make judgements relevant to risk assessment (teaching, aged care, lawyers, doctors, nurses, real estate agents, police, working with children). Standard criminal record checks are handled by ordinary employers with extremely variable experience in making assessments of risk.<sup>36</sup> The protections against unfair discrimination on the basis of what would legally be deemed an ‘irrelevant criminal record’ are extremely limited.<sup>37</sup> Given the breadth of use of cannabis, this particular type of low-level offence is a clear example of the way in which a criminal records may not be an accurate indicator of risk, but rather, an indicator of bad luck, or peripheral circumstances likely to drive police attention (for example, visibility, youth, race, reliance on public spaces, poverty).

We note the government has expressed commitment to pass spent convictions legislation, though the detail of that proposal has not been released to the public. In the context of this submission, we reiterate the submissions of the Law Institute of Victoria. Under Victoria Police information release policy, all findings of guilt are released, including ‘no conviction’ records<sup>38</sup> and ‘prove and dismiss’ dispositions (for ten years from the finding if the person affected is an adult, five for a child).<sup>39</sup> In Victoria, there is clear legislative wording that guides the exercise of judicial discretion not to record a

<sup>35</sup> NZ Drug Foundation, *‘Taking Control of Cannabis – A Model for Responsible Legislation,’* 2020, extracted from the Health Not Handcuffs website.

<sup>36</sup> See publications deriving from the Australian Research Council Project, Monash University and RMIT University researchers, *‘Living Down the Past: Criminal Record Checks and Access to Employment for Ex-Offenders,’* partners VACRO VEOHRC AHRC Jobwatch Fitzroy Legal Service Corrections Victoria.

<sup>37</sup> Legal and Social Issues Committee, *‘A Controlled Disclosure of Criminal Record Information framework for Victoria,’* August 2019, pp 71-75

<sup>38</sup> *Sentencing Act 1991 (Vic)*, section 8

<sup>39</sup> *Victoria Police Information Release Policy*, revised 22 May 2019.

criminal conviction on the basis of adverse consequences for employment and rehabilitation. This understanding founded on legislative provisions has that guided legal advice and client instructions relevant to the handling of legal matters.

As outlined above, discretionary powers to divert people from the court system do not operate uniformly for all Victorians. Further, some options have only been available for a truncated period, and/or have been rolled out across jurisdictions in a way that does not support equity in outcomes. Offences related to cannabis use and possession are absolutely in scope of the types of matters for which a finding of guilt may attach and cause social costs entirely disproportionate to offending, and reinforcing of social inequity. As such, we submit it is absolutely vital that the requirements of justice are understood as underpinning the need to adopt the recommendation of the Legal and Social Committee that – ‘Any findings or orders imposed by Courts that do not result in conviction should be immediately protected from disclosure, subject to completion of any conditions.’<sup>40</sup>

*Case study 3 - N is in his early 20s and has struggled with ongoing learning issues from an early age. N is found with cannabis and makes admissions they share with (‘chop out’) friends. Despite no prior dealings with police, the informant decides to prosecute for the offence of possession and traffic instead of issuing a warning. The client is a first-time offender with limited capacity to work due his circumstances but has actively been putting out his CV to find any type of employment. If the police choose not to recommend diversion for his matter, it will have a devastating impact on his life prospects.*

Recommendation 3 - That spent convictions legislation is passed in Victoria consistent with recommendations of the Legislative Council Legal and Social Committee’s Inquiry,<sup>41</sup> and specifically, that such legislation ensures exclusion of ‘no conviction’ records, and ‘prove and dismiss’ dispositions.<sup>42</sup>

### ***The cumulative and compounding nature of criminalisation processes***

Criminal offending and criminalisation provisions from a policy and outcomes perspective can rarely be viewed meaningfully as a series of isolated incidents. As previously outlined, for DOL clients, drug dependence and complex social and personal circumstances frequently lead to repeat engagement with the criminal justice system. The ‘seriousness’ or moral culpability associated with the offending is less relevant than the repetitive nature of the engagement and the increasingly inflexible ‘churn’ of, and delay attendant on, custodial episodes for low level offending. The relevance of mitigating circumstances or therapeutic goals is increasingly minimised where discretions of decision makers have been fettered against accused persons by the legislature.

As a result of amendments to the *Bail Act* (2016, 2017) decision makers (police, courts) have constrained discretions to grant bail (with a reverse onus presumption in operation) when relevant offences have

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<sup>40</sup> Legal and Social Issues Committee, ‘[A Controlled Disclosure of Criminal Record Information framework for Victoria](#)’, August 2019, pp 31 – 36. See also Law Institute of Victoria Submission ‘[Introduction of Spent Conviction Legislation in Victoria](#)’ 22 April 2015, recommendation 2 – ‘The LIV recommends that a finding of guilt for offences proven and dismissed be immediately spent aligning with the NSW and ACT legislation. The LIV further recommends that an offence ought to become spent immediately if the court dismisses the matter without recording a conviction, or at the end of any bond, undertaking, adjournment, or any other condition imposed by the Court, if a person is released without a conviction.’ pp 7 – 9.

<sup>41</sup> Legal and Social Issues Committee, ‘[A Controlled Disclosure of Criminal Record Information Framework for Victoria](#)’, August 2019.

<sup>42</sup> [Committee Recommendation](#) – ‘Any findings or orders imposed by Courts that do not result in conviction should be immediately protected from disclosure, subject to completion of any conditions.’ p 36.

been committed on bail. Included in the kinds of criminal allegations for which our clients face a presumption against bail (and periods of imprisonment) are drug possession, shop theft, breach of bail condition, breach of community corrections order. The stated purpose of the amendments to the *Bail Act*, as reflected by parliamentary representations internally and to the public, was to remove any opportunity for violent offenders to commit further acts of violence and harm to others whilst on bail and parole.<sup>43</sup> The breadth of the amendments captures a much broader range of Victorians caught in pattern of low-level non-violent offending – people accused of drug possession, theft, breach of bail, breach of community corrections order.<sup>44</sup>

The discretions available to police and courts to keep people out of custody are severely limited, so many matters proceed by way of an early plea of guilty and sentence of time served, or time served combined with a community corrections order. The pressures on lawyers with clients on remand who are unlikely to face a term of imprisonment are immense. Often forfeited are negotiation opportunities on charges, and importantly, the creation of supports outside of the prison system that support reduced recidivism.

*DOL lawyer – “A scenario that can play out is that a person is arrested for stealing an item worth a small amount of money from a service station. This person is arrested and placed on bail. The person, whilst on the police bail, is then found by police with a small quantity of cannabis for personal use. This is an indictable offence whilst on bail (an offence against the bail act) and compelling reasons now need to be shown in order for the person to be granted bail. Compelling reasons is a higher test than the old bail legislation of ‘showing cause’ and may be a too difficult a hurdle to jump. There may be other issues such as homelessness and lack of supports that mean the client is not able to show compelling reasons.*

*“In the event that the police or the Court grant them a further bail, and they are then found again with cannabis, they are now in a position of having to show exceptional circumstances to justify the granting of bail which is an even harder test than showing compelling circumstances.*

*“Serious drug dependence or addiction is a long-term condition. It takes people time and space to improve. Many of our clients have been through really shocking experiences, and we need to work hard with our partners to put together supports that can help. When a client is locked up over a really minor issue in the context of their life and offending, it really throws it all out. The progress and supports and rehabilitation that is happening. It is massively disruptive to be imprisoned on so many levels. Even for clients who have been institutionalised, it stops any opportunities that presented as new. It’s like the world is stopping them in their tracks. We have court reports that show people are still testing positive to cannabis and that is seen as a failure. But the bigger point will be that they have stopped heroin use, which often has started in adolescence, and cannabis for them is a strategy for not using. From where I sit, it’s certainly a lesser harm to society than what they were doing to feed other drug habits.”*

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<sup>43</sup> Coghlan [Bail Review](#). Second Reading Speech [Bail Amendment \(Stage One\) Bill](#), Hansard, Legislative Assembly, 25 May 2017. Parliament of Victoria Parliamentary Debates (Hansard) [Second Reading & debate Bail Amendment \(Stage Two\) Bill](#), Thursday, 22 February 2018 pp 512 – 527, 537 – 564.

<sup>44</sup> [Media Release](#) - Growth in Victoria’s Remand Population Is Driving Increase in Prison Sentences: New Report, Sentencing Advisory Council, 4 February 2020. Bail Act 1977 (Vic), section 4AA, 4A, 4C & Schedule 2 offences. Crimes Act 1958 (Vic), Division 2 – Theft & Similar or Associated Offences, see for example section 74 (theft), section 88 (handle stolen goods), section 81 (obtain property by deception), as well provisions such as section 197 (damage property), section 192C (possession of identification information).

Why is this so important? The Victorian prison population has increased by 86% over the last 10 years (2009-2019),<sup>45</sup> with 37% of prisoners on remand in 2019 (an increase from 19% in 2014).<sup>46</sup> The number of female prisoners has doubled over that period, and numbers of Aboriginal prisoners have more than tripled.<sup>47</sup> 47% of female prisoners are held on remand,<sup>48</sup> and the largest proportion of unsentenced female prisoners are held on drug offences (21%).<sup>49</sup> 14% of unsentenced male prisoners are held on drug offences.<sup>50</sup> The numbers of prison receptions have also doubled over the last ten years, with remandees making up 86% of all prison receptions.<sup>51</sup> 18% of these prisoners were received multiple times over the course of the year (increased from 10% in 2008-2009).<sup>52</sup> The number of female prison receptions has more than tripled in the ten year period, and 88% of women were initially received into custody on remand. The number of receptions of Aboriginal prisoners has more than quadrupled, increasing from 7% to 13% of all receptions and from 10% to 18% for women.<sup>53</sup> Drug offences constituted 15% of unsentenced receptions and 13% of sentenced receptions.<sup>54</sup> There is also an increase in sentenced prisoners, with 'nearly one in three offenders sentenced to imprisonment who had spent time on remand receiv[ing] a time served prison sentence [in 2019], compared with just one in nine offenders six years prior.'<sup>55</sup> Finally, prisoner discharges have doubled between 2009 and 2019, with 41% of prisoners released without serving any time under sentence.<sup>56</sup>

FLS has recently published a report "*A Constellation of Circumstances - The Drivers of Women's Increasing Rates of Remand in Victoria*" (July 2020) that focuses on gendered impacts of Victoria's bail laws, referencing the 'constellation of circumstances' that contribute to women's criminalisation and incarceration, including homelessness, poverty, family violence, untreated health problems and use/dependence/ addiction. Cannabis possession was a prevalent charge in the offending leading to remand episodes in the range of cases investigated.<sup>57</sup>

The gravity of the problems of over-incarceration and discriminatory impacts is extreme. As the recent death of Collingwood resident Auntie Veronica Nelson exemplifies, a remand episode for shop theft can be fatal. We submit frank acknowledgement of the systemic harms the justice system has created and

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<sup>45</sup> Annual Prisoner Statistical Profile 2006-07 to 2018-19, [Annual Prisoner Profile](#), Corrections Victoria, Department of Justice and Community Safety - Corrections Victoria, State Government of Victoria, August 2020.

<sup>46</sup> Paul McGorrery, Manager, Legal Policy and Community Engagement, & Zsombor Bathy, Senior Data Analyst, Sentencing Advisory Council, [Time Served Prison Sentences in Victoria February 2020](#), Published by the Sentencing Advisory Council Melbourne, Victoria, Australia, © Copyright State of Victoria, Sentencing Advisory Council, 2020, p 3.

<sup>47</sup> Annual Prisoner Statistical Profile 2006-07 to 2018-19, [Annual Prisoner Profile](#), Corrections Victoria, Department of Justice and Community Safety - Corrections Victoria, State Government of Victoria, August 2020.

<sup>48</sup> [Ibid.](#)

<sup>49</sup> [Ibid.](#) when combined with 'other property offences', this total increases to 35%.

<sup>50</sup> [Ibid.](#) When combined with 'other property offences', this total increases to 25%.

<sup>51</sup> Annual Prisoner Statistical Profile 2006-07 to 2018-19, [Annual Prison Receptions](#), Corrections Victoria, Department of Justice and Community Safety - Corrections Victoria, State Government of Victoria, August 2020.

<sup>52</sup> [Ibid.](#)

<sup>53</sup> [Ibid.](#)

<sup>54</sup> [Ibid.](#)

<sup>55</sup> McGorrery & Bathy, [Time Served Prison Sentences in Victoria](#), February 2020, Sentencing Advisory Council, p 10.

<sup>56</sup> Annual Prisoner Statistical Profile 2006-07 to 2018-19, [Annual Prison Discharges](#), Corrections Victoria, Department of Justice and Community Safety - Corrections Victoria, State Government of Victoria, August 2020.

<sup>57</sup> Emma Russell, Bree Carlton, Danielle Tyson, Hui Zhou, Megan Pearce, Jill Faulkner (2020) [A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria](#), Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society: Melbourne.

continues to create, including by failing to engage in public health approaches to drug use, trauma and low-level acquisitive offending, requires urgent attention and leadership.

*Case study 4 - L is a 14 year-old child from a migrant refugee background. L is placed on bail for offending. Since getting in trouble, L has been making good progress and attending school regularly for the first time in a long time. L is on a bus and places his feet on the seats. He is pulled off and found by police after a search to be in possession of cannabis (personal use). L is remanded for committing an indictable offence on bail and his other counts of bail are revoked. L spends a month in prison on remand as a result of the possession offence.*

*Case study 5 - F is an Aboriginal man in his mid 40s. By 13, F was on the streets having escaped a violent family home and had also left school. F's substance use issues with heroin started around this time and he reports being in and out of prisons from the age of 14. F spent a large deal of his adolescence at Turana Youth Training Centre, both as a ward of the state, and as a sentenced juvenile offender. F was the victim of significant institutional abuse. The majority of F's adult life has involved imprisonment for low level offending linked to his drug use issues and homelessness.*

*Last year, F was placed on bail for further offending. F made the decision to break the cycle of use and prison. He began to address a 30-year habit through drug rehabilitation counselling, successfully finishing a voluntary program of rehabilitation and stabilising on opiate replacement therapy. F reconnects with family for the first time in many years and is looking at renting his own house. After nine months, F has a minor relapse and is found by police with a small portion of cannabis. F is remanded for committing an indictable offence on bail, and the progress that had been made in the past 9 months is put in jeopardy.*

Recommendation 4 - That legislative amendments are made to ensure drug use and possession, and low-level property offences, no longer trigger presumptions against bail that result in custodial episodes. That the purpose of bail and parole reforms are revisited, and unintended impacts on Victoria's remand prison populations are addressed as a matter of extreme urgency.

### **Drug driving and impairment**

Failing a road side drug test attracts significant penalties. In Victoria, a first-time offence includes a fine of three penalty units, a six-month suspended license with the need to complete a Drug Driver program within the first three months or the license will be cancelled. If going to court for this offence, the penalties increase significantly, with an added zero BAC condition for three years. The court may also record a conviction. For repeat offenders, the fines increase substantially, with the availability for people with more than two offences to be fined around \$20,000. Repeat offenders also have their license cancelled for at least 12 months. These penalties were increased in April 2018.<sup>58</sup>

Unlike random breath testing, which checks for levels of alcohol in the blood, roadside drug tests detect the presence of any THC, which can remain in the system for weeks. The result is that there is no way to discern between those who are impaired and those who have consumed cannabis days ago, or even passively consumed the drug. We submit the test of impairment should be adequate to work to

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<sup>58</sup> Vic Roads, [Drug Driving Penalties](#).

minimise harm by testing drivers for levels of THC scientifically proven to cause impairment for driving. That is, a similar approach for drink driving should be taken for driving and drugs. This approach has been used in Norway since 2012. The limits for THC and other drugs were based on a series of scientific studies compared with alcohol impairment. These limits are regularly updating in response to research to ensure the limits represent actual risks of impairment. Currently, the THC level considered equal to 0.05% BAC is at 3ng/ml.<sup>59</sup>

The Impact of taking away someone's license for detectable levels of THC can be significant. For many people it could mean a loss of job, could damage relationships and have a run off effect with serious consequences. The impacts of these laws have a disproportionate impact. For rural communities, losing a license can be devastating. Without alternative means to get to work, or where work requires a license, it can mean losing work permanently.

This process can also include a criminal conviction. As previously stated, a conviction can have significantly damaging impact on current or future work prospects.

Recommendation 5 – That the charge of 'drive whilst impaired' is accepted as adequate protection against unsafe use of cannabis in connection with handling of a motor vehicle.
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### ***Conclusion***

We note our submissions is accompanied by a submission from the Yarra Drug & Health Forum endorsing our recommendations.

The Yarra Drug & Health Forum (YDHF) is a dynamic, adaptive and educative local network committed to identifying and responding to the health and social needs of the community in Yarra. The Forum aims to ensure health and community relationships are minimally harmed by drug use in the City of Yarra – this includes the impact of drugs on individuals, families and friends, residents and visitors to the area and local businesses.

We are grateful for the opportunity to provide submissions to the Committee.

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<sup>59</sup> ['Driving under the influence of non-alcohol drugs – legal limits implemented in Norway'](#), Published by: Norwegian Ministry of Transport and Communications.