



SUBMISSION TO THE INQUIRY INTO THE USE OF CANNABIS IN VICTORIA

SEPTEMBER 2020

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal community-controlled organisation (ACCO), which was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victorians.¹ Our vision is to ensure that Aboriginal people are treated equally before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

Legal Services

Our legal practice operates in the areas of criminal, family and civil law. We represent women, men and children who come to us for assistance, and are only hindered in doing this where there is a legal conflict of interest. If this is the case, we provide warm referrals to other suitable legal representatives. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers play, who are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

¹ The term “Aboriginal” is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.

Our Criminal Law Practice provides legal assistance and represent Aboriginal people in immediate court dealing such as bail applications, defending or pleading to charges and sentencing. This includes matters in both the mainstream and Koori Court.² Many of our clients come from backgrounds where they may have been exposed to family violence, poor mental health, homelessness and poverty. We try to understand the underlying reasons that have led to the offending behaviour and ensure that prosecutors, magistrates and legal officers are aware of this. We support our clients to access support that can help to address underlying reasons for offending and reduce the risk of recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in relation to a range of civil law issues, including: infringements, tenancy, victims of crime, police complaints, discrimination and human rights, Personal Safety Intervention Orders (PSIVO) matters, Coronial Inquests including in relation to deaths in custody, prisoners' rights, consumer law issues and Working With children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and represents families in family law and child protection matters, where we advocate for support to ensure that families can remain together, and for compliance with the Aboriginal Child Placement Principle wherever children are removed from their parents' care.

Community Justice Programs

VALS run a Custody Notification System (CNS) which requires Victoria Police to notify VALS within 1 hour every time an Aboriginal person in Victoria is taken into police custody.³ Since October 2019, this requirement is legislated under the *Crimes Act 1958*.⁴ Once a notification is received, VALS will contact the relevant police station to carry out a welfare check and provide legal advice if required.

The Community Justice Team also run the following programs:

- Family Violence Client Support Program⁵
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)⁶
- Regional Client Service Officers
- Baggarook Women's Transitional Housing program.⁷

Policy, Research and Advocacy

VALS operates in various strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the legal system in Victoria. VALS works closely with the Aboriginal Justice Caucus ad ACCOs in Victoria, as well as other key statehooders within the legal sector.

² In 2017-2018, VALS provided legal services in relation to 1367 criminal law matters, and in 2018-2019, VALS provided legal services in relation to 1,253 criminal law matters.

³ In 2017-2018, VALS received and responded to 11,104 notifications through the CNS and in 2018-2019, we received 12,293.

⁴ Ss. 464AAB and 464FA, *Crimes Act 1958* (Vic).

⁵ VALS has three Family Violence Client Support Officers (FVCOS) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

⁶ The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

⁷ The Baggarook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

VALS is also engaged in research projects, including a three-year project to pilot Aboriginal Community Justice Reports in Victoria. The project is being carried out in partnership with the University of Technology, Griffith University, the Australasian Institute of Judicial Administration (AIJA) and Five Bridges Aboriginal and Torres Strait Islander organisation (Queensland).

ACKNOWLEDGEMENTS

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past, present and emerging. We also acknowledge all Aboriginal and Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Ren Flannery, Policy Research and Advocacy Officer
- Kin Leong, Principal Legal Officer, Criminal Law Practice
- Dusan Stevic, Lawyer, Civil Law and Human Rights Division
- Andreea Lachsz, Senior Policy, Research and Advocacy Officer
- Emily Yates, Lawyer, Criminal Law Practice
- Kurstyn Miller, Lawyer, Criminal Law Practice
- Siobhan Doyle, Senior Lawyer, Civil Law and Human Rights Practice
- Bennet Harrison, Intern, University of Melbourne
- Claire Topsom, Intern, University of Melbourne

EXECUTIVE SUMMARY

The Victorian Aboriginal Legal Service (**VALS**) welcomes the opportunity to make a submission to the Legislative Council Legal and Social Issues Committee *Inquiry into the use of Cannabis in Victoria* (2020). VALS' submission highlights the disproportionate impacts of criminalisation of cannabis use and possession of cannabis for personal use on our criminal legal service clients.

Addressing low-level drug offences through the criminal justice system comes at an enormous financial, social and health cost to the community and continues to fail in reducing the harm of cannabis disorders in affected community members. Changes to the Bail Act mean that someone charged with possession of cannabis (an indictable offence) is remanded unless they are able to demonstrate exceptional circumstances, despite the fact the finding of guilt in relation to the charge is unlikely to result in a term of imprisonment.

VALS is particularly concerned by the over-representation of Aboriginal and/or Torres Strait Islander people in the criminal justice system, where contact is a result of low-level cannabis offences. In particular, VALS notes the correlation between ongoing trauma resulting from colonisation, and substance use and deaths in custody, highlighting a system-wide failure to address the complex contributing factors of substance misuse in Aboriginal communities. Rehabilitation from drug disorders is an individual journey that commonly includes relapse as part of recovery. Addressing public health and safety concerns through the criminal justice system only contributes to the underlying causes and perpetuates disadvantage and further contact with the criminal justice system.

VALS calls on the Victorian Government to decriminalise the use of cannabis and possession for personal use and take a community health-based approach to supporting the education, recovery and rehabilitation of affected individuals and communities.

As outlined in this submission, there are alternative approaches to addressing the misuse of cannabis through a culturally-responsive, community health approach that addresses health, mental health, and social impacts of cannabis use on people who use cannabis, their families and their carers.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: The use of cannabis and the possession of cannabis for personal use should be decriminalised.

- a. The use of cannabis and the possession of cannabis for personal use should trigger a health response, not a criminal justice response.

Recommendation 2: In the event that the use of cannabis and the possession of cannabis for personal use is not decriminalised:

- a. Cautions should be utilised as a first preference;
- b. To improve access to cautions and diversion, they should be available regardless of someone's criminal history, and the necessity for police consent to and recommendation for diversion should be removed;
- c. Diversion, the Court Integrated Services Program (CISP) and other support services, including culturally appropriate services provided by Aboriginal Community Controlled Organisations, should be expanded, to avoid recordable court outcomes;
- d. The Victorian Drug Court's criteria should be broadened to allow for low-level cannabis offences to be dealt with through a rehabilitation-focused approach;
- e. The use of cannabis and the possession of cannabis for personal use should be a summary offence.

DETAILED SUBMISSION

The use of cannabis and possession of cannabis for personal use should be decriminalised

Impacts of criminalising cannabis

Personal use and possession of cannabis is very low risk of causing any harm to the public and yet the disproportionate impact of unnecessary engagement with the criminal justice system can have significant consequences on a person's life and wellbeing. Approximately 8000-9000 cannabis possession offences are recorded each year in Victoria.⁸ Of these, 27% of offenders are sentenced to imprisonment for possession and 16.9% of offenders are sentenced to imprisonment for cannabis use.⁹

Engagement with the justice system can have life-altering impacts on a person, their family and community, including:

- Continued overrepresentation of vulnerable communities, such as Aboriginal and/or Torres Strait Islander people in the justice system, leading to ongoing interactions with the justice system that can lead to increased distrust between communities and the criminal justice system.
- Increased risk of future engagement with the criminal justice system, and risk of receiving a custodial sentence and more Aboriginal deaths in custody.

⁸ Crimes Statistics Agency, Between 2015-2020: Crime Statistics Agency data, Recorded Drug Offences by Drug Type, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/recorded-offences>.

⁹ Sentencing Advisory Council, SACStat Magistrates' Court Data, Possess Cannabis 1 July 2016 to 30 June 2019, https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/9719_73_1.7.html

- Trauma caused or exacerbated by the experience of engaging with the police, courts, and the justice system, including incarceration.
- Impaired ability to engage in employment, travel, and volunteer work due to having a criminal conviction, discrimination, and inability to meet VISA or Working with Children Check requirements.
- Disruption to community supports that are more likely to lead to meaningful recovery and rehabilitation than a criminal justice response.
- Impaired ability to seek appropriate support due to community and public stigmatisation of drug use.

Impacts of criminalising cannabis on Aboriginal and/or Torres Strait Islander people

Although the National Drug survey shows that Aboriginal and/or Torres Strait Islander people who used cannabis in the last 12 months is on the increase,¹⁰ the most recent sentencing report by the Sentencing Advisory Council (**SAC**)¹¹ shows that:

Non-Koori offenders are far more likely to be sentenced for a traffic offence (16.3% versus 8.6% for Koori offenders), a drug offence (8.2% versus 4.0% for Koori offenders) and a deception offence (7.0% versus 3.2% for Koori offenders).¹²

NSW data from 2013-2017 shows that police are more likely to pursue an Aboriginal person through the courts for possessing a small quantity of cannabis than their non-Aboriginal counterparts.¹³ The Guardian revealed that:

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.¹⁴

VALS notes that the Fitzroy Legal Service' submission to the Committee identified that Aboriginal communities are uniquely impacted by low-level drug offences such as;

- Challenges with kinship arrangements
- Employment exclusion from government funded organisation
- Systemic discrimination and stigmatisation.¹⁵

It is therefore important to take into consideration the historical and systemic contributing factors that lead to low-level drug use and engagement with the justice system amongst the Aboriginal community. The recent *Closing the Gap* report identified that 53% of the health gap between non-Aboriginal and Aboriginal people in Australia is attributable to social determinants of health. The remaining 47% was the result of institutional

¹⁰ Australian Institute of Health and Welfare, 2020 National Drug Strategy Household Survey 2019 – Perceptions and policy support, <https://www.aihw.gov.au/getmedia/de5f3a66-e40e-4607-830b-7e1e43794404/aihw-phe-270-Chapter9-Perceptions.pdf.aspx>

¹¹Sentencing Advisory Council, SACStat Magistrates' Court Data, Possess Cannabis 1 July 2016 to 30 June 2019, https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/9719_73_1.7.html.

¹² Ibid.

¹³M. McGowen and C.Knaus, 2020, The Guardian, *NSW police pursue 80% of Indigenous people caught with cannabis through courts*, 10 June, accessed 9 September 2020 <https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>.

¹⁴ Ibid.

¹⁵ Fitzroy Legal Service, *Submission to the Inquiry into use of Cannabis in Victoria – Legislative Council Legal & Social Issues Committee 2020*

racism, interpersonal racism and intergenerational trauma¹⁶: ‘The loss of connection to cultural life, trauma, racism and social exclusion contribute to poorer health including harmful alcohol and drug consumption.’¹⁷ The link between colonisation, trauma, drug use, systemic discrimination and deaths in custody needs to be recognised when formulating a best-practice approach to addressing low-level drug use in Aboriginal communities in a holistic, meaningful and rehabilitative way.

Decriminalisation of cannabis use and possession of cannabis for personal use

In Victoria, under s73 of the *Drugs, Poisons and Controlled Substances Act, 1981* (the Act), Cannabis is classified as a drug of dependence and possession is an indictable offence.¹⁸ The maximum penalty for a small quantity of cannabis is 5 penalty units; if the amount is more than a small quantity but not a traffickable quantity, the maximum penalty is 1-year imprisonment and/or 30 penalty units.¹⁹ Unless authorised for the purpose of the *Voluntary Assisted Dying Act*, anyone who has or attempts to have in their possession a drug of dependence is guilty of an indictable offence and liable to a penalty of not more than 400 penalty units or to level 6 imprisonment (5 years maximum) or to both that penalty and imprisonment.²⁰

While there are attempts to divert people out of the court or impose low level sentencing options for cannabis possession, criminalisation still often leads to a criminal record and even imprisonment.²¹ Criminal penalties lead to harmful and long-lasting consequences that are in addition to the harm associated with drug use.²²

The disproportionate negative impacts of criminalisation of low-level drug offences on vulnerable community members is the impetus for VALS recommending full decriminalisation of possession and use of cannabis under s73 and s75 of the Act. As seen in other jurisdictions, decriminalisation not only allows reallocation of court and legal resources, but vastly improves social and health outcomes for community and families. VALS notes that the ACT is addressing low-level drug offences with a community health-based approach.

A health-based response is needed

Research has found that a number of therapeutic behavioural treatments, such as cognitive-behavioural therapy, contingency management and Motivational Enhancement Therapy, have shown to be the most effective way to manage, recover and rehabilitate from marijuana disorder.²³ The most effective and appropriate response to cannabis use and possession for personal use is through a health-based approach rather than a criminal justice response. It is highly inappropriate that courts are making an assessment of a person’s use of cannabis rather than the appropriate community health services, who can adequately guide a person to access legal medicinal cannabis (discussed further below) or appropriate therapeutic rehabilitative treatment and support.

¹⁶ Bourke C, Marrie H, Marrie A, 2019, *Transforming institutional racism at an Australian hospital: Australian Health Review*, volume 43, issue 6, pg. 612-613

¹⁷ Nathan, S, Maru, K, Williams, M, Palmer, K & Rawstorne, P 2020, *Koori voices: self-harm, suicide attempts, arrests and substance use among Aboriginal and Torres Strait Islander adolescents following residential treatment*, *Health & Justice*, vol. 8, no. 1, pp. 2

¹⁸ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s73(1)(a)(i).

¹⁹ *Ibid.* As referenced in the Victorian Legal Aid, *Submission to the Inquiry into the Use of Cannabis in Victoria*, 2020, p.3

²⁰ *Drugs, Poisons And Controlled Substances Act 1981* (Vic) s 73(1)(c).

²¹ Fitzroy Legal Service, 2020, *Submission to the Inquiry into the Use of Cannabis in Victoria*

²² *Ibid.*

²³ *Ibid.*

CASE STUDY – Maranguka Project, Bourke²⁴

This project in justice reinvestment and therapeutic responses to social problems was led by the Bourke Tribal Council and involved collaboration with NGOs and philanthropic organisations, reducing drug related offences by 39 percent between 2015-2017 (Allam 2018).²⁵ The Maranguka project redirected funds from prisons and policing to therapeutic projects and investment in the people of the community. Domestic violence, reoffending, vehicle related offences and assaults all featured similarly significant decreases. In the context of the flaws of top-down enforced prohibition, the precarity of refuge offered by isolated safe use sites, and the scale of harm caused by medical institutional racism, the imagination and leadership of Bourke represent a response to social problems and drug use that strengthens communities.

Impacts and outcomes of decriminalisation in other jurisdictions

1. ACT

We know people in the ACT use cannabis. We want to encourage people to get the support they need through our health system and not be forced through the justice system. Our health services are here to support you.²⁶

The Australian Institute of Health and Welfare National Drug Strategy Household survey (2016)²⁷ found that cannabis was the most widely used illicit drug in the ACT, followed by the illicit use of prescription painkillers, opioids and other pharmaceuticals, prompting the ACT Government to introduce legislative change on 31 January 2020 with regards to the use and possession of cannabis.

If someone is aged 18 and over in the ACT, they are permitted to possess up to 50 grams of dried cannabis or up to 150 grams of fresh cannabis, grow up to two cannabis plants per person with a maximum of four plants per household, and use cannabis in their home (personal use).²⁸

2. International approaches

In a response to major drug addiction issues in the 1990's, Portugal led the way in decriminalising drug use. The Commission for the National Strategy for Drug Control was created, and as a result of its findings, drug use was decriminalised in 2001. The Commission found that drug use was better managed through

- primary prevention
- treatment
- social rehabilitation
- training and research
- risk reduction and
- combatting drug trafficking.²⁹

²⁴ C.Robinson, 2020, as provided by Fitzroy Legal Service, *Literature review*

²⁵ L. Allam, 2018, The Guardian, *Unique community policing sees crime rates plunge in Bourke*, <https://www.theguardian.com/australia-news/2018/oct/09/unique-community-policing-sees-rates-plunge-in-bourke>

²⁶ ACT Government website, *Cannabis*, <https://www.act.gov.au/cannabis/home>

²⁷ ACT Drug Strategy Action Plan 2018-2021, https://www.health.act.gov.au/sites/default/files/2019-03/ACT_Drug_Strategy_Action_Plan_2018-21.pdf; citing the Australian Institute of Health and Welfare. National Drug Strategy Household Survey: Detailed findings. Drug Statistics series no.31. Cat. no. PHE 214. Canberra: AIHW, 2017

²⁸ ACT Government website, 2020, *Cannabis*, <https://www.act.gov.au/cannabis/home>

²⁹ Library of Congress, 2020, *Decriminalization of Narcotics: Portugal*, https://www.loc.gov/law/help/decriminalization-of-narcotics/portugal.php#_ftn4

Goulão, the national drug coordinator for Portugal, credited as being an architect of Portugal's drug policy stated that:

*Legalising a single substance would call into question the foundation of Portugal's drug and harm-reduction philosophy. If the drugs aren't the problem, if the problem is the relationship with drugs, if there's no such thing as a hard or a soft drug, and if all illicit substances are to be treated equally, he [Goulão] argued, then shouldn't all drugs be legalised and regulated?*³⁰

Studies comparing countries such as Spain and Italy have shown that the Portuguese decriminalisation did not lead to major increases in drug use. Indeed, evidence indicates reductions in problematic use, drug-related harms and criminal justice overcrowding.³¹

Likewise, in Israel, the possession of a home-grown marijuana plant is no longer punishable by law. Civilians found to be carrying small amounts of cannabis in public without medical authorisation will now face fines rather than be subjected to criminal proceedings.³² The Israeli approach is to address, rather than penalise, the use of cannabis amongst its civilians.

Justice Minister Ayelet Shaked states that:

*Whether one supports use of cannabis or is opposed, it is wrong to judge cannabis users per criminal law and its derivatives.*³³

While the US state of Colorado decriminalised cannabis in 1975 and legalised medical cannabis in 2000, decriminalisation of recreational cannabis only took effect in 2012, and legislated for the sale of cannabis in 2014.³⁴

CASE STUDY – High Costs Program, education and prevention campaign (Denver, Colorado)

High Costs is a youth education and prevention program created to educate young people aged 13-17 years old about how cannabis use can affect their passions, pursuits, and future. High Costs is based in research gathered in part from the *2015 Healthy Kids Colorado Survey* and the Colorado Department of Public Health and Environment *2016 Health Statements and Monitoring Health Concerns Related to Marijuana in Colorado Survey*. The program is also informed by the very audience it is targeting, via a city organised youth commission and youth surveying and focus groups. Instead of promoting scare tactics, Denver's campaign focuses on providing facts for teens, so they have accurate peer-to-peer conversations.³⁵

³⁰ S.Ferreira, 2017, The Guardian, [*Portugal's radical drugs policy is working. Why hasn't the world copied it?*](#)

³¹ C.E.Hughes, A.Stevens, [*What Can We Learn From The Portuguese Decriminalization of Illicit Drugs?*](#) The British Journal of Criminology, Volume 50, Issue 6, November 2010, Pages 999–1022.

³² S.Somerset, 2019, Forbes (online) *Israel Decriminalizes Adult Use Cannabis During CannaTech Conference In Tel Aviv*, <https://www.forbes.com/sites/sarabrittanyosomerset/2019/04/05/israel-decriminalizes-adult-use-cannabis-during-cannatech-conference-in-tel-aviv/>

³³ O.Liebermann and K.Fox, 2017, CNN (online), *Israel Makes It Official: Cannabis Is Not a Crime*, <https://edition.cnn.com/2017/03/06/health/israel-decriminalizes-cannabis-marijuana/index.html>

³⁴ J.T.Hua, M.Afshar, B.J.Clark, E.J.Kovacs & E.L. Burnham, 2020, *The relationship of cannabis decriminalization in Colorado and cannabis use in individuals with alcohol use disorders*, Journal of Cannabis Research, Vol. 2, Article 13 <https://jcannabisresearch.biomedcentral.com/articles/10.1186/s42238-020-00018-0#ref-CR17>

³⁵ Denver Government Website, 2020, *Youth Marijuana Education Campaign Proves Effective: New Survey Shows Denver's Education Campaign Influences Decision Making* https://www.denvergov.org/content/denvergov/en/denver-business-licensing-center/news-events/2019/Youth_Marijuana_Education_Campaign_Proves_Effective.html?fbclid=IwAR21ZwXc8mjkE8iuNf6cqBtM7cZRDIoNhi6n n3jb50jQfvolpxZ0_1VOEg

In 2019, after 12 months of the program, the City Officials surveyed 537 young people aged 13-17 to assess its effectiveness. The survey revealed the number of male and female respondents who said they did not currently use cannabis rose by 8% from the previous year to 90%.³⁶ ‘Teens who consumed marijuana on a monthly and weekly basis declined slightly, down one percentage point to 7% and 4%, respectively. And those in the “several times a week” category remained flat at 4%.’ The survey recorded a 75% awareness of the High Costs campaign, with participants stating that its messaging discouraged them from using cannabis.³⁷

The High Costs campaign survey usage results mirror the latest Healthy Kids Colorado survey data from 2017, which found 81% of teenagers state-wide do not consume marijuana.³⁸

Positive Outcomes of decriminalising cannabis

There is an overwhelming amount of research indicating that decriminalisation will not increase cannabis use or crime. A report on decriminalisation by the University of NSW, National Drug and Alcohol Research Centre and Drug Policy Modelling Program found the following outcomes of decriminalisation of drug use (not just cannabis):

- ‘Reduces the costs to society, especially the criminal justice system costs;
- Reduces social costs to individuals, including improving employment prospects;
- Does not increase drug use;
- Does not increase other crime;’
- May, in some forms, increase the numbers of people who have contact with the criminal justice system (net widening).’³⁹

The National Drug Strategy Household Survey shows that public perception of cannabis Australia-wide:

‘Community tolerance has increased for cannabis use... 2019 was the first time more people supported the legalisation of cannabis than opposed it (41% compared with 37%). Alcohol (45%) continued to have the highest level of personal approval of regular adult use than any other drug. For the first time, cannabis had a higher level of approval than tobacco (19.6% compared with 15.4%). The level of approval for cannabis has continued to increase since 2007 (6.6%).’⁴⁰

‘If cannabis were to be legalised, nearly 4 in 5 (78%) people claimed they would still not use it. However, there was an increase from 2016 to 2019 in the proportion of people who said they would ‘try it’ (7.4% to 9.5%) and ‘use it more often than you do now’ (1.8% to 2.9%).’⁴¹

³⁶ Ricciardi, T, 2020, The Denver Post, *More than 80% of Denver teens say they don’t use marijuana*, accessed 9 September 2020, https://www.denverpost.com/2020/02/26/denver-teen-marijuana-use-survey/?fbclid=IwAR1cCp9_GxGPABcjVy_LZdnz9jDJxhtq04_KiOg_r4W1ESw4QZGXPXH0J7U

³⁷Ibid.

³⁸ Ricciardi, T, 2020, The Denver Post, *More than 80% of Denver teens say they don’t use marijuana*, accessed 9 September 2020, Healthy Kids Colorado Survey and Smart Source Information, https://www.denverpost.com/2020/02/26/denver-teen-marijuana-use-survey/?fbclid=IwAR1cCp9_GxGPABcjVy_LZdnz9jDJxhtq04_KiOg_r4W1ESw4QZGXPXH0J7U; https://www.colorado.gov/cdphe/hkcs

³⁹ UNSW Australia, National Drug and Alcohol Research Centre and Drug Policy Modelling Program, 2017, *Decriminalisation of drug use and possession in Australia – A briefing note*, https://www.parliament.vic.gov.au/images/stories/committees/lrcsc/Drugs_Submissions/164_2017.03.17 - NDARC - submission - appendix a.pdf

⁴⁰Australian Institute of Health and Welfare *National Drug Strategy Household Survey 2019 – Perceptions and policy support*, <https://www.aihw.gov.au/getmedia/de5f3a66-e40e-4607-830b-7e1e43794404/aihw-phe-270-Chapter9-Perceptions.pdf.aspx>

⁴¹Ibid.

Positive health outcomes of cannabis use

There is also a growing body of evidence that certain cannabinoids are effective in the treatment of chronic pain, particularly as an alternative or adjunct to the use of opiates, when the development of opiate tolerance and withdrawal can be avoided. [Cannabinoids](#) have been tested in several experimental models of autoimmune disorders such as multiple sclerosis, rheumatoid arthritis, colitis and hepatitis and have been shown to protect the host from the pathogenesis through induction of multiple anti-inflammatory pathways.⁴²

The National Institute on Drug Abuse, *Marijuana Research Report*,⁴³ found that physiological symptom management emerged as one of the key perceived benefits to cannabis use among participants. The majority who reported symptom relief stated that cannabis was helpful for pain and insomnia. Participants reported that cannabis improved emotional and mental well-being, such as by reducing anxiety, depression, and stress. Several reported using cannabis to successfully cope with post-traumatic stress disorder or depression relief.⁴⁴

In 2016, Victoria was the first Australian state to legalise access to medicinal cannabis (*Access to Medicinal Cannabis Act 2016*),⁴⁵ which has driven policy reform nationally. Cultivation and manufacturing is covered by the Industry Development Plan.⁴⁶

Recommendation 1: The use of cannabis and the possession of cannabis for personal use should be decriminalised.

- a. The use of cannabis and the possession of cannabis for personal use should trigger a health response, not a criminal justice response.

Legal issues arising

There are laws that relate to cannabis in Commonwealth legislation. This should not be a reason for the Victorian Government not proceeding with the decriminalisation of cannabis possession and personal use. The ACT Government has stated that its view is that ‘the ACT has the right to legislate on this issue but, there is a possibility that the Commonwealth will try to test the ACT’s laws in the courts. The ACT Government has taken steps to minimise this risk in the way we have structured our amendments. There will still be an offence in ACT legislation, but with an exception for persons 18 years of age and over. The Government has taken this approach to manage potential issues that may arise regarding consistency with Commonwealth laws.’⁴⁷

⁴²P.Nagarkatti, R. Pandey, [S.A.Rieder](#), [V.L.Hegde](#) and [M.Nagarkatti](#), NCBI, August 2010, *Cannabinoids as novel anti-inflammatory drugs*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2828614/>

⁴³ National Institute on Drug Abuse, 2020, *Marijuana Research Report* <https://www.drugabuse.gov/publications/research-reports/marijuana/available-treatments-marijuana-use-disorders>

⁴⁴Ibid.

⁴⁵ Victorian State Government, Medicinal Cannabis Act (2016)

⁴⁶ Victorian State Government, 2018, *Industry Development Plan: Developing a Medicinal Cannabis Industry in Victoria* https://agriculture.vic.gov.au/_data/assets/pdf_file/0003/536412/11257-DEDJTR-AG-Medicinal-Cannabis-Industry-Development-Plan -WEB.pdf

⁴⁷Ibid.

In the event that the use of cannabis and the possession of cannabis for personal use is not decriminalised

Cautions and Diversions

Under the cannabis cautioning scheme, police have the option to caution an adult accused of possession of a small quantity of cannabis provided they admit possession and it is their first or second offence. Likewise, a child maybe cautioned provided they have not previously received a drug caution or diversion (*Victoria Police Manual 2020*). There is evidence that cautioning, diversion and early intervention reduces the rate of reoffending by young people, in contrast to court outcomes following criminal proceedings.⁴⁸ When assessing outcomes and cost-effectiveness of police diversion of cannabis offences, Shanahan et el, found that diversion for minor cannabis offences can save money and lead to better social outcomes.⁴⁹

It is important to recognise that drug use is a complex and nuanced issue that cannot be addressed either with a ‘one-size fits all’ sentencing outcome in court or a conviction. The benefits of the cannabis cautioning scheme, deriving from its flexible approach and avoiding the lifelong stigma of a recordable court outcome, are limited by the fact that this option is available only once or twice to people. People’s journeys to address their drug issues is likely to take time, with potential relapses along the way.

Of particular concern to VALS is evidence from NSW that Aboriginal people are less likely to receive a caution for cannabis use and are more likely to be brought before a court.⁵⁰ While there has been no equivalent study in Victoria, it is recognised that Aboriginal and/or Torres Strait Islander people are less likely to benefit from diversion programs, with only 3% of the Victorian population identifying as Aboriginal, yet representing 8% of the prison population and only 0.76% of the matters referred to the Criminal Justice Diversion Program.⁵¹ This issue becomes particularly more salient when considered in light of Aboriginal deaths in custody and the over incarceration of Aboriginal people. It is accepted evidence that police are more likely to take matters through the courts than recommend diversionary options and cautions.⁵²

CASE STUDY – Jane (a pseudonym)

Jane, a young Aboriginal woman, employed with no prior criminal history, was arrested, placed on bail and charged with possess a drug of dependence. Despite it being a small amount of cannabis, a caution was not given. The young woman suffers from post-traumatic stress disorder (PTSD) due to a previous abusive relationship and childhood trauma and abuse. Among the justifications raised by police prosecutors as to why diversion would not be suitable included:

- Diversion would not address the possibility of reoffending;

⁴⁸ ‘A young offender who participates in a diversion program is less likely to reoffend than a young person whose case is determined in court and is subsequently incarcerated, even where the seriousness of the offending is taken into account’; Caitlin Grover, ‘Youth Justice in Victoria’ Victorian Parliamentary Library & Information Service (Research Paper, April 2017) 7.

⁴⁹ M. Shanahan, C.Hughes and T.McSweeney, 2017, Australian Institute of Criminology, *Police diversion for cannabis offences: Assessing outcomes and cost-effectiveness*, <https://www.aic.gov.au/sites/default/files/2020-05/tandi532.pdf>

⁵⁰ M.McGowan and C.Knaus, 2020, The Guardian, *NSW police pursue 80% of Indigenous people caught with cannabis through courts*, <https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>.

⁵¹ Magistrates’ Court Victoria, *Criminal Justice Diversion Program; Diversion of Koori Accused before their Elders and Respected Persons*, Practice Direction No. 14 of 2016

⁵² Australian Bureau of Statistics (**ABS**) data shows that court actions as a proportion of police proceedings have increased from 52 per cent in 2012-13 to 71 per cent in 2018-19; conversely the proportion of non-court proceedings has decreased from a high of 65 per cent in 2012-13 to 32 per cent in 2018-19. ABS, 4519.0 *Recorded Crime – Offenders*, 2018-19, (Catalogue No 4519.0, 6 February 2020) *Police proceedings, selected states and territories - Table 27 Victoria*,

- Questioned what steps the young woman had already taken to address her cannabis use; and
- Assertions made by the prosecutor that cannabis use was not being utilised to address her mental health issues (PTSD), requested evidence that she had made steps to address her mental health issues with a professional.

There were no allegations of any other offences being committed, property, violent or otherwise.

The short comings of this approach are:

- A recorded court outcome of guilt would affect her ability to continue to work and travel;
- The exposure to the criminal justice system would not address the underlying issues that have led to her cannabis use, and it may well further traumatisise her; and
- The financial costs to the community in taking this matter through courts does not equate to the negligible damage visited upon the community by her simply possessing and using cannabis, with no allegations of other more serious offending.

This matter attempts to use the court to address the young woman's health issues with predominately punitive measures, but leads to potentially serious, lifelong repercussions. Further it reflects the view that a criminal charge and court outcome represents the end of a person's attempt to address their use and abuse of drugs, rather than an opportunity to begin, or re-engage in, the process of rehabilitation.

Drug Courts

The Victorian Drug Court (**VDC**) has the exclusive jurisdiction to make Drug Treatment Orders (**DTOs**).⁵³ DTOs are an alternative to a term of imprisonment for a person suffering from drug dependence. The purpose of DTOs are to facilitate rehabilitation, take account of the offender's dependency, reduce the level of criminal activity and reduce the offender's health risks.⁵⁴

The VDC may make a DTO if the accused person:⁵⁵

1. pleads guilty to an offence (other than a sexual offence or offence involving the infliction of bodily harm);
2. is dependent on drugs or alcohol and the dependency contributed to the commission of the offence;
3. is facing an immediate term of imprisonment not exceeding two years; and
4. is not subject to a parole order or sentencing order of the County or Supreme Court.

The criteria above are far too narrow and would exclude many accused who have been brought before a court for a low-level drug offences, such as use or possession of cannabis. If the recommendation that the decriminalisation of cannabis is not accepted, then the VDC's criteria should be broadened to allow for low level offences to be dealt with by a rehabilitation-focused approach.

Most drug courts across Australia require a likely term of imprisonment and drug dependence to be eligible for hearing, which often rules out possession offences and low-level drug offence. South Australia (SA), however, is a good example of a broader eligibility criteria in that it does not require a sentence of imprisonment. The SA drug court services adults (aged 18 years or above at the date of commission of the offences) who have either a current or previous dependency, that due to involuntary or forced abstinence is

⁵³ Sentencing Act 1991 (Vic) s 18Y.

⁵⁴ Sentencing Act 1991 (Vic) s 18X.

⁵⁵ Sentencing Act 1991 (Vic) s 18Z.

likely to return to drug use.⁵⁶ The person must be charged with an offence that is related to their drug use (but not necessarily a drug offence), for which they are likely to be imprisoned. In order to appear before the drug court the person must be willing to participate in the Drug Court Program, comply with a case management plan and plead guilty to the most serious offence or majority of the offences with which they have been charged.⁵⁷ The biggest limitation to the SA drug court is the requirement of the person live within the boundaries of Adelaide metropolitan area, Gawler City Centre and Nourlunga City Centre, at a residence that is suitable for electronically monitored home detention bail.⁵⁸ This is a policy that further disenfranchises Aboriginal people's ability to access drug court due to regional or remote living, and the discrimination and stigmatisation caused by the electronic monitoring devices.

The Western Australian drug court similarly has broader eligibility criteria in that there are no requirements that the person is likely to receive a term of imprisonment for any of their charges. The offender must demonstrate a drug related problem and willingness to participate in treatment. However the WA procedure still requires an indicated plea of guilty and a referral from the Magistrate or Judge presiding at any of these courts.⁵⁹ The request may be refused or adjourned to a later date depending on the capacity of the Perth Drug Court. Similarly to SA, WA has geographic restrictions, whereby the participant must be willing and able to move to Perth for the duration of their time before the Perth Drug Court.⁶⁰ If the participant resides outside Perth, they must have all outstanding legal issues resolved and be ready to plead and commit to intensive treatment and counselling,⁶¹ again limiting access to Aboriginal people.

Court Integrated Services Program (CISP)

Court Integrated Services Program (CISP) and other support services, including culturally appropriate services provided by Aboriginal Community Controlled Organisation should be expanded and well resourced.

Unfortunately, the regrettable reality for many people is that the first time they can access support is through interaction with the criminal justice system. In recognition of this, this should be viewed as an opportunity to engage people in programs and supports that will assist with their recovery and rehabilitation. CISP, and more specifically Koori Engagement Officers within CISP, are a valuable asset available to the courts. Unfortunately CISP is over-subscribed, under-resourced and not available at all courts, with many rural and regional courts unable to provide this service.⁶² With 50.7%⁶³ of Aboriginal Victorians residing in regional and rural areas, and comparatively higher drug use in regional and rural areas,⁶⁴ a great number of Aboriginal people fall on the wrong side of what could be viewed as postcode justice.

There is no doubt that the support of Koori Engagement Officers, Koori Court Officers, the various Aboriginal Co-ops, Aboriginal support services and Aboriginal medical and health services lead to greater success in diversion plans and outcomes for Aboriginal people. Services provided by organisations such as the Victorian Aboriginal Health Service (VAHS), Dardi Munwurro, Goolum Goolum, Bendigo and District Aboriginal

⁵⁶ Courts Administration Authority of South Australia Website, Drug Court, <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx>

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Magistrates Court of Western Australia, Drug Court, https://www.magistratescourt.wa.gov.au/D/drug_court.aspx

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² CISP is available in eight of ten metropolitan courts and only 12 of 41 regional courts <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>.

⁶³ Census Summary Data, 2016, <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20-%20Victoria~10002>

⁶⁴ Victorian Parliament, *Inquiry into Drug Law Reform*, March 2018, p.139.

Cooperative (BDAC), and Mallee District Aboriginal Services (MDAS), to name only a few, offer culturally appropriate and culturally safe community-based programs. These services assist in providing a holistic approach to rehabilitation, often complementing court supported programs through CISP, diversion, the Assessment and Referral Court (ARC) and the Koori Courts, all established to reduce both the incarceration and interaction of Aboriginal people and the criminal justice system.

Case study – Monty (a pseudonym)

A middle-aged Aboriginal male charged with possession and what could be considered low-level trafficking of cannabis (supplying personal use quantities to his close friends), with only one prior court outcome for non-violent offending, which was ultimately proven and dismissed. Monty has a strong employment history, but recently found himself unemployed due to health issues. He suffers extreme anxiety and depression since his teens due to a number of suicides of people very close to him.

Through the supports offered by the community, triggered through his unfortunate interaction with the courts, he is now engaging services and is working towards employment. This is a positive outcome which has been achieved pre-sentence, that addresses a number of the underlying issues that has exacerbated his cannabis use.

Unfortunately, the recording of a conviction or another recordable court outcome in this instance will work against the positive effect of his rehabilitation.

Possession for personal use should be a summary offence

An unfortunate consequence of the bail reform in 2018 means that someone charged with possession of cannabis (an indictable offence) may find themselves remanded and having to demonstrate exceptional circumstances, the test previously only applied to murder and treason, despite the fact the finding of guilt in relation to the charge is unlikely to result in a term of imprisonment.

The Bail reforms have increased the number of Aboriginal people on remand. Between July 2017 and July 2018, the percentage of unsentenced Aboriginal prisoners increased by 26% (from 2,262 to 2,852 prisoners; 9% for Aboriginal men, 16.8% for Aboriginal women). Between 2017-18 and 2018-19, the number of Aboriginal young people on remand increased from 57 to 71 (including 54 males and 17 females). This equates to a 24.6% increase. Most of these young people were remanded for 1 month or less. Aboriginal people in regional areas are disproportionately impacted by the bail reforms; in 2018-19, the Hume region had the highest number of Aboriginal young people on remand, followed by Loddon Mallee, Gippsland, Barwon South West, Grampians, and the metro regions.

VALS highlights the following from Victoria Legal Aid's Submission to the Committee:

The consequences of periods on remand include:

- a) Short periods on remand are particularly harmful for vulnerable people: long enough to disrupt existing supports, such as mental health treatment, training, employment and housing; but not long enough to get access to any meaningful support while in custody.
- b) Remand rates are indirectly affecting sentencing outcomes, because time spent on remand increases the likelihood that a court will ultimately impose a sentence of imprisonment, which has flow-on consequences.
- c) Remand rates may be contributing to the recidivism rate, because time in custody is criminogenic - people are much more likely to go back to prison once they have been there, even for short periods.
- d) Remand rates increase the risk of accused persons pleading guilty to offences where the evidence may not have sustained a finding of guilt. Our practice experience accords with recent research which found that

accused people who have limited prospects of bail may plead guilty in order to be released from custody, even if they have a legitimate challenge to some or all of the prosecution case.⁶⁵

Legislation should be amended so that possession of cannabis for personal use is a summary offence only. The beneficial effect of this two-fold, being that people would not need to demonstrate exceptional circumstances to be granted bail, and such an approach better reflects the gravity of the offence.

Recommendation 2: In the event that the use of cannabis and the possession of cannabis for personal use is not decriminalised:

- a) Cautions should be utilised as a first preference;
- b) To improve access to cautions and diversion, they should be available regardless of someone's criminal history, and the necessity for police consent to and recommendation for diversion should be removed.
- c) Diversion, the Court Integrated Services Program (CISP) and other support services, including culturally appropriate services provided by Aboriginal Community Controlled Organisations, should be expanded, to avoid recordable court outcomes;
- d) The Victorian Drug Court's criteria should be broadened to allow for low-level cannabis offences to be dealt with through a rehabilitation-focused approach;
- e) The use of cannabis and the possession of cannabis for personal use should be a summary offence.

⁶⁵ Victorian Legal Aide, 2020, Submission to the *Inquiry into use of Cannabis in Victoria*