SUBMISSION TO LEGISLATIVE COUNCIL SELECT COMMITTEE INTO ALTERNATE APPROACHES TO REDUCING ILLICIT DRUG USE AND ITS EFFECTS ON THE COMMUNITY

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1 Executive Summary

This submission argues that the *Misuse of Drugs Act 1981* should be substantially overhauled. It is divided into four main parts.

First, it considers the different rationales given for prohibiting certain conduct by the force of the criminal law, generally. Acknowledging wide differences of political opinion as to the proper scope of the criminal law, it argues that there is nevertheless broad consensus that our criminal law should pragmatically weigh the harms it seeks to avoid by criminal sanction with the harms caused by such sanctions. Consequently, an approach to the prohibition of substances which is granular and takes specific account of the various harms relating to various substances might assist in bridging what has been a persistent political divide.

Second, it examines in broad terms the current provisions of the *Misuse of Drugs Act*. It suggests that the Act is – compared to other areas of WA's criminal law – peculiarly unsubtle. There has been no substantive revision of the main terms of the law since its commencement in 1981. Consequently, there is presently a great divide between the current state of knowledge and community sentiment about particular substances and their broad treatment in the Act. This section also demonstrates some of the absurdities that arise from the structure of the Act in light of social and legal changes since 1981. It suggests that, whatever other recommendations this committee makes, a wholesale review of the provisions of the *Misuse of Drugs Act* generally is long overdue.

Third, the submission considers the effects of the present law in Western Australia. It notes that WA has one of the highest rates of incarceration for drug related offences in the country. In particular, it identifies that the second largest cohort of offenders in WA prisons are those whose most serious offence relates to possession or supply of a prohibited substance. Strikingly, this group is larger than those whose most serious offence is burglary or a related crime. This suggests that WA's legal scheme is incarcerating a very large number of offenders whose behaviour has not escalated to the more serious offences often related to drug and alcohol addiction. It suggests that an alternative approach to prohibition and incarceration is likely to have a substantial effect on the prison population in WA.

Fourth, it considers the present state of knowledge regarding harms associated with a particular prohibited substance – cannabis. It contends that our knowledge about the harms associated with cannabis has developed considerably in nearly 4 decades since the enactment of the *Misuse of Drugs Act*. In light of these developments, and the known harms associated with the criminalisation of cannabis, it suggests that a substantial revision of the Act as it applies to cannabis is warranted. The present state of knowledge suggests that considerably more harm is done by the criminalisation of cannabis than is prevented by it. Public sentiment regarding the criminalisation of cannabis has also changed dramatically. In light of this, this submission contends the committee should recommend a return to the decriminalisation of cannabis which WA undertook in 2003. It further contends that legalisation of cannabis should be seriously

considered.

Finally, the submission argues that the committee should recommend the same type of analysis as between potential harms avoided and actual harms incurred by criminalisation should be undertaken for all substances prohibited by the *Misuse of Drugs Act*. Such an approach would ensure that WA had laws relating to prohibited substances which are conceptually consistent, rigorous and evidence based which might command broad public support. Presently, it does not.

2 Introduction

This Select Committee is tasked with 'examining alternate approaches to reducing illicit drug use and its effects on the community'. In doing so it is to inquire into: approaches taken in other jurisdictions to reducing harm from illicit drug use; the effectiveness and cost of other jurisdictions' approaches as compared to Western Australia's and; the applicability of those approaches to the Western Australian context.

Comparison with other jurisdictions is laudable. A great many such reports have been undertaken. They are full of interesting and important data and conclusions. However, if this committee merely adds to their number, very little will have been achieved.

Presently, the law in Western Australia prohibits the possession of certain substances. Other jurisdictions prohibit other substances. To take one example, Western Australia prohibits the possession of methamphetamine, whereas North Korea does not. Absent any other context this comparison seems entirely unhelpful.

What context, then, is needed? Some empirical data – for example about rates of use of particular substances, the harms and benefits that their use occasions – might be of assistance. Yet, such data is already well known. Further, on its own such data is not particularly useful. Knowing that nicotine is more addictive than cannabis, for instance, does not tell us whether either substance should be prohibited by the State.

That is, the empirical data cannot tell us what the law should be. That question is a political one; it must be determined by the democratic processes. Empirical evidence might assist lawmakers to make such a determination, but it cannot make the determination for them.

This committee is ultimately considering what the law regarding certain substances in Western Australia *should be*. For any empirical data to be helpful, it must address that question.

This submission attempts to assist the committee by putting the relevant information in that context. It will be structured in three parts: (1) Why do we criminalise certain conduct; (2) Does Western Australia's current law relating to prohibited substances cohere with our rationale for criminalising conduct and; (3)Calls for a different approach.

3 Why do we criminalise certain conduct?

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. [Wolfenden Report, see 15]

The criminal law represents the most dramatic example of the State's power to regulate an individual's conduct. In practice, it imposes a sanction backed by the threat of force, which is intended to compel compliance with certain norms of conduct. Notoriously, political opinion as to the appropriate scope of the criminal law differs widely. Yet, regardless of the particular political philosophy one adopts, there is broad recognition that to criminalise conduct is a serious undertaking which must be justified.

3.1 Liberal approaches to drug laws

Broadly speaking there are two main approaches to how and when we ought to criminalise conduct; liberal and conservative. In general terms, liberals accept that there is a sphere of private conduct in which the State ought not to interfere.

Classical liberals like John Stuart Mill distinguish between private conduct – which the state ought not to regulate – and public conduct, which the State has a legitimate interest in regulating. Mill draws this distinction on the basis of his well-known 'harm principle'. That is, if the conduct is harmful to others it is public conduct which the State might properly regulate. If it is not harmful to others in the sense in which Mill uses the word it is private conduct into which the State ought not intervene. Thus Mill contends that the State has a legitimate interest in regulating conduct which harms those who do not consent to the harm; for example assault, theft, murder, etc. By contrast the state has no legitimate interest in regulating conduct which the individual consents to. As Mill puts it, 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'[20]

To be clear, Mill uses the term harm in a narrow and technical sense. While, plainly, smoking 'harms' the smoker, this would not, for Mill, be sufficient warrant to criminalise smoking.

Other liberal theorists agree with Mill that there is a line to be drawn between private and public conduct. However, they disagree as to where and how that line should be drawn. Rawls, for example, contends that human rights, rather than the harm principle, is the appropriate yardstick. Rights are those things which are in everyone's interest.

The practical difference between these two liberal positions is most commonly rhetorical. Classical liberals, following Mill, tend to discuss drug reform in terms of consent and individual liberty. Rawlsian liberals tend to emphasise the rights of individuals who happen to use drugs. Both, however, agree in

general terms that the state needs to point to serious and imminent harm to people other than the drug user – and not merely 'society at large' – to justify bringing to bear criminal sanctions. While such thinkers might differ on the appropriateness of drug taking for individuals, they are broadly consistent in the view that the matter ought not to be dealt with by criminal sanction.

3.2 Conservative approaches to drug laws

By contrast conservative thinkers reject the distinction liberals draw between 'private' and 'public' conduct. As Lord Devlin put it: 'It is not possible to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter'.[3] For Devlin – typical of many conservative thinkers – the issue is not whether 'harm' in Mill's sense can be found. Rather the question is practical. In any particular case, the State should weigh the individual's right to autonomy and privacy against society's interest in the suppression of vice, which is a risk to social cohesion generally. Devlin states a fairly standard conservative position when he contends that the State is entitled to regulate any conduct which incites a real feeling of reprobation, indignation, intolerance or disgust in the reasonable person, regardless of whether that conduct is public or private, or harmful in the relevant sense.

Pragmatic considerations dominate Devlin's analysis. That is, how the law actually operates – or might operate – is always a relevant consideration. So we might have general agreement that adultery is morally intolerable. Nevertheless, the practical consequences of outlawing adultery might speak against its criminalisation.

3.3 Relevance of theoretical approaches

It is unlikely that this committee can finally determine which approach to political philosophy is to be preferred. And, outside the rarefied discussions of political philosophers, few people formulate their political opinions with explicit reference and absolute fidelity to a theoretical framework. Rather, we should be aware of these different perspectives when we come to discuss the preferable legal framework.

Much of the political debate about the criminalisation of certain substances is intractable because different groups bring different – and incommensurate – values to the discussion. In the most common case, 'liberal' advocates focus on the relevant harms – again in the narrow and technical sense that term is used by Mill – caused by drug use. However standard 'conservative' advocates disagree about when and how discussion of such harms is relevant. Equally conservative advocates who focus on the perceived morality of drug taking find that such a perspective is largely irrelevant to liberal theorists.

The consequence is that both sides of the debate talk at cross purposes. Hopefully by articulating the basic assumptions each side brings to the discussion – at least in general terms – we might better focus on areas in which each side's reasoning overlaps.

Specifically, liberals and conservatives might agree that where legislative intervention itself causes harm, there might be pragmatic reasons to not legislate. Additionally, both sides might agree that the greater and more serious the risk to social cohesion in any particular case, the more appropriate it is for the State to intervene.

Consequently, this submission will focus on just those two areas. Rather than adopting any particular ideological approach, it will frame discussion of WA's drug policy in light of the practical consequences of our laws and the evidence for suggesting that any particular substances poses a real risk to social cohesion, and therefore might be a matter about which both liberals and conservatives might agree, even if for different reasons.

4 WA's present law on illicit drug use

Since the passage of the *Misuse of Drugs Act 1981* WA's approach to the regulation of illicit substances has not changed substantially. I have taught the provisions of the *Misuse of Drugs Act* in various classes for the past decade or so. One of the facts which I am consistently struck by is the difference between the perception of drug laws which students have coming into the course and the way the Act actually operates.

In my experience, most people assume that the law on prohibited substances will be quite complicated. They presume that different substances receive different legal treatment on the basis of their nature, the objective harm that attends their use, the circumstances in which the substances are purchased and used, and so on. The reality is that the provisions of the *Misuse of Drugs Act* are incredibly blunt.

By way of example, most students assume that selling methamphetamine for profit would be treated differently to passing a stranger joint at a concert. Legally however, those two actions constitute essentially the same criminal offence. In light of this, it is worth outlining the provisions and operation of the *Misuse of Drugs Act*.

4.1 Overview of *Misuse of Drugs Act 1981*

Broadly speaking the *Misuse of Drugs Act* contains two main offences: possession of a prohibited substance/plant and possession of a prohibited substance/plant with intent to sell or supply. Section 6 of the Act provides:

6. Offences concerned with prohibited drugs generally

(1) A person commits a crime if the person —

(a) with intent to sell or supply it to another, has in his or her possession a prohibited drug;

(b) manufactures or prepares a prohibited drug; or

(c) sells or supplies, or offers to sell or supply, a prohibited drug to another person.

(2) A person who has in his or her possession or uses a prohibited drug commits a simple offence.

Section 7 largely reproduces 6, but with respect to prohibited plants, rather than substances.

What is immediately apparent is that sections 6 and 7 are very blunt instruments. The crime of possession in s6(2) and s7(2) captures all instances in which any prohibited substance/plant is in a person's possession. The section 6(1) and 7(1) crimes of possession with intent, manufacturing or actually selling/supplying a prohibited substance/plant are equally broad. No distinction is drawn between the type of substance/plant possessed or supplied. No distinction is drawn between circumstances in which a prohibited substances is sold/supplied.

Consequently, a person who brings a small quantity of cannabis to a house party intending to share it with friends commits the same analogous offence – possession of a prohibited plant with intent to supply contrary to section 7(1)(a) – as a person who takes a small quantity of methamphetamine to a nightclub intending to sell it for a profit – possession of a prohibited substance with intent to supply contrary to section 6(1)(a). The penalties for both such offences, set out in section 34, are notionally the same.

4.2 Penalties under the Act

The *Misuse of Drugs Act 1981* provides;

34. Penalties

(1) Subject to subsections (2) and (3), a person who is convicted of –

(aa) any other crime under section 6(1) is liable to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 25 years or both; or

(ab) a crime under section 7(1) is liable to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 25 years or both;

However, significant discounts on penalties apply where the substance supplied is cannabis alone per sections 34(2)(a) and (b), which provide:

(2) A person who is convicted of a crime under section 6(1) or 7(1) —

(a) being a crime —

(i) relating only to cannabis; and

(ii) not relating to cannabis resin or any other cannabis derivative or to any prohibited drug or a prohibited plant other than cannabis,

is liable, if sentenced by the District Court or the Supreme Court, to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 10 years or both; or

(b) is liable, if sentenced by a summary court, to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 4 years or both.

By section 11 'Presumption of intent to sell or supply', the Act deems that persons in possession of a prohibited substance in a greater amount than that set out in Schedule V are deemed to have intended to sell or supply that substance. That is, someone who is caught in possession of more than 2 grams of cocaine will be presumed to be intending to sell or supply it, unless the contrary is shown at trial.

This sets the tenor of the Act, generally. The heavy lifting in terms of defining criminal conduct is done by sections 6 and 7. Distinctions between the types of substances criminalised and the relative penalties are dealt with by way of particular carve outs to those general provisions. The three main ways such distinctions are drawn are: (1) sections which vary penalties for all offences when committed in particular circumstances; (2) by the schedules which vary the amount of a substance required for the presumption of an intention to sell/supply and; (3) various incidental discounts or variations to penalties which apply for cannabis specifically.

4.2.1 Sections which vary penalties

Certain sub-sections of the sentencing provisions set out circumstances which alter the applicable penalties in all cases. For example section 34(3) applies certain mandatory sentencing rules which are triggered where a person who is an adult sells or supplies a prohibited substance to a child. Specifically:

(3) If a court is sentencing a person for an offence under section 6(1) or 7(1) that involved selling or supplying, or offering to sell or supply, a prohibited drug or a prohibited plant to a child, and the person was an adult when the offence was committed, then, despite the Sentencing Act 1995 Part 5 —

(a) for a first offence the court must use one of only these sentencing options —

(i) suspended imprisonment imposed under the Sentencing Act 1995 section 39 and Part 11;

(ii) conditional suspended imprisonment imposed under section 39 and Part 12 of that Act;

(iii) a term of imprisonment imposed under section 39 and Part 13 of that Act;

Again, no distinctions are drawn on the basis of substances supplied, or the particular circumstances of the supply. One might well be of the view that a

adult who sells methamphetamine to a child for profit ought to be subject to a very severe penalty. However, one can equally imagine circumstances in which such a severe penalty is inapt.

Take a hypothetical party, attended only by first year university students from a particular degree. Recent alterations to the age at which children commence, and hence graduate from school has meant that a typical first year class will be comprised of school leavers who are between 17 and 18 years old. Imagine a student who attends this hypothetical party and at some point in proceedings passes a joint of cannabis to a classmate. Sub-section 34(3)(a) would operate such that the mandatory sentencing provisions might or might nor apply, depending on the particular age of the individuals involved. There seems to be no coherent reason for treating the specific act differently based on fine shades of distinction about ages – in this case perhaps a matter of weeks or months. Yet, this is precisely the effect the sub-section has.

4.2.2 The deeming provisions in Schedule V

In the usual case, criminal trials proceed on the basis that the State carries the burden of proof. This means that the prosecution must prove all elements of a criminal offence beyond reasonable doubt. The accused is not compelable as a witness in their own case. That is, the State cannot force an accused to give evidence against themselves. It follows that an accused can exercise something akin to a 'right' against self-incrimination, broadly speaking.

For example, conviction under s6(1)(a) of the *Misuse of Drugs Act* requires the State to show that an accused; (1) had in their possession, (2) a prohibited drug and (3) intended to sell or supply that to another. Demonstrating a particular subjective intention is notoriously difficult. Consequently, the *Misuse of Drugs Act* contains certain 'deeming' provisions. These provisions operate to 'reverse' the onus of proof in certain circumstances. So section 11 of the Act provides;

> **11. Presumption of intent to sell or supply**
>
> For the purposes of —
>
> (a) section 6(1)(a), a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V in relation to the prohibited drug;

Schedule V sets out different amounts which deem an intention to sell or supply for different substances. However, there is little attempt to scale those amounts to typical doses of, or risks associated with, those substances. For example, 2g is sufficient to deem an intention in relation to heroin (item 63), amphetamines (item 11), cocaine (item 29) and MDMA (item 84B). Heroin is typically used at doses of about 8mg.[7, Table 1] Cocaine is used at doses

ten times higher, about 80mg. MDMA is used in higher doses still, 125mg or about 15 times higher than usual doses of heroin. Heroin is substantially more dangerous than either cocaine or MDMA.[7] In practice, an intention to sell or supply will be imputed to someone in possession of 16 'usual' doses of MDMA, but not until 250 'usual' doses of heroin.[1] More curiously, schedule V imputes an intention to sell or supply psilocybin (item 132) at possession of 0.1 grams, notwithstanding that a typical dose of that drug is about the same as heroin – 6mg. This sets the threshold for an intention to sell or supply psilocybin at about 16 typical doses, to heroin's 250, again despite the fact that heroin is considerably more dangerous.

While not technically a separate offence to selling or supplying a prohibited substance, the *Misuse of Drugs Act* contains provisions which permit a court to declare a person to be a drug trafficker. Under section 32A(1)(b) that declaration can be made is where the person is convicted of a serious drug offence and the amount of the substance in their possession was greater than the amount set out in Schedule VII. Once such a declaration is made, the penalty for the offence does not change. However, the provisions of the *Criminal Property Confiscation Act 2000* are enlivened, which gives rise to the possibility of extensive confiscation orders to be made. For the sake of completeness, the amount of heroin, cocaine, amphetamines or MDMA that will meet the threshold of schedule VII is 28g, the amount of cannabis required is 3kg.

4.2.3 Different treatment for cannabis

Though caught within the broad application of sections 6 and 7, Cannabis is treated somewhat differently than other illicit substances under the Act. The schedule V threshold for a deemed intention to sell or supply cannabis (item 25) is 100g. A 'usual' dose of cannabis varies, but in countries where 'recreational' cannabis use is permitted a joint will typically contain .5g of cannabis. Assuming a THC content of about 4% – which is typical in Australia[8, p. 4] – this equates to about 20mg of THC. This accords with Gable, who reports a 'typical' dose of THC to be 15mg.[7] Consequently, an intention to sell or supply cannabis will be deemed at approximately 200 usual doses, compared with heroin's 250. It is worth noting that if the cannabis has been processed into 'cigarettes' for smoking, 80 such cigarettes, regardless of their content of cannabis, is sufficient to deem an intention to sell or supply the drug.

Part IIIA of the Act sets out the regime for Cannabis Intervention Requirements. That scheme will be discussed in more detail in Part 6.2.1.

[1] It might be suggested that a 'usual' dose of heroin is elastic, given the tolerance users typically develop. However, the same is true of most substances, so normalising for tolerance in this case would imply that we ought normalise for tolerance in all cases, which would mean the overall comparison does not change.

4.3 Conclusion on the structure of the *Misuse of Drugs Act*

Structurally, the *Misuse of Drugs Act* is an odd beast. Other parts of WA's criminal law draw fairly fine distinctions between offences based on the circumstances of the offending. For example in the *Criminal Code* an assault is a different offence depending on whether the particular action caused no substantial harm (s313), caused bodily harm (s317), caused grievous bodily harm (s297) or was sexual in nature (s323). The effect of this is that different elements must be proved in different cases and defences available may vary depending on the nature of the offence charged. Further, for each distinct offence, various provisions then apply to raise or lower the penalties depending on the particular circumstances which differ in relation to each offence. We might describe this general situation as one in which the law is granular. That is, the particular offence an accused might be charged with depends on subtle distinctions between the the various factual situations which might arise.

The *Misuse of Drugs Act*, by comparison, is a blunt instrument. The vast bulk of behaviour criminalised by the Act is captured by two sections, s6 and s7, and the various distinctions which might be drawn are passed off to sections which impact on sentencing alone. The Act rarely draws granular distinctions between different classes of behaviour which fit under the offences it sets out.

One consequence of this is that the Act fails to draw distinctions which people might reasonably presume it should draw. In my experience the 'common sense' understanding of most legally naive students is that the law ought to distinguish between a person who shares a prohibited substance with a friend at a party from one in which a person sells a stranger a prohibited substance for profit in the same way that the law distinguishes as different criminal offences assaults which cause bodily harm and those that do not. The *Misuse of Drugs Act* draws no such distinction.

The Act does demonstrate some attempt to bring a 'common sense' distinction between different offences. For example it treats cannabis quite differently to other prohibited drugs and sometimes singles out methamphetamine for higher sentences. Yet that is almost the full extent of its subtlety.

Other jurisdictions have very different approaches to legislation to prohibit illicit substances. Notably, the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) creates a series of distinct charges which relate to different classes of substances, trafficking, possession, use, administering, sale to particular classes of persons and so on. This permits much finer granularity when specifying the fact which will give rise to a particular charge, as well as the penalties which will obtain in any particular case. As will be detailed in Part 5, Victoria incarcerates far fewer people – both proportionately and in real numbers – for illicit drug offences than Western Australia does.

Whatever other recommendations this committee makes, it would do well to consider recommending a complete review of the *Misuse of Drugs Act*. Such a review should consider whether the present provisions of the Act, broadly unchanged since its enactment in 1981 still reflect community attitudes and the

best present evidence. Our appreciation of the different harms – both personal and social – which various substances attend has evolved remarkably in the last 40 years. It would be desirable that the general structure of the Act be re-written to reflect those changes.

5 Effects of present law on incarceration rates

Western Australia presently has the highest overall rate of incarceration of any State in Australia.[31] WA's drug laws are a major contributor to this – and may be the largest contributor. ABS data shows that the single largest cohort of prisoners in WA are people whose most serious offence is possession or supply of a prohibited substance:[1, Table 23]

Most serious offence	*NSW*	*Vic.*	*Qld*	*SA*	**WA**	*Tas.*	*Aust.*
Illicit drug offences	1333	631	1011	266	**977**	37	4328
Homicide and related offences	723	493	510	242	**388**	60	2527
Acts intended to cause injury	1766	723	1133	205	**736**	94	5280
Sexual assault and related offences	1264	831	755	323	**535**	56	3948
Dangerous acts endangering persons	266	165	245	45	**434**	31	1252
Robbery and related offences	589	387	576	117	**449**	31	2209
Burglary	695	557	862	182	**822**	27	3217
Theft and related offences	347	186	287	79	**80**	22	1055

Table 1: Number of persons incarcerated by most serious offence as at 2018

The second largest cohort of prisoners in WA, on the ABS' numbers, are people whose most serious offence is burglary. Anecdotal evidence suggests that a significant proportion of burglaries are driven by underlying drug addiction. Payne and Gaffney's research indicates that 36.7% of property offenders attribute their offending to illicit drug taking – the highest proportion of all classes of detainees, save illicit drug offences themselves.[13, Table 3]

Comparison with other jurisdictions is striking. Western Australia incarcerates more people for drug offences per head of population than any other jurisdiction in the Commonwealth. WA incarcerates more people for illicit drug offences than Victoria in real terms, and almost as many as Queensland – states with three times and twice our population, respectively. This difference cannot be explained by rates of drug use. In 2016, the National Drug Strategy Household Survey Report showed identical overall rates of illicit use between WA and Queensland; 16.8% of those surveyed.[21, Table 7.14] Victoria's overall rate of drug use was only modestly lower, at 15%.

One might contend that WA's rates of incarceration are higher than other states because there are higher rates of use of more harmful illicit drugs. Certainly, WA has a higher rate of meth/amphetamine use than other jurisdictions

(2.7% of persons in WA reporting use in 2016, compared to 1.5% in Victoria and 1.9% in Queensland).[21, Table 7.25] If this explanation were sound, we would expect rates of incarceration to track with rates of use of more harmful illicit drugs like methamphetamine. They do not. Indeed, WA's rate of incarceration has increased steadily, even as rates of methamphetamine use have reduced significantly from 3.4% in 2010 and 3.8% in 2013 down to 2.7% in 2016.

Nor can WA's reduction in rates of use of methamphetamine be attributed to its punitive rates of incarceration. Other jurisdictions have seen similar – and sometimes more remarkable – reductions in rates of use:[21, Table 7.25]

	2010	2013	2016
NSW	1.6	1.4	0.7
VIC	2.3	1.9	1.5
Qld	1.9	2.3	1.5
SA	2.5	2.2	1.9
Tas	1.1*	3.0*	2.1*
WA	**3.4**	**3.8**	**2.7**
Australia	2.1	2.1	1.4

Table 2: Reported rates of recent use of methamphetamine

Finally, it is worth noting that the jurisdiction with the lowest overall rate of illicit drug use, the ACT at 12.9% in 2016, is also the jurisdiction which takes the least punitive approach to illicit drug use.

Plainly, WA is taking a far more punitive approach to illicit drug use than any other jurisdiction in Australia. Measured in rates of use, that approach is not working.

This committee should note that if the intended effect of a punitive approach to illicit drug use is to prevent drug use – or at least reduce the rate at which drugs are used – then, comparison with other Australian jurisdictions demonstrates that WA's approach is simply ineffective. Once that fact is recognised, persisting with the status quo seems indefensible.

6 Harms caused by illicit substances

Part 3 of this submission discussed different political approaches to the question of when the State ought to regulate citizen's conduct by means of the criminal law. It noted the main division on this question; between liberals who recognise a sphere of private morality into which the State ought not intervene and conservatives who contend that no such sphere can be drawn coherently. In light of this discussion of 'harms' associated with illicit drug use is fraught. In general terms one group thinks harm largely irrelevant where it is a result of an individual's autonomous choice. The other thinks harm largely irrelevant as it cannot provide a consistent yardstick for ascertaining the appropriate limit of State intervention in citizen's conduct. This is perhaps why – despite a great

deal of discussion about the harms associated with the use of illicit substances – there remains very little consensus as to whether or how harm is relevant to formulating a policy on illicit drug use.

Legal and political philosophers have the significant advantage of being able to defer resolution of this controversy indefinitely. Sadly, this committee has no such luxury.

This submission has argued that there is at least one relevant point at which the competing political theory's interest in harm intersects. That is, practically speaking, when we descend from abstract principle to actual legislation, both sides seem to agree that we should weighing the relative harms caused by prohibition against the potential harms prohibition seeks to avoid. While resolution of how that process should be determined in any case remains a political matter, description of those relative harms is at least relevant to how we ought to conduct ourselves in practice.

6.1 Harms associated with cannabis use

This part of the submission considers the harms associated with cannabis use.[2] It will examine the present state of knowledge about those harms, and explain where and how they differ from the state of our knowledge when cannabis was first prohibited. It will contrast the harms of cannabis use with the known harms associated with prohibition. In light of these facts, it will suggest that the present state of our knowledge suggests that the relative harm caused by criminalising cannabis use significantly outweighs the potential harm criminalisation seeks to avoid. It will, therefore, suggest that decriminalisation, or indeed legalisation, is the preferable policy position. Finally, it will suggest that this committee should recommend that a similar style of analysis be undertaken for each substance, or class of substances, prohibited by the *Misuse of Drugs Act*.

Cannabis is by far the most commonly used illicit substance in both Australia and WA. Results of the 2016 National Drug Strategy Household Survey indicate that 10.4% of Australians reported having used cannabis in the last 12 months. Western Australians reported having used cannabis at a slightly higher rate; 11.6%. Nationally, use of cannabis has remained relatively stable since 2010 (10.3%), having declined from a rate of 12.9% in 2001. In Western Australia the overall rate of use has declined more markedly, down from 17.5% reporting use in the last 12 months in 2001.

15.6% of Australians, and 16.8% of West Australians, reported use of any illicit substance in 2016.[21, Table 7.14] After cannabis the next most common reported use of an illicit substance was MDMA (3.2%) in WA, cocaine (2.5%)

[2] This submission will not consider the benefits of cannabis use, in particular its potential therapeutic uses. This committees terms of reference do not extend to the regulation of therapeutic substances. In this regard I note only that the therapeutic value of any substance is an entirely separate matter from its regulation for non-therapeutic use. These two distinct issues ought not to be conflated.

nationally, followed by meth/amphetamine (2.7%) in WA, and MDMA (2.2%) nationally.[21, Table 7.18]

Among cannabis users, dependence is comparatively rare. It occurs at a lower rate than than in users of alcohol or nicotine. Early estimates of the rate at which cannabis users developed dependence suggested that 'The risk of developing dependence among those who have ever used cannabis was estimated at 9% in the USA in the early 1990s compared to 32% for nicotine, 23% for heroin, 17% for cocaine, 15% for alcohol and 11% for stimulants.[30, p. 11]'

More recent studies have suggested a higher rate of lifetime risk of substance dependence for nicotine (67.5%), alcohol (22.7%) and cocaine (20.9%), but not cannabis (8.9%).[18]

Unlike other illicit substances, cannabis has a very low acute toxicity. The WHO notes 'There are no reports of fatal overdoses in the epidemiological literature.'[30, p. 19]

Cannabis can impair a user's capacity to drive. Early laboratory studies of reaction times theorised such an impairment. Later epidemiological studies suggest 'that recent cannabis use (indicated by either THC in blood or self-reported cannabis use) doubled the risk of a car crash.'[30, p. 20] However, this association is not straightforward, and studies which used regression analysis to disassociate other factors concluded that 'the association disappeared when age, gender, ethnicity and BAC levels were taken into account'. Overall, the WHO concludes,

> The existing evidence points to a small causal impact of cannabis on traffic injury. There are plausible biological pathways, and the pooling of studies found significant effects for cannabis. Overall, even though the effect is small compared to the effects of alcohol, traffic injury may be the most important adverse public health outcome for cannabis in terms of mortality in high-income countries.[30, p. 21]

Epidemiological studies of all injuries are more inconclusive. Again, the WHO summarises the present state of evidence noting,

> Although a recent study found no increased risk of injury associated with cannabis use, which suggests that the setting in which cannabis is used may affect the risk, other studies show the use of cannabis to be associated with increased injuries in adolescents and increased burns.[30, p. 21]

Studies undertaken in the 1990s suggested that long term cannabis use impaired cognitive function. More recent studies paint a more complex picture. Well controlled case studies have found 'deficits in verbal learning, memory and attention in regular cannabis users. These deficits have usually been correlated with the duration and frequency of cannabis use, the age of initiation and the estimated cumulative dose of THC.'[30, p. 24] However, the evidence is not straightforward;

> Excluding the possibility of reverse causation as an explanation for these findings has been difficult because younger persons with poorer cognitive performance are more likely to become regular cannabis users. There are also shared risk factors for regular cannabis use and poor cognitive performance.[30, p. 24]

Australian studies have found that 'early-onset users had significantly higher rates of later substance use, juvenile offending, mental health problems, unemployment and school dropout.' However it is not clear that these consequences are a risk of using cannabis per se. The WHO notes that these consequences are attributable to two factors:

> First, those electing to use cannabis were a high-risk population characterised by social disadvantage, childhood adversity, early-onset behavioural difficulties and adverse peer affiliations. Secondly, early-onset cannabis use was associated with subsequent affiliations with delinquent and substance-using peers, moving away from home and dropping out of education, with these factors in turn being associated with increased psycho-social risk.[30, p. 25]

That is, it is not clear whether these risks are *caused* by cannabis use, or are a result of cannabis' legal status. This point will be addressed in more detail in the next section. It will suffice at this point to note that causation is probably shared.

The present evidence suggests that links between cannabis use and mental health disorders (except psychosis) are unclear. The WHO summarises the present state of evidence as:

> In general, while there are associations between regular cannabis use or cannabis-use disorders and most mental disorders, causality has not been established. Reverse causation and shared risk factors cannot be ruled out as explanations of these relationships.[30, p. 28]

While a link between cannabis use and psychosis or schizophrenia has been well documented, there has been persistent controversy over the nature of the link. A causal relationship between cannabis use and the onset of schizophrenia has been cited as a motivating factor for the criminalisation of cannabis in WA. The former Police Minister referred to this phenomenon specifically when increasing the penalties for cannabis possession in 2011.[14] It therefore deserves special attention by this committee.

A 2003 Australian study 'did not find any marked increase in incidence [of schizophrenia] after steep increases in cannabis use during the 1980s and 1990s.'[30, p. 27] Nevertheless, as at 2016, the WHO suggested that 'the available evidence points to a modest contributory causal role for cannabis in schizophrenia' but cautioned 'researchers who are not convinced by the evidence argue that these studies have not excluded the possibility that the relationship is explained by residual confounding.'[30, p. 27]

Since then, Pasman et al. have published the largest genome-wide association study on the link between lifetime cannabis use and schizophrenia.[24] That study

> found weak evidence for a causal link from cannabis use to schizophrenia and much stronger evidence for a causal link from schizophrenia to cannabis use. This suggests that individuals with schizophrenia have a higher risk to start using cannabis.

This accords with Segal-Gavish et al., whose findings 'suggest that sub-chronic exposure to THC in adolescence-equivalent period results in significant aberrations in behaviour only in mice harboring host susceptibility (DN-DISC1 mice).'[25]

The best contemporary evidence does not support a claim that there is a causal link between cannabis use and schizophrenia. Rather, the best recent evidence from studies which consider genetic causes suggest that the stronger causal link is the reverse.

6.2 Harms associated with the criminalisation of cannabis use

Plainly there are harms associated with cannabis use. There are also harms associated with a great many human activities. Comparatively, the harms associated with cannabis use are markedly less severe than those associated with other licit substances; specifically alcohol and nicotine.

There are also harms associated with the criminalisation of cannabis use; both individual and social. One might contend that the individual harms caused by the criminalisation of cannabis are entirely avoidable, by abstinence. In a narrow sense this is true. However, it is equally true to say that the individual harms caused by the criminalisation of cannabis are entirely avoidable by decriminalisation. Both claims are, by definition, correct.

In the previous section we saw that cannabis is the most commonly used illicit substance in Western Australia. By definition, the *Misuse of Drugs Act* will most often applied to individuals who possess or supply cannabis. It follows that any harms which attend the criminalisation of certain substances, per se, will in practice be most often applied to cannabis users. This is a truism, but its import is often obscure.

Specifically, it means that the general and broadly crafted laws which comprise the *Misuse of Drugs Act* will most often be applied to the least serious matters. This is particularly the case when it comes to matters of sentencing. Sentences set out in the Act – calibrated to offer appropriate punishments for the most serious offending – are most often used to determine the appropriate sentence for the most minor offences. It is true enough that there are a series of provisions in the Act that direct minor courts to impose lower sentences. Yet, the entire structure of the Act remains cast in broad terms and driven from the top down. Rules and penalties focused on the most serious offending are applied most frequently to the least serious instances of their breach.

The harms associated with the criminalisation of cannabis are, therefore, of three main kinds. Firstly they are (1) harms to individuals that attend exposure to the criminal justice system; (2) harms to that flow from the state's inability to deliver risk minimisation strategies under a regime of prohibition and (3) harms that flow to the community in terms of the real and opportunity costs associated with criminalisation.

6.2.1 Harms from exposure to the criminal justice system

For all the discussion of the harms that caused by cannabis, one striking statistic often escapes notice. The World Health Organisation cites a NSW study which found that 'Homicide victims appear to have higher detection rates of cannabis at the time of death than suicide victims do.'[30, p. 29] Per Darke, the risk of being a victim of homicide increases seven fold compared with abstention. Plainly there is no pharmacological mechanism by which we might expect cannabis use to increase one's propensity to be murdered. Darke notes 'The data also indicate the risks associated with illicit drug use in terms of exposure to violence, whether through disinhibition or the broader life-style risks of illicit drug use.'[2]

This highlights an issue raised in Part 5 of this submission; that a legal regime of prohibition exposes those who use illicit substances to harms associated with criminal activity. Those harms are not necessarily intrinsically linked to the offending which attends the use of illicit substances. Rather, as in the case of homicide, they might be risks which attend the interaction with organised criminal undertakings more generally. It is trite to state that the use of licit substances (other than alcohol) is not generally attended by an increased risk of becoming a victim of homicide. Risks of this kind might be described as iatrogenic – that is, they are a risk caused by the legal framework surrounding prohibition, rather than the illicit substances themselves.

It is also well documented that mere contact – and particularly early contact – with the criminal justice system is criminogenic. Diversion programs are successful precisely because they divert people away from the criminal justice system. Yet, the criminalisation of cannabis means that a significant number of people who would not otherwise have contact with the criminal justice system do.

In 2016-17, 77,549 people were arrested for offences relating to cannabis nation wide. 70,747 of those – about 91% – were arrests of cannabis consumers, rather than suppliers. Again, nationally, the most common action taken by law enforcement against those arrested was summons to appear before a court to answer charges. In WA options do exist for police to issue Cannabis Intervention Requirements as a method of diverting people from the criminal justice system. A person who is issued a CIR may undertake a Cannabis Intervention Session within 60 days (s8E(3)). Certified completion of the CIS will provide a bar to prosecution for the offence (8K). A CIR is only available where an offender is caught with less than 10g of cannabis (8B(1)) – one third the amount that deems an intention to sell or supply under Schedule V – and only one time

(s8E(4)). Since the changes to the scheme by which CIRs are administered was undertaken in 2011, there has been a dramatic increase in the number of convictions for cannabis possession in this state.

Convictions themselves attend significant personal and financial cost to individuals. Beyond the penalty imposed by a court, other costs include legal representation, restrictions on international travel and serious impact on current employment and future employment prospects. Again, while it is by definition true to say that these costs are avoidable by abstention from cannabis use, it is equally true to say that those costs are avoidable by decriminalisation or legalisation.

6.2.2 Harms which could be avoided by education

One consequence of the present scheme of criminalisation is that there is limited scope to undertake public health education aimed at harm reduction. Fischer et al. note that 'evidence indicates that a substantial extent of the risk of adverse health outcomes from cannabis use may be reduced by informed behavioural choices among users.'[6, e1] That is, harms related to the use of cannabis can be substantially reduced by public health education campaigns which are possible under legalisation regimes.

There is widespread agreement among researchers that cannabis use ought to be avoided in children and adolescents; specifically those under the age of 16. It is notable in this context that legalisation is consistently associated with a *reduction* in cannabis use by adolescents. This was seen recently in Washington State, where, contrary to predictions, the legalisation of so-called 'recreational' cannabis use was associated with a *decline* in adolescent rates of use.[4] This mirrors the experience of 'decriminalisation' Western Australia when the introduction of the *Cannabis Control Act 2003* also attended reductions in rates of use among adolescents.[17]

To the extent that a regime of decriminalisation or legalisation might reduce the rate of use among adolescents and allow for more effective public health messaging around the risks associated with cannabis use, the present regime of prohibition is causing individual and public harm.

6.2.3 Costs of criminalisation to the community

Finally, criminalisation of cannabis represents a significant direct and opportunity cost to the community. Direct costs to the criminal justice system include, *infra*, police investigations; police time spent preparing for and engaging in court proceedings; prosecutorial costs; costs of court operations; costs of providing legal aid/duty lawyers; costs of incarceration and costs associated with enforcement of non-custodial penalties. Other indirect costs include any increase in the burden on the health system consequent on an inability for the State to run effective public health campaigns; forgone revenue on illicit transactions; and broader productivity losses.

This committee should also consider the opportunity cost represented by black market transactions for illicit substances. These represent a considerable revenue stream for organised crime. A recent Reserve Bank of Australia analysis of the use of cash suggests that the value of black market transactions relating to cannabis, nationally, is just shy of $4 billion dollars.[5]. This cost, specifically, is a double edged sword. By definition every dollar in lost revenue is a dollar lost to criminal activity. In relation to cannabis, estimates suggest that about half the value of transactions is captured by serious organised crime.[27] The experience of some US states is that the legalisation of cannabis has been a significant source of revenue.[9]

It is difficult to identify the overall costs associated with illicit drug use. It is more difficult still to disaggregate those costs, for example by state, particular substance, relation to serious organised crime, etc.. Consequently, only high level data is available. This committee should recommend a comprehensive assessment of the costs associated with enforcing the *Misuse of Drugs Act* in Western Australia, disaggregated by type of offence and substance. To the best of this author's knowledge, such information is not publicly available.

In national terms, in 2003 Mayhew estimated the direct costs of illicit substance abuse in Australia at about $1.9 Billion.[19] In 2013-14 The Australian Institute of Criminology estimated 'The overall costs of serious and organised crime related illicit drug activity are around $4.4b.'[27] Western Australia, specifically, has seen large and consistent increases in its prison muster in recent years. As noted above, ABS data indicates that the single largest proportion of that population are those whose most serious offence is possession of supply of a prohibited substance.

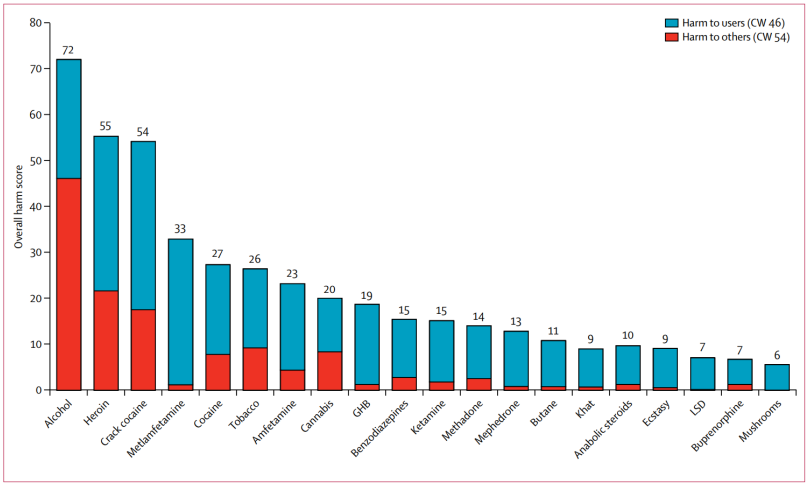
Plainly, these costs are not solely attributable to cannabis use. Indeed, it is likely that cannabis use represents a small part of these direct costs – except perhaps in terms of police and court's time and resources. Nevertheless, the sheer quantum of these figures, and the very large number of arrests for offences relating to cannabis indicates that we can expect the costs associated with the criminalisation of cannabis to be high. In this context it is notable that in 2007 Wundersitz found that police diversion programs relating to cannabis use in NSW had a significant impact; 2,658 fewer arrests for cannabis possession and a consequent reduction in court costs of around $1 million during the first three years of operation.[32]

6.3 Weighing the costs and benefits of criminalisation of cannabis

It is inescapable that there are harms associated with the use of cannabis. Relative to other drugs, however, those harms are minor. As the Victorian Inquiry into Drug Law Reform noted,

> Well-known United Kingdom (UK) scientist, Professor David Nutt and other members of the Independent Scientific Committee on Drugs conducted the study, which assessed the harms of 20 sub-

Drugs ordered by their overall harm scores



Source: Nutt, D, et al., 'Drug harms in the UK: a multicriteria decision analysis', *The Lancet*, vol. 376, no. 9752, 2010, viewed 1 November 2010, <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)61462-6/abstract>, p. 1561.

Figure 1: Reproduced from Victoria's Law Reform, Road and Community Safety Committee *Inquiry into drug law reform*

> stances according to 16 separate criteria relating to harms to the individual user and harms to the community. ... alcohol was the most harmful drug (overall harm score of 72), followed by heroin (overall harm score of 55) and crack cocaine (overall harm score of 54). Interestingly, the study concluded that its findings correlated poorly with the UK drug classification system, which has limited relevance to the evidence of harm.[10]

It is equally inescapable that the criminalisation of cannabis itself causes harm. While can evidence can assist in formulating policy, it cannot determine it. The relevant question for this committee is whether, in light of the known harms caused by the criminalisation of cannabis it is on balance preferable to persist with those harms. This submissions argues that it is not.

Criminalisation of cannabis represents a clear example of 'cure' being worse than the disease. More relevantly, the purported 'cure' simply does not work. Jurisdictions with less stringent regulation of cannabis see consistently lower rates of cannabis use than does Western Australia.

At present Western Australia's regulatory regime for cannabis in fact causes significantly more harm than it potentially avoids. In light of this, the argument for law reform seems irresistible, regardless of one's particular political philosophy. Few indeed would argue that the State is justified in intervening in citizen's lives to *increase* harm.

A coherent, evidence-based, pragmatic and justifiable approach to drug reg-

ulation ought to weigh the harms caused by legal intervention with the harms intervention intends to prevent. This committee should recommend that such an evaluation should form the basis of Western Australia's approach to illicit substances generally. As applied to cannabis, such an analysis will almost certainly speak in favour of decriminalisation and diversion as regards the possession of cannabis for personal use. Further analysis of the comparative benefits and harms might well speak in favour of the full legalisation of the adult use cannabis.

This committee ought also to recommend that such an analysis be undertaken of all substances prohibited under the *Misuse of Drugs Act*. The evidence suggests that some substances which are presently regulated more strictly than cannabis – such as MDMA and Psilocybin – are in fact significantly less harmful, (per Figure 1 above). That fact alone will not determine the relevant policy outcome. It is possible that, owing to their being used significantly less frequently, the overall balance of harm is different. Such an overall assessment will be for policy makers, and cannot be urged solely on the basis of an ordinal ranking of the relative harm of substances. Nevertheless, there would need to be clear, coherent, evidence-based and pragmatic reasons for prohibiting those substances by threat of severe criminal penalties, while objectively more harmful substances remain more lightly regulated – and in the case of alcohol and tobacco, legalised.

7 Calls for a different approach

There has been a long and consistent series of calls for law reform in this area across Australia and internationally. The general thrust of those recommendations has been remarkably consistent; reform should rely on the evidence available and the regulation of illicit substances should preference a medical, rather than a criminal justice model. A very small sample of these regulations follows.

In 1997 a Background Paper prepared by the Commonwealth Parliamentary Library noted;

> The consequences of a prohibitionist approach to the non-medical use of drugs have been examined by many writers and in many inquiries. In 1989, the Parliamentary Joint Committee on the National Crime Authority listed the social costs of prohibition as including the direct costs of law enforcement, drug-related crime, the involvement of professional criminals and organised crime, corruption in law enforcement bodies, health costs, the stigmatisation of drug users, the erosion of civil liberties in the name of the war against drugs and the benefits foregone by the community because illicit drugs like heroin and cannabis are not available for medical use.[22].

It concluded;

> As two Australian researchers have recently argued:

> ...drug law enforcement in some shape or another is here to stay, whatever drug law reforms take place in the future, and it behoves us to render such enforcement as rational as possible.

In 2000 the Royal Australasian College of Physicians implored policy makers to;

> Ensure that policy is evidence-based. The fundamental flaw in policy on illicit drugs has been the failure to base policy on evidence. Such an approach would commit government to ensure the gathering of evidence where important gaps exist. Our approach should be similar to our response to other health issues (such as cancer, hypertension and diabetes) where progress in health outcomes depends on adequately funded, rigorous research based on proper scientific processes.[29]

In 2001 the WA Government convened the Community Drug Summit, which was attended by 100 delegates from the community over four days. The same year, the Commonwealth House of Representatives Standing Committee on Family and Community Affairs released a discussion paper which noted

> In Australia the vast majority of arrests are cannabis-related and most are consumer rather than provider-related. The Committee believes it is appropriate, to divert young illicit drug users away from the criminal justice system, while aggressively pursuing and incarcerating others who are regarded as being more serious offenders – heroin traffickers, for example.[28, p. 83]

Again in 2004 the Royal Australasian College of Physicians wrote; 'The Colleges believe that Governments must re-define illicit drugs primarily as a health and social issue, with funding for health and social interventions increased to the same level as law enforcement.'[12]

In 2010, Hughes and Stephenson considered Portugal's model of decriminalisation and noted,

> The Portuguese evidence suggests that combining the removal of criminal penalties with the use of alternative therapeutic responses to dependent drug users offers several advantages. It can reduce the burden of drug law enforcement on the criminal justice system, while also reducing problematic drug use.[11]

In 2016 Lee and Ritter argued,

> It's becoming increasing clear that the illegal status of drugs causes significant harms to users and the community. There is increasing recognition that a new approach is needed. Decriminalisation of illegal drugs has the support of Australians and does not appear to increase use, but can substantially reduce harms.[16]

In 2018, Victorian Parliament's Law Reform, Road and Community Safety Committee released the final report in its *Inquiry into Drug Law Reform.*[10] Most relevant is recommendation 13 of that report;

> The Victorian Government, while maintaining all current drug offences in law, treat the offences of personal use and possession for all illicit substances as a health issue rather than a criminal justice issue. This approach will ensure appropriate pathways are in place for the referral of people to health and treatment services in a timely manner where required. Mechanisms to achieve this should include:
>
> - exploring alternative models for the treatment of these offences, such as the Portuguese model of reform
> - removing the discretion involved with current Victoria Police drug diversion processes by codifying them
> - reviewing all threshold amounts for drug quantities in order to appropriately distinguish between drug traffickers and people who possess illicit substances for personal use only
> - conducting education and awareness programs to communicate with the public about the need to treat drug use as a health issue.

Recommendation 23 related to adult use of cannabis specifically;

> The proposed Advisory Council on Drugs Policy investigate international developments in the regulated supply of cannabis for adult use, and advise the Victorian Government on policy outcomes in areas such as prevalence rates, public safety, and reducing the scale and scope of the illicit drug market.[3]

Writing in *The Age*, Michael Short summarised and endorsed the recommendations of the Victorian inquiry and noted its consistency with a broad swathe of political opinion;

> Portugal decriminalised drugs 15 years ago. There's been a decrease in drug use, crime, disease and overdoses. Other nations are taking the same prescription, and ending proscription. It's an approach that should appeal to progressives, libertarians and conservatives alike – progressives and libertarians because of their support for freedom, and conservatives because of their appreciation for rational, evidence-based policy.[26]

[3]That recommendation – to essentially wait and see how other jurisdictions fare with the legalisation of adult use of cannabis – should be understood in the context of Victoria's broader legal regime and recommendation 13, which seeks to divert all offences of personal use and possession for all illicit substances from the criminal justice system.

8 Conclusion

This submission has outlined the features of the *Misuse of Drugs Act 1981*. That Act is unusually broad in its drafting. As a consequence it applies a narrow range of offences and penalties to a very wide range of behaviour. It does not draw appropriately subtle distinctions between various classes of behaviour. WA has the highest rate of incarceration for drug related offences in Australia. This submission suggests that the structure of the *Misuse of Drugs Act 1981* has had a significant hand in causing that outcome. It argues that, whatever other conclusion this committee reaches, it should **(1) recommend a root and branch review of the *Misuse of Drugs Act 1981***.

The submission has acknowledged persistent differences in political opinion as to the relevance of harm when considering what conduct to prohibit by the operation of the criminal law. Nevertheless, it has suggested that it is always relevant to consider the *relative* harms caused the imposition of criminal penalties as opposed to not imposing penalties.

Considering cannabis specifically, this submission has argued that our understanding of the relative harms caused by cannabis use has evolved considerably in the three decades since the enactment of the *Misuse of Drugs Act 1981*. Consequently, it is worth revisiting whether, on balance, more harm is caused by the criminalisation of cannabis than is potentially avoided by it. This submission argues that the three classes of harm caused by criminalisation – harms associated with contact with the justice system, harms associated with an inability to engage in effective public health messaging and harms to the community in terms of the real and opportunity cost of administering a system of prohibition – very significantly outweigh the potential benefits which might obtain to criminalising cannabis.

Consequently, this submission urges the committee to **(2) recommend the decriminalisation of cannabis in the form of an immediate return to the provisions of the *Cannabis Control Act 2003* as passed** with mandatory, rather than discretionary police diversion per recommendation 13 of the Victorian *Inquiry into drug law reform*. It should **(3) further recommend that the WA Government begin a substantive enquiry into legalising the adult use of cannabis**.

More broadly, this submission argues that the committee should **(4) recommend that the regulation of illicit substances should compare the harms caused by prohibition with the harm sought to be avoided**. That is, decisions about which substances to regulate and how should compare the relative harms caused by regulation with the possible harms regulation seeks to avoid. Substances should be regulated by reference to the outcome of that comparison. In practice this will require developing or adopting an ordinal ranking of the relative harms of various substances, such as Nutt's.[23] Decisions about the regulation of substances should be undertaken by reference to that ranking and the harms associated with prohibition. This may mean that some substances currently prohibited – such as psilocybin and MDMA – are apt to less strict regulation and penalties, decriminalisation or perhaps legalisation.

Others might be apt to stricter penalties than currently provided for in the Act – particularly for crimes which involve the supply of those substances to strangers for profit, rather than personal use.

Western Australia has, at present, the most punitive approach to illicit substance use of all States and Territories in the Commonwealth. It is no surprise, therefore, that it also has the highest rates of incarceration for drug related offences. Western Australians are incarcerated for drug related offences at more than twice the average national rate. Western Australia has more people incarcerated for drug related offences in real terms than Victoria – a state more than three times our population. Despite this considerable disparity, rates of illicit drug use remain higher in Western Australian than other jurisdictions. Most notably, those jurisdictions have seen more dramatic *decreases* in illicit substance use, despite – perhaps because of – less punitive regulatory regimes than WA's.

In light of these facts, it is simply no longer possible to justify Western Australia's unusually punitive approach to the regulation of illicit substances. The economic cost – real and opportunity – is too high. The human cost is unjustifiable. Something must change. This committee can and should recommend a new coherent, justifiable approach to the regulation of illicit substances in Western Australia.

Perth, 12th February 2019

Tomas Fitzgerald

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