



Legislative Council  
Legal and Social Issues Committee

# Workplace drug testing in Victoria

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**Inquiry**

August 2024

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# About the Committee

## Functions

The Legislative Council Legal and Social Issues Committee inquires into and reports on any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice.

The Committee consists of members of the Legislative Council from the government, opposition, and other parties.

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# Terms of reference

## Inquiry into workplace drug testing in Victoria

On 30 August 2023, the Legislative Council agreed to the following motion:

That this House requires the Legal and Social Issues Committee to inquire into, consider and report, by 30 June 2024, on —

- (1) the legislative and regulatory framework for workplace drug testing;
- (2) the treatment of prescription medicinal cannabis as compared to other prescription medications, under that workplace drug testing framework;
- (3) whether the framework for occupational health and safety and workplace drug testing may be improved to benefit medicinal cannabis patients, ensuring due process and natural justice in workplace settings, balanced against risks to occupational health and safety;
- (4) whether current workplace drug testing laws and procedures are discriminatory in nature and could be addressed by the addition of a further protected attribute such as ‘medication or medical treatment’, in Victoria’s anti-discrimination laws;
- (5) any other relevant matters; and
- (6) directs the Committee, in undertaking this inquiry, to limit its consideration to workplace drug testing and not consider the broader subject of roadside drug testing and reform of the *Road Safety Act 1986*.

On the 28 May 2024 the Legislative Council resolved to extend the reporting date to 27 August 2024.





# Chair's foreword

Since the introduction of the Narcotic Drugs Amendment Bill 2016, which amended the *Narcotic Drugs Act 1967*, Victorian medical practitioners have been able to prescribe medicinal cannabis to their patients. In the succeeding years, we have experienced a rapid increase in the use of medicinal cannabis. This has posed new challenges in relation to workplace drug testing policies.

In Victoria, workplace drug testing is neither mandatory nor prohibited. However, the accompanying Regulations specify that the mining industry must have alcohol and other drugs (AOD) policies that explain when testing is required. Policies are also required by specific legislation governing several other sectors, considered to require high safety standards.

The Committee heard that the current legislative and regulatory frameworks around workplace safety and testing practices may discriminate against employees who have been legally prescribed medicinal cannabis. While the Committee fully understands the concerns raised by employees and their advocates, it had to balance these with employers' legal responsibility to keep workplaces safe.

The challenge comes down to how to test for impairment rather than the mere presence of a drug. Based on the evidence the Committee collected, it is clear that more work needs to be done to find alternative methods to test for impairment that provide a fairer picture of employees' ability (or lack thereof) to perform their tasks safely.

The Committee is aware that work in this area is constantly evolving with the aim of developing an accepted way of testing for impairment. Until then, the Committee believes that the current legislative and regulatory frameworks should be updated to provide more specific guidelines to employers on the use of prescribed medicinal cannabis and drug testing in the workplace. The Committee has made recommendations to this effect.

On behalf of the Committee, I would like to thank everyone who made a submission to this Inquiry and spoke with us at our public hearings. The Committee relied on your evidence – some of it very personal – and your expertise to understand this complex and evolving topic of the use of medicinal cannabis and its consequences in the workplace.

I would also like to thank my fellow Committee Members for their hard work and cooperation throughout this Inquiry. Finally, can I please thank the Secretariat: Sally Tregear, Julie Barnes, Chiara De Lazzari, Caitlin Connally and Patrick O'Brien for their support and assistance.

I commend this Report to the House.

A handwritten signature in black ink, appearing to read 'Trung Luu', written in a cursive style.

**Trung Luu MLC**  
**Chair**

# Findings and recommendations

## 3 Workplace drug testing: its effectiveness and impact on employees

**FINDING 1:** The current workplace drug testing approach focuses on drug presence. The methods used do not test for impairment.

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**RECOMMENDATION 1:** That the Victorian Government support the principle that in non-mandated industries, drug testing should only occur where employers have a well-founded belief that an employee may be impaired at work and should only then occur in the context of a comprehensive, alcohol and other drug policy and accompanying support framework as agreed by employers and employees within a workplace relations context.

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**FINDING 2:** Employees may consider prescription medication such as benzodiazepines and opioids a safer option than medicinal cannabis, despite the fact they may cause greater impairment and be more addictive.

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## 4 Reform to legislation and alcohol and other drugs policies

**RECOMMENDATION 2:** That the Victorian Government amend the *Occupational Health and Safety Act 2004* and/or regulations to state key principles around alcohol and other drugs testing, including prescription medication. These principles should include, but not be limited to, the rights of workers to privacy and dignity, a commitment to workplace education, appropriate support measures and when and how alcohol and other drugs testing can or should be carried out.

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**RECOMMENDATION 3:** That the Victorian Government amend the definition of discrimination in Section 7 of the *Equal Opportunity Act 2010* to clarify that where a person uses prescription medication or requires medical treatment for a disability, this is a characteristic that a person with that disability generally has.

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**FINDING 3:** Alcohol and other drugs policies vary because they depend on the workplace and the nature of work in each workplace. However, the absence of specific guidance from WorkSafe on some issues – including medicinal cannabis – has resulted in uncertainty and therefore inconsistencies in the approach taken by different workplaces.

39

**RECOMMENDATION 4:** That WorkSafe update its advice on alcohol and other drugs policies with information on medicinal cannabis, in particular that it should be considered in the same way as all medications that cause impairment. The advice should include but not be limited to:

- The legal status of prescribed medicinal cannabis
- The difference between CBD and THC
- The relationship between the presence of THC and impairment
- When employees should be required to disclose that they are taking medicinal cannabis.

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**RECOMMENDATION 5:** That WorkSafe convene a working group consisting of industry stakeholders including employees and employers' representatives, government departments, and public sector Alcohol and Other Drug (AOD) providers to:

- a. Update the 'Guide for developing a workplace alcohol and other drugs policy' which is no longer fit-for-purpose.
- b. Develop a Compliance Code covering, but not limited to:
  - Obligations of employers and workers in relation to impairment and safety at work, including the right to privacy and dignity,
  - General awareness training of impairment,
  - Appropriate policies and procedures,
  - Obligations and rights of HSRs to provide a health led response to impairment,
  - Reasonable workplace adjustments in the workplace for impairment, and
  - Advice on available alcohol, drug and gambling support.

The Compliance Code should be accompanied by a complementary and comprehensive education campaign, emphasising a health-based approach to AOD in the workplace, and the development of a Health and Safety Representative refresher training program.

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**RECOMMENDATION 6:** That WorkSafe establish a framework to ensure that workplace drug policies are communicated in a clear and easily understandable manner which is visible and accessible to all employees.

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**RECOMMENDATION 7:** That WorkSafe investigate impairment testing methodologies, including the results of the current medicinal cannabis closed track driving trial, and publicly advise on their applicability to workplace drug testing.

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# What happens next?

There are several stages to a parliamentary inquiry.

## The Committee conducts the inquiry

This report on the Inquiry into workplace drug testing in Victoria is the result of extensive research and consultation by the Legislative Council Legal and Social Issues Committee.

The Committee received written submissions, spoke with people at public hearings, reviewed research evidence and deliberated over a number of meetings. Experts, government representatives and individuals expressed their views directly to us as Members of Parliament.

A Parliamentary Committee is not part of the Government. The Committee is a group of members of different political parties (including independent members). Parliament has asked us to look closely at an issue and report back. This process helps Parliament do its work by encouraging public debate and involvement in issues.

You can learn more about the Committee's work at: <https://www.parliament.vic.gov.au/lpic-lc>.

## The report is presented to Parliament

This report was presented to Parliament and can be found at: <https://www.parliament.vic.gov.au/get-involved/inquiries/workplacedrugtestinginquiry/reports>.

## A response from the Government

The Government has six months to respond in writing to any recommendations made in this report.

The response is public and put on the inquiry page on Parliament's website when it is received at: <https://www.parliament.vic.gov.au/get-involved/inquiries/workplacedrugtestinginquiry/reports>.

In its response, the Government indicates whether it supports the Committee's recommendations. It can also outline actions it may take.

# Chapter 1

## Introduction

### 1.1 Scope of the Report

The Committee received the Terms of Reference for this Inquiry on 30 August 2023. The Terms of Reference required the Committee to table its Report by 30 June 2024. On 28 May 2024, the Legislative Council resolved to extend the reporting date to 27 August 2024.

The purpose of this Inquiry is to investigate the legislative and regulatory framework for workplace drug testing, including the treatment of prescription medicinal cannabis compared to other prescription medications. The Committee aimed to understand whether the framework for occupational health and safety and workplace drug testing can be improved to benefit medicinal cannabis patients and whether current workplace drug testing laws and procedures are discriminatory.

This Chapter provides an overview of the Inquiry, including the submissions process, a survey designed by the Committee to collect further evidence, and the public hearings held by the Committee. More details about the submissions and public hearings are available in Appendix A, while the survey and key findings are contained in Appendix B.

Chapter 2 outlines the main pieces of legislation and regulations relevant to workplace drug testing in Victoria, including examples of case law around unfair dismissal challenges.

In Chapter 3, the report analyses the effectiveness of current workplace drug testing practices, issues related to testing for impairment as opposed to the presence of a drug, and potential ways of testing for impairment. This Chapter also discusses the impact of workplace drug testing on employees, including the issues of stigma and discrimination in the workplace and feeling the need to use other types of medication instead of medicinal cannabis.

Chapter 4 explains the difficulties faced by governments writing legislation around workplace drug testing, with particular reference to the *Occupational Health and Safety Act 2004*, *Equal Opportunity Act 2010* and *Disability Act 2006*. The Chapter also provides insights into the challenges WorkSafe faces providing advice on alcohol and other drugs (AOD) policies. This Chapter includes recommendations formulated by the Committee.

## 1.2 The Inquiry process

### 1.2.1 Submissions

Submissions to the Inquiry opened on 1 September 2023. The call for submissions was promoted on the Parliament’s website and social media accounts. The Committee also wrote to individuals and organisations inviting them to put in a submission. Submissions closed on 9 February 2024, with the Committee accepting several late submissions. The Committee received 44 submissions, which are available on the Committee’s website.

### 1.2.2 Committee survey

The Committee designed a survey to gather further evidence around workplace drug testing and medicinal cannabis, which was accessed via the Inquiry website. The Committee also informed stakeholders of the survey.

The survey opened on 21 February 2024 and closed on 28 March 2024. The survey was anonymous and included nine questions. The Committee received 487 responses. See Appendix B for an overview of the survey.

### 1.2.3 Public hearings

The Committee conducted two days of public hearings in Melbourne on the following dates:

- Tuesday 21 May 2024
- Wednesday 22 May 2024.

The Committee heard from 25 witnesses at these hearings. These included unions and industry group representatives, academics and testing experts, and representatives of companies producing medicinal cannabis in Australia.

Transcripts of the hearings can be found on the Committee’s website.

## 1.3 Medicinal cannabis and workplace drug testing in Victoria

### 1.3.1 Medicinal cannabis in Victoria – the regulatory framework

The medicinal cannabis regulatory framework in Victoria is shaped by both State and Commonwealth legislation. In 2016, with the introduction of the Narcotic Drugs Amendment Bill 2016 that amended the *Narcotic Drugs Act 1967*, a national



licensing and permit scheme was created to regulate the cultivation, production and manufacture of cannabis in Australia for medicinal and scientific purposes.<sup>1</sup>

Following this Victoria amended its legislation to incorporate the changes. The *Drugs, Poisons and Controlled Substances Amendment (Real-time Prescription Monitoring) Act 2017* updated the *Drugs, Poisons and Controlled Substances Act 1981*. Medical practitioners can now prescribe medicinal cannabis to patients for a range of reasons, including pain management, insomnia, and chronic or terminal illnesses.<sup>2</sup>

The implementation of the 2017 Act also resulted in the Government's SafeScript initiative, Victoria's real-time prescription monitoring software.<sup>3</sup> Since April 2020, doctors and pharmacists must check SafeScript when writing or dispensing a prescription for Schedule 8 medicines and certain Schedule 4 medicines, including some medicinal cannabis products.<sup>4</sup> The following section provides more detail about Scheduling and medicinal cannabis.

There has been a rapid increase in the use of medicinal cannabis over the past several years. In April 2020, 583 patients were dispensed medicinal cannabis. By May 2024, this number had increased to 24,462 patients.<sup>5</sup> See Appendix C of this Report for a monthly breakdown of these figures.

### 1.3.2 The main components of cannabis and TGA Scheduling

The two main ingredients in cannabis are THC ( $\Delta^9$ -tetrahydrocannabinol) and CBD (cannabidiol). THC is a psychoactive substance that may cause impairment, while CBD is not psychoactive and does not cause impairment. Medicinal cannabis products vary in the amount of CBD and THC they contain.

The Therapeutic Goods Administration (TGA) categorises medicinal cannabis products by active ingredients. There are five Categories based on the levels of CBD and THC present.<sup>6</sup> These categories are described in the table below.

- 
- 1 Victorian Department of Health, Medicinal cannabis regulatory framework, <<https://www.health.vic.gov.au/drugs-and-poisons/medicinal-cannabis-regulatory-framework>> accessed 8 July 2024.
  - 2 Victorian Department of Health, Medicinal cannabis information for health professionals, <<https://www.health.vic.gov.au/drugs-and-poisons/medicinal-cannabis-information-for-health-professionals#clinical-evidence>> accessed 8 July 2024.
  - 3 Ibid.
  - 4 Ibid.
  - 5 Department of Health, Correspondence 24 July 2024.
  - 6 Department of Health and Aged Care, Medicinal cannabis products by active ingredients, <<https://www.tga.gov.au/medicinal-cannabis-products-active-ingredients>> accessed 11 July 2024.

**Table 1.1 Medical cannabis product by active ingredients**

Category 1	CBD medicinal cannabis product (CBD ≥ 98%)
Category 2	CBD dominant medicinal cannabis product (CBD ≥ 60% and < 98%)
Category 3	Balanced medicinal cannabis product (CBD <60% and ≥ 40%)
Category 4	THC dominant medicinal cannabis product (THC 60% - 98%)
Category 5	THC medicinal cannabis product (THC >98%)

Source: Department of Health and Aged Care, Medicinal cannabis products by active ingredients, <<https://www.tga.gov.au/medicinal-cannabis-products-active-ingredients>> accessed 11 July 2024.

Most relevant to this Inquiry is the fact that the vast majority of products marketed as ‘CBD products’ are not available as an isolate and include at least some level of THC, usually less than 2% (Category 1 in Table 1.1). CBD isolate containing no THC or other contaminants is possible to produce but, according to the evidence collected by the Committee, these products are currently very expensive.<sup>7</sup>

For these reasons, medicine labelled as CBD oil cannot guarantee that it does not contain any THC. This means a test is likely to produce a positive result.

### TGA Scheduling

Medicinal cannabis is approved by the TGA in Australia and it is listed in the TGA Scheduling. Scheduling is a national classification system that controls how medicines and chemicals are made available to the public. Medicines are classified into Schedules according to the level of regulatory control considered necessary to protect public health and safety.<sup>8</sup> The table below provides a summary of the TGA Scheduling for medicines and chemicals.

<sup>7</sup> Workplace Drug Testing Australasia, *Submission 27*, p. 6

<sup>8</sup> Department of Health and Aged Care, Scheduling basics of medicines and chemicals in Australia, <<https://www.tga.gov.au/scheduling-basics-medicines-and-chemicals-australia>> accessed 8 July 2024.

**Table 1.2 TGA Scheduling**

Schedule 1	Not currently in use
Schedule 2	Pharmacy Medicine
Schedule 3	Pharmacist Only Medicine
Schedule 4	Prescription Only Medicine or Prescription Animal Remedy
Schedule 5	Caution
Schedule 6	Poison
Schedule 7	Dangerous Poison
Schedule 8	Controlled Drug
Schedule 9	Prohibited Substance
Schedule 10	Substances of such danger to health as to warrant prohibition of sale, supply and use

Source: Department of Health and Aged Care, Scheduling basics of medicines and chemicals in Australia, <<https://www.tga.gov.au/scheduling-basics-medicines-and-chemicals-australia>> accessed 8 July 2024.

Medicinal cannabis products are classified as either Schedule 4 or Schedule 8 controlled substances.<sup>9</sup> This classification varies depending on the level of THC in the medicine. As most medicinal cannabis products contain varying amounts of THC, they are classified as Schedule 8 products and are controlled drugs in Victoria.

However, medicinal cannabis products, which include ‘CBD only’ preparations and those containing 2% or less of any other cannabinoids (including THC), are classified as Schedule 4 prescription-only medicines.<sup>10</sup> Table 1.3 lists some examples of products and how they are classified.

**Table 1.3 Examples of medicinal cannabis products**

Preparation	Cannabinoid composition	Schedule
Oil capsule	CBD10mg, 0mg other cannabinoids	Schedule 4
Plant material (floss)	THC 18.3%-27.2%	Schedule 8
Oral spray	2.7 mg THC and 2.5 mg CBD per 100 microlitre spray	Schedule 8

Source: Victorian Department of Health, Medicinal cannabis information for health professionals, <<https://www.health.vic.gov.au/drugs-and-poisons/medicinal-cannabis-information-for-health-professionals>> accessed 8 July 2024.

Stakeholders in this Inquiry considered it highly unlikely that Schedule 4 products containing 2% or less of any other cannabinoids cause impairment.

<sup>9</sup> Victorian Department of Health, Medicinal cannabis information for health professionals, <<https://www.health.vic.gov.au/drugs-and-poisons/medicinal-cannabis-information-for-health-professionals>> accessed 8 July 2024.

<sup>10</sup> Ibid.

### 1.3.3 How does testing work?

The *Occupational Health and Safety Act 2004* (OHS Act) regulates workplace drug testing in Victoria. Methods used for alcohol and drug testing include breath tests, urine tests, saliva tests and blood tests.<sup>11</sup>

Testing is governed by two Australian Standards:

- AS/NZ 4760-2019 – procedure for specimen collection and the detection and quantification of drugs in oral fluid
- AS/NZ 4308-2008 – procedure for specimen collection and the detection and quantification of drugs in urine fluid.<sup>12</sup>

Cut-off levels for AS/NZS 4760:2019 include:

- Amphetamines (50 ng/mL)
- Cannabis (15 ng/mL)
- Cocaine (50 ng/mL)
- Opiates (50 ng/mL)
- Oxycodone (40 ng/mL).<sup>13</sup>

Cut-off levels for AS/NZS 4308:2008 include:

- Amphetamines (300 ug/L)
- Benzodiazepines (200 ug/L)
- Cannabis (50 ug/L)
- Cocaine (300 ug/L)
- Opiates (300 ug/L).

According to the OHS Act, drug testing is neither mandatory nor prohibited in workplaces. However, the accompanying Regulations specify that the mining industry must have AOD policies in place that explain when testing is required. Policies are also required by specific legislation developed for several other sectors considered to require high safety standards. Chapter 2 outlines this legislation in more detail.

While AOD policies are only required in prescribed workplaces, employers can develop AOD policies that include testing when they believe that substances like alcohol and

<sup>11</sup> Ibid.

<sup>12</sup> The Committee understands this has recently been updated to AS/NZ 4308-2023.

<sup>13</sup> Alcolizer Technology, What are the Australian Standard Drug Class Screening Cut-off Levels?, <<https://alcolizer.com/what-are-the-australian-standard-drug-class-screening-cut-off-levels>> accessed 17 July 2024.

other drugs may impair workers' judgement, concentration, alertness and motor skills when performing their duties.<sup>14</sup>

In Victoria, WorkSafe Victoria provides guidelines for employers developing AOD policies. According to WorkSafe Victoria:

When considering the introduction of alcohol or drug testing, employers should ensure workplace policies and programs are appropriate to the level of risk by doing a risk assessment. Ultimately, testing is one of a variety of control measures that can be used and its applicability in the workplace should be carefully considered.<sup>15</sup>

Workplace drug testing, then, should only be used by employers to reduce the risk of workplace accidents, injuries, lost productivity, and equipment damage.

The Committee proposes improvements to legislation and WorkSafe's advice on AOD policies in Chapter 4 of this Report.

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<sup>14</sup> WorkSafe Victoria, Guide for developing a workplace alcohol and other drugs policy, <<https://www.worksafe.vic.gov.au/guide-developing-workplace-alcohol-and-other-drugs-policy>> accessed 19 June 2024.

<sup>15</sup> WorkSafe Victoria, Guide for developing a workplace alcohol and other drugs policy, <<https://www.worksafe.vic.gov.au/guide-developing-workplace-alcohol-and-other-drugs-policy>> accessed 19 June 2024.



# Chapter 2

## Relevant legislation, regulations and case law

### 2.1 Introduction

This Chapter outlines the main pieces of legislation and regulations relevant to workplace drug testing in Victoria. (NB. Other pieces of legislation are discussed throughout this Report.)

The Chapter references the following authorities:

- *Occupational Health and Safety Act 2004* (Vic)
  - Occupational Health and Safety Regulations 2017 (Vic)
- *Equal Opportunity Act 2010* (Vic)
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- *Independent Broad-based Anti-corruption Commission Act 2011* (Vic)
  - Independent Broad-based Anti-corruption Commission Regulations 2023 (Vic)
- *Victoria Police Act 2013* (Vic)
  - Victoria Police Regulations 2014 (Vic)
- *Bus Safety Act 2009* (Vic)
- *Commercial Passenger Vehicle Industry Act 2017* (Vic)
- *Rail Safety National Law Act 2012* (SA)
  - Rail Safety National Law Regulations 2012 (NSW)
  - *Rail Safety National Law Application Act 2013* (Vic).

The Chapter concludes with brief summaries of unfair dismissal challenges concerning positive drug tests:

- *Endeavour Energy v CEPU* [2012] FWA 1809
- *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249
- *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033
- *Construction, Forestry, Mining and Energy Union-Construction and General Division v Port Kembla Coal Terminal Limited* [2015] FWCFB 4075
- *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331

- Sydney Trains v Gary Hilder [2020] FWCFB 1373
- Haigh v Platinum Blasting Services Pty Ltd [2023] FWC 2465
- Reece Goodsell v Sydney Trains [2023] FWC 3209.

## 2.2 Overview of the legislative framework for workplace drug testing in Victoria

The first three legislative instruments listed below serve to protect rights, with subsequent instruments outlining the requirements for alcohol and drug testing in specific workplaces and industries. While the *Occupational Health and Safety Act 2004* (OHS Act) and accompanying regulations do not mandate, require or prohibit workplace testing, some specific workplaces and industries require AOD policies to be in place that specify when and how testing should occur: IBAC; Victoria Police; bus drivers; commercial passenger vehicle operators; mariners; and railway workers.

### 2.2.1 *Occupational Health and Safety Act 2004* (Vic) and associated regulations

The principal legislation related to workplace drug testing in Victoria is the OHS Act and its associated regulations. Key to this Inquiry is that employers and employees have a shared duty to eliminate or reduce risks to health and safety in the workplace.<sup>1</sup>

#### Aim

The aim of the OHS Act is to secure the health, safety and welfare of people at work, eliminate the source of risks, ensure the public is not placed at risk, and allow employees, employers and organisations to be involved in formulating and implementing safety standards.<sup>2</sup>

#### Duties of employers

Employers have a duty to maintain a working environment that is safe and without risks to health, and to monitor the health of their employees, the conditions at their workplace, and provide information to employees concerning this.<sup>3</sup> This includes consideration of the likelihood and degree of harm, what a person knows/ought reasonably to know about a hazard and ways of eliminating/reducing it, and the availability and cost of doing so.<sup>4</sup> Employers must consult with employees and their health and safety representative when doing things that affect or are likely to affect employees' health and safety.<sup>5</sup>

<sup>1</sup> *Occupational Health and Safety Act 2004* (Vic) s 20(1) ('OHS Act').

<sup>2</sup> *Ibid.* s2(1).

<sup>3</sup> *Ibid.* s21(1), 22.

<sup>4</sup> *Ibid.* s20(2).

<sup>5</sup> *Ibid.* s35(1).



## Duties of employees

Employees have a duty to take reasonable care for their safety and that of others, and to cooperate with their employer in respect of action taken under the Act.<sup>6</sup>

## Mining industry

Mining is the only industry to be specifically targeted by the OHS Act's accompanying Regulations in respect of workplace alcohol and drug policies. Mine operators are required to have a system in place for dealing with risks created by alcohol and other drugs.<sup>7</sup> This does not require mandatory testing, although in practice mine workers are tested frequently.<sup>8</sup> If conducting AOD testing, employers must explain why and keep any testing reports confidential.<sup>9</sup> The testing report must be provided to the person it relates to, a third party if authorised by the person, and WorkSafe if requested.<sup>10</sup>

## The regulator: WorkSafe

WorkSafe administers several Acts and Regulations as part of its role as Victoria's workplace health and safety regulator, including the OHS Act and its associated Regulations.

WorkSafe has published several documents on its website for employers wanting assistance with managing risks around alcohol or drug use by employees:

- Guide for developing a workplace alcohol and other drugs policy<sup>11</sup>
- Drug and alcohol policy tipsheet<sup>12</sup>
- Alcohol and other drugs policy<sup>13</sup>
- Alcohol and drugs in mines.<sup>14</sup>

These are discussed further in Chapter 4 of this Report.

6 Ibid. s25.

7 *Occupational Health and Safety Regulations 2017* (Vic) r409(1).

8 Ben Wright, WorkSafe Victoria, Melbourne, 21 May 2024, *Transcript of evidence*, p. 6.

9 *Occupational Health and Safety Regulations 2017* (Vic) r 19(2), 20(1).

10 Ibid. r20(2).

11 WorkSafe Victoria, Guide for developing a workplace alcohol and other drugs policy, <<https://www.worksafe.vic.gov.au/guide-developing-workplace-alcohol-and-other-drugs-policy>> accessed 20 June 2024.

12 WorkSafe Victoria, Drug and alcohol policy tipsheet, <<https://www.worksafe.vic.gov.au/resources/drug-and-alcohol-policy-tipsheet>> accessed 20 June 2024.

13 WorkSafe Victoria, Alcohol and other drugs policy, <<https://www.worksafe.vic.gov.au/workwell-toolkit-alcohol-and-other-drugs-policy>> accessed 20 June 2024.

14 WorkSafe Victoria, Alcohol and drugs in mine, <<https://www.worksafe.vic.gov.au/alcohol-and-drugs-mines>> accessed 20 June 2024.

## 2.2.2 *Equal Opportunity Act 2010 (Vic)*

The principal legislation governing discrimination in Victoria is the *Equal Opportunity Act 2010* (EOA).

### Aim

The aim of the EOA is to eliminate all forms of discrimination, sexual harassment and victimisation, promote the *Charter of Human Rights and Responsibilities Act 2006*, and enable the Victorian Equal Opportunity and Human Rights Commission to facilitate compliance and resolve disputes.<sup>15</sup>

### Discrimination

Discrimination is prohibited in respect of several attributes, including disability and physical features.<sup>16</sup> Discrimination can be direct or indirect and occur on the basis of an attribute listed in Section 6 or contravention of a specific section listed in Section 7.<sup>17</sup> These sections cover discrimination against employees and the requirement for an employer, firm, or educational authority to make reasonable adjustments for a person with a disability.<sup>18</sup>

### When discrimination is lawful

Discrimination is lawful when an exception applies.<sup>19</sup> Discrimination based on disability or physical features is lawful if it is necessary to protect the health or safety of any person or the public, or the property of any person or the public.<sup>20</sup>

The issue of discrimination against employees using medicinal cannabis is discussed in Chapters 3 and 4.

## 2.2.3 *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

The *Charter of Human Rights and Responsibilities Act 2006* enshrines civil, political and cultural rights into Victorian law and requires public authorities to observe those rights. Key to this Inquiry is the fact that policies and legislation must consider human rights when being created, with the Charter ensuring that all statutory provisions be interpreted, so far as possible, in a manner consistent with human rights.<sup>21</sup>

<sup>15</sup> *Equal Opportunity Act 2010* (Vic) s3.

<sup>16</sup> *Ibid.* s6(e), (j).

<sup>17</sup> *Ibid.* s(7).

<sup>18</sup> *Ibid.* ss 18, 20, 33, 40.

<sup>19</sup> *Ibid.* s13.

<sup>20</sup> *Ibid.* s86(1).

<sup>21</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss(2)b–(d).

Any limitations to human rights must consider several factors, including: the importance of the purpose of the limitation; and if there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>22</sup>

Relevant protections include not being treated or punished in a cruel, inhumane or degrading way<sup>23</sup> and the right to privacy.<sup>24</sup>

### 2.2.4 *Independent Broad-based Anti-corruption Commission Act 2011 (Vic) and accompanying regulations*

The Independent Broad-based Anti-corruption Commission (IBAC) is tasked with preventing and exposing public sector corruption and police misconduct in Victoria. In respect of AOD testing, the IBAC Act and accompanying regulations explain why, how and when workplace testing should be conducted.<sup>25</sup>

#### Definitions

1. An 'IBAC officer' means the Commissioner, Deputy Commissioner, Chief Executive Officer, and a person employed, engaged by, or consulting for IBAC.<sup>26</sup>
2. A 'drug of dependence' is given the same meaning as in Schedule 11 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*.<sup>27</sup>
3. A 'critical incident' means an incident involving an IBAC officer while performing a function or exercising an authorised duty which resulted in the death or serious injury of a person and involved one or more of the following: the discharge of a firearm by the officer; the use of force by the officer; the use of a motor vehicle by the officer; or the death or serious injury of a person in the custody of the IBAC officer.<sup>28</sup>

#### When testing directions can be given

Breath, urine or blood samples may be requested to test for alcohol or a drug of dependence if IBAC reasonably believes that the result is relevant to the capacity of an officer in performing their work or the officer has been involved in a critical incident.<sup>29</sup> A testing direction must be in writing, made in accordance with the regulations, and specify the type of test to be taken.<sup>30</sup> The identity of a person directed to take a test cannot be disclosed unless required or authorised by this Act or the regulations.<sup>31</sup>

<sup>22</sup> Ibid. s7(2).

<sup>23</sup> Ibid. s10.

<sup>24</sup> Ibid. s13.

<sup>25</sup> *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* s171 ('IBAC Act').

<sup>26</sup> Ibid. s3(1).

<sup>27</sup> Ibid. s3(1); *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* s4(1).

<sup>28</sup> *IBAC Act (n )* s3(1).

<sup>29</sup> Ibid. s172.

<sup>30</sup> Ibid. ss172(2)-(3).

<sup>31</sup> Ibid. s177.

Officers may be directed to test if IBAC reasonably believes the officer:

- Has consumed alcohol or a drug of dependence and as a result is incapable of, or inefficient in, performing their duties;
- Has been involved in a critical incident;
- Should be tested to manage their performance; or
- Should be tested to conduct a disciplinary process.<sup>32</sup>

Most relevant to this Inquiry, the direction for testing must state: the reason for the direction; the type of sample required; and that the sample may be affected by prescription medication and that the officer should notify the sampler of any prescription medication taken.<sup>33</sup>

### How testing should be conducted

Testing must be conducted in a respectful manner and in circumstances affording reasonable privacy to the officer.<sup>34</sup> Specific procedures for the taking of breath, urine or blood samples are provided for in the regulations, specifying the persons authorised to conduct tests, and the procedures they and the people analysing the samples must follow.<sup>35</sup> Officers may request their sample be independently analysed by a registered medical practitioner, laboratory or drug testing service of their choice.<sup>36</sup>

If a test is positive, the Chief Commissioner or an authorised officer may conduct an inquiry.<sup>37</sup> They must notify the relevant member within seven days of the inquiry into the charge.<sup>38</sup> The affected member can appeal for a review of the decision.<sup>39</sup>

### Confidentiality of results

Generally, results and documents relating to results must be kept confidential and in a secure location. Several exemptions to this include if: the information is publicly known; the officer consents to disclosure; disclosure is authorised under the Act or regulations.

## 2.2.5 *Victoria Police Act 2013 (Vic)* and accompanying regulations

The *Victoria Police Act 2013* and its associated regulations are similar to the IBAC Act and regulations discussed above. It applies specifically to Victoria Police personnel and details when a testing direction can be given and confidentiality of the results.

<sup>32</sup> *Independent Broad-based Anti-corruption Commission Regulations 2023 (Vic)* r16(1)(a).

<sup>33</sup> *Ibid.* r16(1).

<sup>34</sup> *Ibid.* r17(1).

<sup>35</sup> Regulations 19–28 detail the procedures for taking samples and regulations 29–30 detail the procedure to follow for the analysis of the samples and certificate requirements.

<sup>36</sup> *Ibid.* r31(2).

<sup>37</sup> *Ibid.* r51.

<sup>38</sup> *Ibid.* r51(1).

<sup>39</sup> *Ibid.* Part 7.

NB. At a public hearing, Wayne Gatt, Secretary of the Police Association Victoria, advised the Committee that Victoria Police, in cooperation with the Association, recently updated its alcohol and other drugs (AOD) policy with specific regard for medicinal cannabis.<sup>40</sup>

## Definitions

- A ‘critical incident’ has the same meaning as in the IBAC Act and pertains to a member while they are on duty.<sup>41</sup>
- A ‘serious injury’ includes an injury that-
  - is life threatening;
  - is likely to result in permanent impairment;
  - is likely to require long-term rehabilitation; or
  - is likely to, in the opinion of the Chief Commissioner, bring into disrepute or diminish public confidence in Victoria Police.<sup>42</sup>
- A ‘testing direction’ is a direction to a person to give a sample of breath, urine, hair, oral fluid, swab, or blood for the purpose of testing for the presence of alcohol or a drug of dependence.<sup>43</sup>
- ‘Designated work units’ and ‘designated work functions’ refer to when the Chief or Deputy Chief Commissioner determine that a work unit or function should be designated for the purposes of workplace alcohol and drug testing.<sup>44</sup>
- ‘Rostered on’ refers to when a member has reported or is required to report for work in accordance with a roster or is working overtime in accordance with an applicable industrial instrument.<sup>45</sup> A member is ‘rostered off’ at all other times.<sup>46</sup>

## When testing directions can be given

Members can be directed to test if involved in a critical incident or due to a reasonable suspicion that a rostered on member has consumed alcohol or a drug of dependence or appears unfit to work due to the consumption of alcohol or a drug of dependence.<sup>47</sup> Testing can also occur if a member’s unit or work function is designated for testing by the Chief or Deputy Chief Commissioner, or if a rostered on member is selected for random testing.<sup>48</sup> In all instances of testing directions, members are required to comply.<sup>49</sup>

<sup>40</sup> Wayne Gatt, Police Association Victoria, Melbourne, 22 May 2024, *Transcript of evidence*, p. 32.

<sup>41</sup> *Victoria Police Act 2013* (Vic) s82 (‘VPA’).

<sup>42</sup> *Ibid.* s82.

<sup>43</sup> *Ibid.* s82.

<sup>44</sup> *Ibid.* s83.

<sup>45</sup> *Ibid.* s84(a).

<sup>46</sup> *Ibid.* s84(b).

<sup>47</sup> *Ibid.* ss86(1), 88(2)–(3), 89A(2), 90(2).

<sup>48</sup> *Ibid.* ss 92, 94–95.

<sup>49</sup> *Ibid.* s99.

A testing direction may be given to collect samples of breath, urine, hair, oral fluid, a buccal swab or blood.<sup>50</sup> The Victorian Police Regulations match the IBAC Regulations, including stating that that the sample may be affected by prescription medication and that the officer should notify the sampler of any prescription medication taken within the previous seven days.<sup>51</sup> Failure to comply with a direction is in breach of the Act and disciplinary action may follow.<sup>52</sup>

### How testing should be conducted

A testing direction must be conducted in a respectful manner and in circumstances affording reasonable privacy.<sup>53</sup> Specific procedures for the taking of samples are provided for in the regulations, specifying the persons authorised to conduct tests and the procedures they and the people analysing the samples must follow.<sup>54</sup> After a sample is taken, a certificate must be provided to the relevant officer, detailing information about the test (like date, time and location), the results (if applicable), and the person who conducted the test.<sup>55</sup>

### Confidentiality of results

Requirements regarding confidentiality are broadly in line with the IBAC Act.

## 2.2.6 *Rail Safety National Law Act 2012 (SA) and accompanying regulations*

The *Rail Safety National Law Act 2012 (SA)* and its accompanying regulations created a national law and apply in Victoria via the *Rail Safety National Law Application Act 2013 (Vic)*.<sup>56</sup>

A rail transport operator must prepare and implement a drug and alcohol management program for workers.<sup>57</sup> Operators must establish rules relating to the use of drugs and alcohol by workers (including prohibitions and restrictions on use) and identify workers with alcohol- or drug-related problems to be referred for support where appropriate.<sup>58</sup>

At least 25% of workers in the State must be randomly selected to undergo a breath or urine test.<sup>59</sup> If a worker is involved or suspected of being involved in a prescribed

<sup>50</sup> *Victoria Police Regulations 2014 (Vic)* r30(1), 2(b).

<sup>51</sup> *Ibid.* r30.

<sup>52</sup> *Ibid.* r30(2)(f).

<sup>53</sup> *Ibid.* r34(1).

<sup>54</sup> Regulations 35–40 details the procedures for taking samples, 41–43 detail the procedure to follow after taking the relevant sample.

<sup>55</sup> *Ibid.* r44–48.

<sup>56</sup> *Rail Safety National Law Application Act 2013 (Vic)* s6.

<sup>57</sup> *Ibid.* s115.

<sup>58</sup> *Ibid.* r5.

<sup>59</sup> *Ibid.* r28(2)(a)(i).

incident while carrying out rail safety work, the operator must require them to submit to a breath or urine test within three hours of the incident.<sup>60</sup>

It is an offence for a rail safety worker to carry or attempt to carry out rail safety work while a prescribed concentration of alcohol or drugs is in their system or if they are under the influence as to be incapable of effectively discharging their duties.<sup>61</sup> A worker is incapable of effectively discharging their duties if the use of any mental or physical faculty is lost or appreciably impaired.<sup>62</sup>

A worker may be directed to test for the presence of alcohol or drugs in their system if they are:

- About to, are, or are attempting to carry out rail safety work;
- On the premises after working; or
- Involved in a prescribed notifiable occurrence.<sup>63</sup>

A breath or drug screening test must not take place more than eight hours after finishing work or following a prescribed notifiable occurrence.<sup>64</sup> A notifiable occurrence is a railway accident or incident that has or could have caused significant property damage, serious injury or death.<sup>65</sup>

### 2.2.7 *Commercial Passenger Vehicle Industry Act 2017 (Vic)*

The *Commercial Passenger Vehicle Industry Act 2017 (Vic)* pertains to drivers and their employers (booking service providers). Booking services providers must, so far as reasonably practicable, ensure services are provided safely. They contravene this safety obligation if they do not implement systems or processes for: the management of fatigue; drug and alcohol testing; and driver behaviour, competency and medical fitness. The legislation does not set out standards or guidelines as to how these systems or processes should be implemented or achieved, and it is silent on whether the identity of drivers directed to test are to be kept confidential.<sup>66</sup>

Drivers must take reasonable care for their own health and safety, the health and safety of those who may be affected by their acts or omissions, and cooperate with booking service providers in respect of any action taken in complying with the Act.<sup>67</sup>

<sup>60</sup> Ibid. r28(1), (2)(a)(ii).

<sup>61</sup> *Rail Safety National Law Act 2012 (SA)* s128(1).

<sup>62</sup> Ibid. s128(2).

<sup>63</sup> Ibid. s123, 126(1).

<sup>64</sup> Ibid. ss12(2), 13(3).

<sup>65</sup> Ibid. s4(1).

<sup>66</sup> *Commercial Passenger Vehicle Industry Act 2017 (Vic)*.

<sup>67</sup> Ibid. s27(1).

### 2.2.8 *Bus Safety Act 2009 (Vic)*

The *Bus Safety Act 2009 (Vic)* provides that an alcohol and drug management policy must be developed, maintained and implemented by all accredited bus operators.<sup>68</sup> The policy must specify that a driver must not have any alcohol or drugs present in their system immediately before or while driving a bus.<sup>69</sup> If a policy allows for workplace testing, it must specify the process as to how tests should be handled and conducted and mandate that tests can only be taken an hour before work or if there is reasonable cause to test the driver due an accident or incident, reasonable belief of impairment, or in the interests of safety.<sup>70</sup> The policy must specify the measures employed to ensure confidentiality of results.<sup>71</sup>

## 2.3 Examples of case law on workplace drug testing

The following section contains examples of cases from the Fair Work Commission and Federal Court of Australia over the past decade. Generally, while acknowledging that an employee's consumption of drugs away from work is only relevant if connected to the performance of their work, Courts have also found that breach of an internal AOD policy can be enough to constitute dismissal if done in a just manner.

### **Endeavour Energy v CEPU [2012] FWA 1809<sup>72</sup>**

**Court and date:** Fair Work Commission, Sydney, 26 March 2012.

**Facts:** CEPU disagreed with a new AOD policy implemented by Endeavour, primarily in respect of the cut-off or acceptable threshold level, type of drug testing used, requirement for pre-employment and internal placement testing, procedure for random testing, requirements for accident/incident and causal/suspicion testing, and process for what to do when someone tests positive.<sup>73</sup>

**Held:** Workplaces can implement AOD policies and procedures, subject to the following:

1. The appropriate blood alcohol concentration (BAC) cut-off for all employees should be 0.5mg/100ml, except for those required to have a lower cut-off due to legislation or those working in high-risk activities, who should be subject to a BAC cut-off of 0.02mg/100ml.
2. Due to accuracy issues with urine testing, the appropriate method of drug testing should be through oral fluid, in accordance with AS/NZ 4760-2019.

<sup>68</sup> *Bus Safety Act 2009 (Vic)* s56(2).

<sup>69</sup> *Ibid.* s57(b).

<sup>70</sup> *Ibid.* s57(2).

<sup>71</sup> *Ibid.* s57(2)(f).

<sup>72</sup> An appeal of this decision failed.

<sup>73</sup> *Endeavour Energy v CEPU [2012] FWA 1809 [1]*.



3. A target concentration for benzodiazepines should be determined by the applicant in consultation with its service provider.
4. Proposed procedures for AOD testing should clarify that post-incident and causal/suspicion testing should only occur where a manager has reasonable grounds for suspicion that alcohol or drugs were a contributory factor.
5. Confirmatory testing should occur in a laboratory, consistent with AS/NZ 4760-2019.
6. Employees should not be subject to random testing until six weeks following an education program being rolled out at that workplace.
7. Employees should not be required to disclose personal information about prescription medications unless and until they return a confirmed positive test.
8. A procedure should indicate that workplace AOD policies will not be varied by employers without first consulting employees and their representatives.<sup>74</sup>

### Harbour City Ferries Pty Ltd v Toms [2014] FWCFB 6249

**Court and date:** Fair Work Commission, 12 September 2014 (appeal).

**Facts:** Toms was dismissed from his position as Master after testing positive for cannabis following an accident.<sup>75</sup> Toms had smoked marijuana the previous day to assist with shoulder pain as he did not think he would be required to work the following day.<sup>76</sup> Toms brought a case against his employer in which the court determined that while valid, his termination was harsh, unjust or unreasonable, meaning he should be reinstated.<sup>77</sup> Harbour City Ferries Challenged this decision.

**Held:** A lack of impairment is not relevant in respect of a breach of a workplace AOD policy, the relevant matter is that an internal policy was not complied with.<sup>78</sup>

### Sharp v BCS Infrastructure Support Pty Ltd [2015] FWCFB 1033

**Court and date:** Fair Work Commission, 27 February 2015

**Facts:** Sharp failed a workplace drug test for cannabis in excess of the permitted threshold and was dismissed.<sup>79</sup> Sharp was employed by Qantas at Sydney Airport to maintain and service various types of equipment. This work constituted 'Safety Sensitive Aviation Activities' under civil aviation safety regulations.<sup>80</sup>

<sup>74</sup> Ibid. [61].

<sup>75</sup> *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249 [2].

<sup>76</sup> Ibid. [9].

<sup>77</sup> Ibid. [3].

<sup>78</sup> Ibid. [27]–[28].

<sup>79</sup> *Sharp v BCS Infrastructure Support Pty Ltd* (C2014/7029) at [1].

<sup>80</sup> Ibid. [3].

**Held:** Due to the inability to test for impairment with medicinal cannabis, it is within an employer’s power to dismiss an employee if they test positive and work in a safety-critical role.<sup>81</sup> The lack of an impairment test places employers in a difficult position.<sup>82</sup> Saliva testing can more accurately detect recent cannabis use than urine testing, meaning it is a better proxy of impairment, even though it cannot conclusively demonstrate impairment or non-impairment.<sup>83</sup> When assessing whether or not a workplace abided by procedural fairness in their dismissal of an employee, the Fair Work Commission will assess the employee’s role in relation to safety, the employer’s approach to enforcing the AOD policy, whether employees were trained in and understood the AOD policy, and whether the AOD policy addresses real risks of impairment (e.g. does the worker undertake safety critical tasks).<sup>84</sup>

### Construction, Forestry, Mining and Energy Union–Construction and General Division v Port Kembla Coal Terminal Limited [2015] FWCFB 4075

**Court and date:** Fair Work Commission, 19 August 2015.

**Facts:** Port Kembla Coal Terminal wanted to introduce urine drug testing for workers as part of their AOD policy, which the CFMEU opposed on privacy grounds.<sup>85</sup>

**Held:** The Fair Work Commission rejected this on the basis that while workplace drug testing could be discriminatory and impinge on privacy, it was necessary to protect the safety and health of workers in high-risk workplaces.<sup>86</sup> The purpose of drug testing is deterrence from attending work in an impaired state.<sup>87</sup>

### Sydney Trains v Gary Hilder [2020] FWCFB 1373

**Court and date:** Fair Work Commission, 13 March 2023 (appeal).

**Facts:** Hilder was dismissed from his role at Sydney Trains after testing positive to a random drug test; he had smoked marijuana the night before.<sup>88</sup> As a Customer Service Attendant at a train station, Hilder’s job was to ensure the cleanliness and security of the station and the safety and convenience of customers.<sup>89</sup> When dismissed, Hilder was informed he had breached Sydney Trains’ internal AOD policy.<sup>90</sup>

<sup>81</sup> Ibid. [24].

<sup>82</sup> Ibid. [24].

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> *Construction, Forestry, Mining and Energy Union–Construction and General Division v Port Kembla Coal Terminal Limited* (C2015/2695) at [2], [51].

<sup>86</sup> Ibid. [58], [69]. [72]–[73].

<sup>87</sup> Ibid. [66].

<sup>88</sup> *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 [2].

<sup>89</sup> Ibid.

<sup>90</sup> Ibid. [3]–[4].

**Held:** Hilder was unfairly dismissed and Sydney Trains' subsequent appeal against the decision, which relied on its zero-tolerance approach, failed.

### Millar v FQM Australia Nickel Pty Ltd [2022] FCA 1331

**Court and date:** Federal Court of Australia, 2 November 2022.

**Facts:** Millar was a mechanical fitter with FQM on a fly-in-fly-out basis who was prescribed medicinal cannabis (with THC) for treatment of Crohn's disease.<sup>91</sup> Millar had tried other methods of treatment, but medicinal cannabis was the only one he felt truly worked.<sup>92</sup> As a result of FQM's AOD policy, Millar was placed on unpaid leave before his position was terminated.<sup>93</sup>

Millar submitted that FQM's inflexibility around his medical treatment amounted to unlawful discrimination under the *Disability Discrimination Act 1992* (Cth).<sup>94</sup> FQM countered that it has a strict AOD policy which must be complied with to work at its mine sites and that all employees must pass these tests, regardless of the lack of a test for impairment.<sup>95</sup>

**Held:** The court found in favour of Millar and ordered him to be reinstated to his previous employment status until his discrimination matter was decided. The court accepted that THC can be detected in a person's urine well after impairment and rejected FQM's submission that the only way to ensure no risk was to prevent Millar from taking medication as a condition of his employment.<sup>96</sup>

### Haigh v Platinum Blasting Services Pty Ltd [2023] FWC 2465

**Court and date:** Fair Work Commission, 26 September 2023.

**Facts:** Haigh was prescribed medicinal cannabis to assist with anxiety and insomnia.<sup>97</sup> He tried other medications but found that only medicinal cannabis worked.<sup>98</sup> Haigh submitted that he would take medicinal cannabis outside of work hours and stop taking it 32 hours before going back to work, meaning he was not impaired and therefore did not have to disclose his prescription medication to his employer.<sup>99</sup> Haigh was involved in a workplace incident, was tested as part of an investigation, advised his workplace that he may test positive for THC, and was then terminated for breaching the AOD policy.<sup>100</sup>

<sup>91</sup> *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331 at [1].

<sup>92</sup> *Ibid.* [39].

<sup>93</sup> *Ibid.* [1].

<sup>94</sup> *Ibid.* [6].

<sup>95</sup> *Ibid.* [3]–[4].

<sup>96</sup> *Ibid.* [37], [40].

<sup>97</sup> *Haigh v Platinum Blasting Services Pty Ltd* [2023] FWC 2465 at [15].

<sup>98</sup> *Ibid.* [15].

<sup>99</sup> *Ibid.* [45].

<sup>100</sup> *Ibid.* [19]–[23].

Haigh had signed his employment contract, a Medical Management Plan, and was aware of the AOD policy, all of which provided employees had to notify management if taking medication that could impair their judgment.<sup>101</sup> The respondent submitted that Haigh was not unfairly dismissed as he breached the AOD policy, which constitutes grounds for dismissal.<sup>102</sup>

**Held:** Failure to disclose drug use in breach of a workplace's AOD policy may be a valid and lawful reason to dismiss an employee where impairment is a possibility, even if minimal or non-existent.<sup>103</sup> As his workplace AOD policy stated that he must state if he is taking medication that 'may' or 'could' impair, he was under an obligation to advise them.<sup>104</sup>

### Reece Goodsell v Sydney Trains [2023] FWC 3209<sup>105</sup>

**Court and Date:** Fair Work Commission, 4 December 2023.

**Facts:** Goodsell was suspended and then dismissed following testing positive for cocaine.<sup>106</sup> Goodsell made an application to the FWC for unfair dismissal and sought to be reinstated to his former position as Work Group Leader.<sup>107</sup> His role included conducting pre-work briefings, identifying hazards and putting in controls to mitigate risks, liaising with protection officers, and closing off work orders.<sup>108</sup> Sydney Trains' AOD policy required workers to be AOD free, meaning a drug test reading less than the cut off levels stipulated in the AS/NZS 4308-2008.<sup>109</sup> Further, the policy provides that returning a positive drug test may be an offence and result in disciplinary action.<sup>110</sup> Goodsell advised he tried cocaine as a one-off four days before he was supposed to return to work and was under the impression it would no longer be in his system.<sup>111</sup> He did not feel impaired and the testing officer observed the same.<sup>112</sup>

**Held:** The court ordered Goodsell to be reinstated, finding that an employee taking drugs away from work is only relevant if connected to the performance of work.<sup>113</sup> Sydney Trains failed to establish any risk that Goodsell was impaired or link the positive result to a risk of impairment.<sup>114</sup>

<sup>101</sup> Ibid. [42]-[43], [56].

<sup>102</sup> Ibid. [34].

<sup>103</sup> Ibid. [47].

<sup>104</sup> Ibid.

<sup>105</sup> Note that an appeal was lodged against this decision which at the time of writing had not been heard.

<sup>106</sup> *Reece Goodsell v Sydney Trains* (U2022/9973) at [2] ('*Goodsell*')

<sup>107</sup> Ibid. [1], [12].

<sup>108</sup> Ibid. [13].

<sup>109</sup> Ibid. [8], [11].

<sup>110</sup> Ibid. [10].

<sup>111</sup> Ibid. [18].

<sup>112</sup> Ibid. [19].

<sup>113</sup> Ibid. [186], [102].

<sup>114</sup> Ibid. [114].

# Chapter 3

## Workplace drug testing: its effectiveness and impact on employees

### 3.1 Introduction

This Chapter analyses the effectiveness of workplace drug testing, including the issue of testing for the presence of substances rather than impairment. Measuring impairment is one of the more significant challenges in the current system, since there is no widely accepted test that can assess impairment caused by prescribed drugs, including medicinal cannabis.

The final part of this Chapter discusses the impact of workplace drug testing on employees, including stigma, discrimination, the impact on careers and potentially using less safe medication.

### 3.2 Effectiveness of testing – presence vs impairment

Providers of workplace drug tests the Committee spoke with considered testing an efficient safety tool. For example, Peter Cook from Workplace Drug Testing Australasia told the Committee:

WDTA sees workplace drug testing as one tool for ensuring the safety of a workplace. The basis of workplace safety is that an employer must provide a safe work environment for employees, and employees must attend their workplace capable of performing their work functions.<sup>1</sup>

While workplace drug testing is used by employers to test for the presence of drugs, the Committee also heard evidence around the limitations of testing for impairment. Assessing impairment is a critical issue in workplace drug testing practices. The issue has become a concern for doctors who prescribe the products, employers and employees who want to safely perform their tasks at work.<sup>2</sup> However, testing for impairment is problematic.

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<sup>1</sup> Peter Cook, Workplace Drug Testing Australasia, Melbourne, 21 May 2024, *Transcript of evidence*, p. 11.

<sup>2</sup> Iain McGregor The Lambert Initiative, Melbourne, 22 May 2024, *Transcript of evidence*, p. 41.

According to The Lambert Initiative, impairment is defined as a deleterious effect on the performance of tasks.<sup>3</sup> Safework Health in its submission quoted a definition from the Alberta Advisory Committee on Impairment in the Workplace:

[Impairment is] a disturbance of functions from any cause that results in an unacceptable risk of an individual being unable to safely perform a task at work. The point at which this disturbance in function becomes an unacceptable risk in terms of job performance depends on the job at hand and its hazards.<sup>4</sup>

An important part of assessing the impact of cannabis is its lasting effect on the system. This will determine the level of impairment caused by THC. Danielle McCartney from The Lambert Initiative told the Committee that, depending on the dose, impairment from medicinal cannabis lasts no longer than eight hours when inhaled and ten hours when taken orally.<sup>5</sup>

In the case of urine testing, presence can be detected up to 72 hours after a person has consumed the drug. However, the Committee heard that a positive test for cannabis does not necessarily equal impairment.

Moreover, the impact of cannabis is also affected by frequency of consumption (regular users vs occasional users). According to Professor Iain McGregor from The Lambert Initiative:

it is actually very difficult to show impairment in people who are daily regular users of cannabis. Nearly all of the laboratory studies, for whatever reason, have been done on occasional cannabis users, often uni students who have a bit of cannabis once a month or once every couple of months. So if you are in that category, then you are likely to be much more impaired because you have no tolerance towards THC.<sup>6</sup>

According to Katinka van de Ven from 360Edge, this inability to assess impairment leads to inconsistency in how employers respond to positive test results, from being referred to counselling to losing their jobs. She said: 'The lack of regulation around this places many workers at risk of being sanctioned for taking a prescribed medication without any evidence of impairment.'<sup>7</sup>

Essentially, despite being legal since 2016, medicinal cannabis is sometimes treated differently to other prescription medications in workplaces. See the Committees discussion on reform to legislation and alcohol and other drugs (AOD) policies in Chapter 4.

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3 The Lambert Initiative, *Submission 39*, p. 4.

4 Safework Health, *Submission 23*, p 1.

5 Danielle McCartney, The Lambert Initiative, Melbourne, 22 May 2024, *Transcript of evidence*, p. 44.

6 Iain McGregor, *Transcript of evidence*, p.44.

7 Katinka van de Ven, 360Edge, Melbourne, 22 May 2024, *Transcript of evidence*, pp. 42-43.

The inability to test for impairment has challenged the validity of workplace drug testing for some stakeholders in this Inquiry. Katinka van de Ven believes:

There is no valid rationale to support workplace drug testing in workers whose potential alcohol and drug use presents no risk to workplace health and safety. The only exception where drug testing is warranted is for entry to high-risk work sites to protect workers from serious harm – for example, people working in mining who have to operate heavy machinery.<sup>8</sup>

Professor Kate Seear from Latrobe University suggested a shift in public policy to focus on impairment would encourage the development of more reliable tests.<sup>9</sup>

**FINDING 1:** The current workplace drug testing approach focuses on drug presence. The methods used do not test for impairment.

**RECOMMENDATION 1:** That the Victorian Government support the principle that in non-mandated industries, drug testing should only occur where employers have a well-founded belief that an employee may be impaired at work and should only then occur in the context of a comprehensive, alcohol and other drug policy and accompanying support framework as agreed by employers and employees within a workplace relations context.

### 3.3 Testing for cannabis – THC and CBD

Modern drug testing devices most commonly test for the presence of cannabis either in urine or in oral fluid.<sup>10</sup> Because of the different nature and effects of THC and CBD, stakeholders identified a need to differentiate between the two chemicals when performing tests. Wayne Gatt from Police Association Victoria stated:

We recognise the difference between THC and CBD in terms of the psychoactive impact on the human body. We base our view that they should be treated differently on that basis: that there is potential for a distinction to be made with respect to testing regimes and requirements and indeed, if any future legislative reform is on the table, that consideration for distinguishing between the two should be made.<sup>11</sup>

As part of this Inquiry, the Committee examined whether there is a percentage of THC in medicinal cannabis that can be declared safe and cannot cause impairment. Cannabis-associated impairment of complex-task performance tests have been

<sup>8</sup> Ibid.

<sup>9</sup> Kate Seear, Latrobe University, Melbourne, 22 May 2024, *Transcript of evidence*, p. 16.

<sup>10</sup> Workplace Drug Testing Australasia Limited, *Submission 27*, p. 7.

<sup>11</sup> Wayne Gatt, Police Association Victoria, Melbourne, 22 May 2024, *Transcript of evidence*, p. 30.

conducted in both experimental studies and epidemiological reviews on driving-skill impairment.<sup>12</sup>

In its submission, Safework Health stated that at lower-range blood THC levels, crash risks are around the same as a blood alcohol concentration 0.02 to 0.05%. According to Safework Health, Schedule 5 products (containing 2% or less THC) 'are easily managed at the workplace and have minimal if any associated impairment'.<sup>13</sup>

### 3.4 Suggested ways of testing for impairment

The Committee considered alternative options for workplace drug testing using evidence presented by stakeholders. For example, according to Professor Iain McGregor, using a combination of tests could provide a better picture of impairment compared to the current approach. The tests suggested are:

- The Druid test
- Visual-spatial tracking test
- Oral fluid tests.

The Druid test is a smartphone app that tests balance. The individual holds the phone in one hand and stands on one leg, during which time the app measures any swaying through the accelerometer in the phone. This test takes two minutes to administer. The visual-spatial tracking task involves a test where a person must move the finger on the screen following a dot.<sup>14</sup>

According to Professor McGregor these tests 'are sensitive to THC impairment, and they are quite useful in as much as you can get a baseline for someone'.<sup>15</sup>

Alternately, oral fluid tests are considered good in detecting the presence of cannabis if a person smoked cannabis in the last 1-2 hours. This type of test suits workplaces with high cut-off levels (e.g. 25 or 50 nanograms/ml of THC in oral fluid).<sup>16</sup>

The solution recommended by Professor McGregor includes a mixed approach, using different types of tests to detect impairment:

So some kind of judicious combination of oral fluid testing with a very high cut-off ... plus something looking for deviation in a Druid test ... would be one possible approach to trying to detect impairment in medicinal cannabis users.<sup>17</sup>

<sup>12</sup> On 21 May 2024, Premier Jacinta Allen announced a trial to determine whether people who use medicinal cannabis can drive safely. While driving testing is not part of the Terms of References for this inquiry, it should be noted that the trial involved impairment testing: <https://www.premier.vic.gov.au/green-light-world-first-medicinal-cannabis-driving-trial>.

<sup>13</sup> BAC levels are used to trace alcohol presence in blood samples. Safework Health, *Submission 23*, pp. 2-3.

<sup>14</sup> Iain McGregor, *Transcript of evidence*, p. 46.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, pp. 46-47.

<sup>17</sup> *Ibid.*



## 3.5 Impact of testing on employees

Workplace drug testing aims to protect employers and employees from potential safety risks caused by alcohol and other drugs. Despite this aim, the Committee heard that testing can have unintended consequences for employees including stigma and discrimination, and having to use other medications in place of medicinal cannabis.

### 3.5.1 Stigma and discrimination

The issue of stigma and drug use is a broad one. For this Inquiry, the Committee considered how stigma around cannabis can affect workplaces. Fundamentally, the stigmatisation of drugs exists because drugs are criminalised.<sup>18</sup> The issue around cannabis is complicated by the fact that employees testing positive may have consumed the drug legally or illegally.

The Committee received evidence discussing how stigma plays a crucial role in employees' reluctance to disclose the use of medicinal cannabis. According to Alcohol and Drug Foundation CEO Robert Taylor, stigma may be one reason why employees do not disclose their use of medicinal cannabis to their employers.<sup>19</sup>

Union representatives told the Committee that stigma in the workplace can only be overcome through the introduction of guidelines that help employers implement policies that ensure employees are comfortable discussing the use of any medication.<sup>20</sup>

Sean Mulcahy from Latrobe University provided similar evidence that stigma can be overcome through a change of language in AOD policies and guidelines.<sup>21</sup>

Community perception is also a large hurdle to overcome with regard to stigma and the use of medicinal cannabis. John Ryan from The Penington Institute believes a lack of education around medicinal cannabis means it is still treated differently to other medications, but education campaigns in workplaces and the wider community would reduce stigma attached to medicinal cannabis.<sup>22</sup>

At a public hearing, Professor Kate Seear from Latrobe University explained the correlation between wider drug testing, stigma and discrimination:

We suggested that workplace drug testing can risk generating stigma and discrimination in a range of ways, including through insufficient privacy protections; undignified testing methods lacking safeguards; broad, imprecise testing powers with excessive discretion; stereotypical assumptions about people who use drugs; and inadequate training on stigma and discrimination.<sup>23</sup>

<sup>18</sup> Robert Taylor, Alcohol and Drug Foundation, Melbourne, 22 May 2024, *Transcript of evidence*, p. 9.

<sup>19</sup> *Ibid.*, p. 4.

<sup>20</sup> Tony Piccolo, Australian Manufacturing Workers' Union, Melbourne, 21 May 2024, *Transcript of evidence*, p. 48.

<sup>21</sup> Sean Mulcahy, Latrobe University, Melbourne, 22 May 2024, *Transcript of evidence*, p. 13.

<sup>22</sup> John Ryan, Penington Institute, Melbourne, 22 May 2024, *Transcript of evidence*, p. 17.

<sup>23</sup> Kate Seear, Latrobe University, Melbourne, 22 May 2024, *Transcript of evidence*, p. 12.

According to Montu's representative Matthew McCrone, there is a risk that 'treating medicinal cannabis differently to other types of prescription medication promotes stigma and discrimination of those employees taking a legally prescribed medication'.<sup>24</sup>

Discrimination can take many forms in the workplace. Wayne Gatt from the Victorian Police Association raised one example, the risk of police officers not being able to take appropriate medication:

Policing, as you know, is a very traumatic industry by its nature ... We would hate to think that they would refuse treatment or that they would seek to not medicate where that was suggested by a registered medical practitioner ought it be discovered and have a negative or discriminatory impact on them in the workplace.<sup>25</sup>

Stakeholders in this Inquiry also revealed the impact using medicinal cannabis has had on their careers, including limited or non-existent opportunities for career progression.<sup>26</sup>

Grant Smith in his submission described his circumstances as follows:

The current drug policies surrounding workplaces create undue stress, anxiety and worry, as I am a certified patient, yet I am treated as though a black market criminal, additionally subjected to the stigmas and prejudices cast upon criminality by mainstream society. If I do not consume my medicine, for fear of retribution at the workplace, then I am less capable of completely and accurately performing and completing my work. The employer has a lack of understanding regarding the application of cannabis as a medicine and I am recurrently subjected to discrimination in this workplace.<sup>27</sup>

Employees have also lost their jobs through using medicinal cannabis in breach of a workplace AOD policy. In a submission, Jason Turner explained how he lost his job after disclosing that he used medicinal cannabis:

I was casual ... for 10 months. Was asked to go full time which I was happy to. I was informed that there was a drug and alcohol test as part of the medical. I informed them that I used medical marijuana after work and it would come up on a test. I was dismissed at the end of the day due to their company policy not allowing for medicinal cannabis. All other prescription medicines where acceptable.<sup>28</sup>

(See also similar comments received as part of the Committee's survey carried out during this Inquiry at Appendix B.)

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24 Matthew McCrone, Montu, Melbourne, 22 May 2024, *Transcript of evidence*, p. 33.

25 Wayne Gatt, *Transcript of evidence*, p. 31.

26 Katrina Thorpe-Birkett, *Submission 9*, p.1; Julie Van Der Harst, *Submission 11*, p. 1.

27 Grant Smith, *Submission 14*, p.1.

28 Jason Turner, *Submission 1*, p.1.

Stephanie Thuesen from the Health and Community Services Union was of the view that voluntary disclosure of the use of cannabis was an 'extremely courageous' act considering the consequences employees could face.<sup>29</sup>

The Committee accepts that all employees should declare if they are impaired by medication they are taking, regardless of the type. However, it is clear that current attitudes mean some employees are treated differently to others based on the type of prescription medication they are taking. Significantly, a positive test for cannabis can lead to termination or other punitive responses regardless of whether the employee has a valid prescription for medicinal cannabis. The Committee discusses this issue in more detail in Chapter 4.

### 3.5.2 Using other prescribed medication

The Committee heard about employees who stop taking medicinal cannabis in favour of other prescribed drugs – such as benzodiazepines and opioids, for example. This can happen not because of any impairment caused by medicinal cannabis but because they are worried about possible sanctions from their employers.

For example, in its submission, the Victorian Equal Opportunity and Human Rights Commission documented the case of an employer advising their employee to change medication or lose their job.<sup>30</sup>

This is problematic because other prescribed drugs may cause greater impairment than medicinal cannabis – therefore being a safety risk – and come with a greater potential to be addictive.<sup>31</sup> Yet when they attract no sanctions, employees may consider them to be a 'safer' option.

**FINDING 2:** Employees may consider prescription medication such as benzodiazepines and opioids a safer option than medicinal cannabis, despite the fact they may cause greater impairment and be more addictive.

<sup>29</sup> Stephanie Thuesen, *Transcript of evidence*, p. 43.

<sup>30</sup> Victorian Equal Opportunity and Human Rights Commission, *Submission 20*, p. 2.

<sup>31</sup> The Police Association Victoria, *Submission 19*, p. 3; MedReleaf, *Submission 15*, p. 1.



# Chapter 4

## Reform to legislation and alcohol and other drugs policies

### 4.1 Introduction

This Chapter explains the difficulties governments face writing legislation around workplace drug testing and proposes limited changes to the *Occupational Health and Safety Act 2004* and *Equal Opportunity Act 2010*. It then comments on similar difficulties faced by WorkSafe in developing the advice it provides on alcohol and other drugs (AOD) policies.

The Committee found that WorkSafe does provide comprehensive advice based on important principles that acknowledges that different workplaces require different approaches. However, the Committee recommends that WorkSafe update its advice on medicinal cannabis in light of the recent rapid growth in its use.

#### 4.1.1 Legislation – *Occupational Health and Safety Act 2004*

Legislators face several challenges regarding medicinal cannabis, as established throughout this Report:

- The term ‘medicinal cannabis’ can refer to medication that has zero (or very close to it) THC or higher amounts of THC.
- Highly safety-sensitive workplaces are justified in their zero-tolerance approach to alcohol and illicit drugs, yet workers taking medication said to contain only CBD may test positive for tiny amounts of THC.
- Although it can be said that small amounts of THC are unlikely to cause impairment, defining what is a small amount is difficult.
- There is no accepted test for impairment regarding cannabis.
- Safety risks differ between workplaces and within workplaces.

The Committee considered the *Occupational Health and Safety Act 2004* (OHS Act) and regulations as part of its investigations in this Inquiry. In particular, it considered whether changes could be made to provide more certainty to employers and employees regarding medicinal cannabis in the workplace.

In its submission, the Penington Institute told the Committee that workplaces generally only test for alcohol and illicit substances. This is despite the fact that many medications can cause impairment. As a result, it is possible that ‘many Victorians have or will be subject to unfair and potentially discriminatory treatment because of their use of medicinal cannabis’.<sup>1</sup>

At a public hearing, the Chief Executive Officer of the Penington Institute, John Ryan, commented further on the inconsistency of workplaces testing for cannabis but not for other prescription drugs. For example, benzodiazepines and opioids, including anti-anxiety medications, sleeping tablets and pain killers, can be very impairing. In Mr Ryan’s view, it is the responsibility of the Victorian Parliament to create a legislative framework that is ‘fair, reasonable and protects individual patients but also protects their colleagues and the general public’.<sup>2</sup>

Matthew McCrone, Government Relations Manager at medicinal cannabis company Montu, told the Committee that legislation ‘should consider the unintended consequences of mandatory and universal workplace drug-testing programs, including positive drug tests that are not linked to impairment as well as the possibility of inaccurate results’.<sup>3</sup>

It is difficult to create a framework that covers every workplace, especially in the absence of a standard test for impairment. Mines, for example, will approach this issue differently than, for example, retail employers. Even within workplaces, different roles will require a different approach. For example, employees in a warehouse could be working in an office or doing more safety-sensitive roles such as driving a forklift.

As Tracey Browne from the Australian Industry Group pointed out, the legislation creates a ‘general duty’ for employers to provide a safe workplace and ensure that employees are fit for work, adding: ‘I do not see a way that any form of regulation could be written in a way that could cover all of the potential circumstances of every Victorian workplace.’<sup>4</sup>

Similarly, in its submission Master Electricians Australia argued that the current legislation ‘rightfully allows employers to assess impairment risk in light of subjective risks as opposed to a blanket legislative framework’.<sup>5</sup>

### Committee comment

It can be difficult for legislation, generally being a broad tool, to be prescriptive. However, the Committee believes that the OHS Act can define key overarching principles that inform employers and employees regarding AOD testing, in particular when it is justified and how it should be carried out. For example, the *Independent*

<sup>1</sup> Penington Institute, *Submission 33*, pp. 4-5.

<sup>2</sup> John Ryan, Penington Institute, Melbourne, 22 May 2024, *Transcript of evidence*, p. 16.

<sup>3</sup> Matthew McCrone, Montu, Melbourne, 22 May 2024, *Transcript of evidence*, p. 32.

<sup>4</sup> Tracey Browne, Australian Industry Group, Melbourne, 22 May 2024, *Transcript of evidence*, p. 23.

<sup>5</sup> Master Electricians Australia, *Submission 31*, p. 2.

*Broad-based Anti-corruption Commission Act 2011* and the *Victoria Police Act 2013* (see Chapter 2). This would have the added benefit of guiding WorkSafe's advice around AOD policies (see below).

**RECOMMENDATION 2:** That the Victorian Government amend the *Occupational Health and Safety Act 2004* and/or regulations to state key principles around alcohol and other drugs testing, including prescription medication. These principles should include, but not be limited to, the rights of workers to privacy and dignity, a commitment to workplace education, appropriate support measures and when and how alcohol and other drugs testing can or should be carried out.

## 4.2 Legislation – *Equal Opportunity Act 2010* and *Disability Act 2006*

The Committee also considered the question of discrimination against employees using medicinal cannabis. This is a difficult question to answer, as there is some complexity around whether workers being sanctioned for using medicinal cannabis are being discriminated against under the *Equal Opportunity Act 2010* (EOA) or *Disability Act 2006* (DA).

Employers can dismiss or discipline employees who don't comply with an AOD policy or whose test results contravene the policy.<sup>6</sup> The complexity arises because, as noted in Chapter 2, legislation provides protection against discrimination on the grounds of disability. A person with a disability may be prescribed medication for that disability, including medicinal cannabis, which the Committee heard provides some level of protection under the EOA and DA.<sup>7</sup>

For example, the EOA discusses the responsibility of employers to make 'reasonable adjustments' for employees with a disability. However, the Act also states that these adjustments are not required if 'the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made'.<sup>8</sup>

The Committee accepts that 'checks and balances' do exist – such as the EOA and DA and unfair dismissal laws i.e. the *Fair Work Act 2009*, as shown in the cases included in Chapter 2 of this Report. While these provide some protection for employees and guidance for employers, not everyone who feels they have been unfairly sanctioned because of taking medicinal cannabis will take their case to court. This could be for many reasons, ranging from financial to the fact they may simply be too sick.

The Committee also notes that both Acts are silent on prescription medication.

<sup>6</sup> Australian Industry Group, *Submission 30*, p 4.

<sup>7</sup> Australian Industry Group, *Submission 30*, p. 4; Victorian Equal Opportunity and Human Rights Commission, *Submission 20*, p. 4.

<sup>8</sup> *Equal Opportunity Act 2010* (Vic) s30 (2).

Ideally, employers and employees should be clear about their rights and responsibilities regarding medicinal cannabis. As the Penington Institute wrote in its submission:

Taking proactive steps to address these issues would be preferable, as one of the potential alternatives is to wait until a sufficient number of employees have sued for unfair dismissal or discrimination and policies must be reformed in response to case law.<sup>9</sup>

Master Electricians Australia argued that the broad nature of legislation ‘generates exposure towards unwarranted level of risk for discriminatory lawsuits’. As such, it believes the Victorian Government should ‘explicitly legislate for lawful discrimination in preventing an employee to work when they are unfit for work (or if their fitness cannot be determined empirically) due to their medical prescription’.<sup>10</sup>

In its submission, the Victorian Equal Opportunity and Human Rights Commission stated that it believes the existing exceptions in the EOA – specifically Section 75(1) and Section 86(1) – fairly balance the rights and responsibilities of employers and employees. The Commission refers to two VCAT cases to support this view: *Slattery v Manningham City Council* [2013] VCAT 1869; and *Hall v Victorian Amateur Football Association* [1999] VCAT 627.<sup>11</sup>

Nevertheless, the Commission recommends reform to the EOA to provide more protection against discrimination for people taking prescription medication or receiving medical treatment for a disability.

The Commission provided two options:

1. Amending the definition of discrimination in Section 7 to clarify that where a person uses prescription medication or requires medical treatment for a disability, this is a characteristic that a person with that disability generally has; or
2. Adding a new attribute to Section 6, such as prescription medication or medical treatment.

While the Commission sees value in both options, overall it recommends Option 1. Amending Section 7 in this way was supported by several stakeholders in this Inquiry: the Penington Institute,<sup>12</sup> Seear *et al*;<sup>13</sup> and the Mining and Energy Union.<sup>14</sup>

### Committee comment

The Committee notes existing ‘checks and balances’, such as unfair dismissal laws and existing discrimination legislation, that may protect employees using prescription medication. It believes these would be strengthened by amending the EOA in the manner suggested by the Victorian Equal Opportunity and Human Rights Commission.

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<sup>9</sup> Penington Institute, *Submission 33*, p. 7.

<sup>10</sup> Master Electricians Australia, *Submission 31*, p. 2.

<sup>11</sup> Victorian Equal Opportunity and Human Rights Commission, *Submission 20*, p.6.

<sup>12</sup> John Ryan, *Transcript of evidence*, p. 14.

<sup>13</sup> Kate Seear, Latrobe University, Melbourne, 22 May 2024, *Transcript of evidence*, p. 13.

<sup>14</sup> Mining and Energy Union, response to questions on notice, p. 1.



**RECOMMENDATION 3:** That the Victorian Government amend the definition of discrimination in Section 7 of the *Equal Opportunity Act 2010* to clarify that where a person uses prescription medication or requires medical treatment for a disability, this is a characteristic that a person with that disability generally has.

### 4.3 Personal information

The Committee considered the issue of personal information and whether there is a need for a distinct piece of legislation regarding workplace drug testing. The Committee notes that legislation regarding how organisations can collect and use personal information include:

- *Privacy Act 1988* (Cth)
- *Privacy and Data Protections Act 2014* (Vic)
- *Health Records Act 2001* (Vic).

The Committee further notes that Section 20 (1) of the *Occupational Health and Safety Regulations 2017* states that any reports of medical examinations or health monitoring must be kept confidential (except for specific circumstances listed elsewhere in the regulations).

As such, the Committee has no further comment to make regarding this issue.

### 4.4 Alcohol and other drugs policies

The Committee heard two main concerns regarding workplace AOD policies:

- That there is a lack of consistency across workforces with some employers being overly harsh regarding medicinal cannabis, including termination of employment.
- It is not clear what AOD policies in some workplaces are trying to achieve.

For example, in their submission Seear *et al* raised inconsistencies between Acts and Regulations governing AOD testing in Victoria (see Chapter 2 of this Report for these pieces of legislation). These include different reasons permitting testing and samples being provided via different methods.<sup>15</sup>

At a public hearing, Nathan Davies from medicinal cannabis provider MedReleaf spoke about the risk of ‘unfair penalties for patients adhering to their prescribed treatments’.<sup>16</sup> Submissions to this Inquiry from individuals<sup>17</sup> and unions<sup>18</sup> and the

<sup>15</sup> Kate Seear *et al*, *Submission 43*, pp. 3–4.

<sup>16</sup> Nathan Davies, MedReleaf, Melbourne 22 May 2024, *Transcript of evidence*, p. 33.

<sup>17</sup> Julie Van Der Harst, *Submission 11*, p. 1; Grant Smith, *Submission 14*, p. 1.

<sup>18</sup> Mining and Energy Union, *Submission 41*, p. 2.

evidence gathered by the Committee's survey (see Appendix B) show that this is a problem in Victorian workplaces that needs to be addressed.

It is important to note that the Committee heard that driving many AOD policies is employers' responsibility to provide a safe workplace, as required by the OHS Act. Tracey Browne from the Australian Industry Group noted that the highest possible penalty under occupational health and safety laws, workplace manslaughter, is 25 years jail. Hence, employers want policies in place that address all potential risks to safety. This includes that the presence of THC may indicate impairment.<sup>19</sup>

The Committee then considered the role of WorkSafe in helping employers and employees understand their rights and responsibilities when it comes to workplace drug testing. In particular, it considered whether WorkSafe could be more prescriptive in its advice and whether the advice it does provide is sufficient.

At a public hearing, WorkSafe Chief Executive Officer Joe Calafiore told the Committee that it is difficult for WorkSafe's 'Guide for developing a workplace alcohol and other drugs policy' – available on its website – to be prescriptive because AOD policies will, by their very nature, vary.

Effectively, as noted in the discussion on legislation above, the lack of consistency simply reflects the fact that different workplaces require different policies.

Mr Calafiore discussed WorkSafe's compliance, enforcement and prosecution roles regarding workplace health and safety with the Committee, adding that it also provides a great deal of advice to employers and employees around AOD policies. This advice takes the form of principles that apply to forming AOD policies, in particular that policies should be informed by the role. Mr Calafiore also said that industry associations have an important role to play in helping businesses develop their policies.<sup>20</sup>

Tracey Browne from the Australian Industry Group told the Committee that, similar to WorkSafe, it provides advice on the principles of AOD policies and how employers should structure their policies. More explicit technical advice, she said, should be sought from testing experts due to the rapidly evolving evidence base around drugs and impairment.<sup>21</sup>

Regarding the advice that WorkSafe does provide around AOD policies, the Committee received evidence regarding the key principles stakeholders believed should underpin AOD policies. These include that:

- AOD policies should be written with the involvement of employees and should be explained to workers

<sup>19</sup> Tracey Browne, *Transcript of evidence*, p. 24.

<sup>20</sup> Joe Calafiore, WorkSafe Victoria, Melbourne 21 May 2024, *Transcript of evidence*, p. 3.

<sup>21</sup> Tracey Browne, *Transcript of evidence*, p. 24.

- Testing should only be done to address a specific risk, most commonly a safety risk (i.e. a 'fitness for work' approach)
- Testing should be procedurally fair, including ensuring an employee's privacy
- Positive results should trigger a supportive rather than a punitive response.<sup>22</sup>

Fundamentally, the Committee agrees with Robert Taylor from Alcohol and Drug Foundation, who told the Committee:

I think if you give people the benefit of the doubt and assume that most people actually do want to do the right thing and do want to be safe in the workplace, information can be a really strong way of empowering them to do so. So it is ensuring ... that there is a strong policy, that information is provided to employees and employers, ensuring that people have access to support and information when needed ...<sup>23</sup>

The Committee examined WorkSafe's 'Guide for developing a workplace alcohol and other drugs policy' and notes that it contains these principles. In a submission to this Inquiry, Professor Vicki Kotsirilos described WorkSafe's advice as 'excellent guidelines ... as a guidance for employers on developing policy to manage risks to workplace health and safety with alcohol and other drug use'.<sup>24</sup>

For example, the Guide states that AOD policies should be developed in consultation with employees as part of a wider approach to occupational health and safety. It is also clear in stating that the aim of an AOD policy 'should be prevention, education, counselling and rehabilitation'.

The Committee adds here that the with unions and employer groups it spoke with during this Inquiry who agree that workers who test positive for drugs should be offered support before sanctions are considered. In other words, a positive test should be a starting point for action.

Regarding testing, WorkSafe's Guide states: 'When considering the introduction of alcohol or drug testing, employers should ensure workplace policies and programs are appropriate to the level of risk by doing a risk assessment.'

Further, it says:

If alcohol and/or other drug testing is used, specify the following:

- the purpose of testing for presence of alcohol or other drugs
- the type of tests used and testing procedures, including cut-off points for a positive result
- whether a MRO will be used
- circumstances when tests are carried out

<sup>22</sup> Kate Seear et al, *Submission 43*, p.1; Katinka van de Ven, 360Edge, Melbourne, 22 May 2024, *Transcript of evidence*, p. 43.

<sup>23</sup> Robert Taylor, Alcohol and Drug Foundation, Melbourne 22 May 2024, *Transcript of evidence*, p. 4.

<sup>24</sup> Vicki Kotsirilos, *Submission 16*, p. 3.

- who may conduct the tests
- how and where test samples and results are to be stored, handled or destroyed
- procedures following a positive test including consequences (if any)
- consequences of refusing to take a test
- legal rights of those tested
- the grievance and complaints process, and
- how the results of the tests will be reviewed and conveyed to management, for example, through the use of a MRO.<sup>25</sup>

In response to concerns that WorkSafe does not specifically address how to measure impairment, the Committee notes the second bullet point above about the need to specify ‘cut-off points for a positive result’. The Committee also notes elsewhere in the Guide that WorkSafe states: ‘excluding alcohol testing, a positive drug test is not always directly related to impairment’.

See the Committee’s discussion on the challenges around testing for impairment in Chapter 3.

Some stakeholders recommended WorkSafe strengthen its advice. For example, in a response to a Question on Notice, Seear *et al* advised the Committee that in Canada workplace drug testing can only happen ‘with demonstrable justification, based on reasonable and probable grounds’. They believe that WorkSafe should update its guide in line with the Canadian approach.<sup>26</sup> The Committee notes that, as a regulator, WorkSafe could only act in this way following a change in Victorian legislation.

In its submission, the Health and Community Services Union recommended that a compliance code relating to alcohol and other drugs and impairment in the workplace replace WorkSafe’s Guide. The Union argued that the code ‘should include matters relating to workplace policy, training, impairment procedure, personnel required and reasonable adjustments and policies in relation to the use of medicinal cannabis’.<sup>27</sup>

Regarding medicinal cannabis, the Committee notes that the Guide refers to prescription medication generally without making specific mention of any one type of medication. This is understandable considering the large number of prescription drugs on the market.

However, the Committee has observed that the recent rapid increase in the use of medicinal cannabis in Victoria – as noted in Chapter 1 – seems to have happened at a faster rate than the community’s understanding of the drug, in particular knowledge

<sup>25</sup> WorkSafe Victoria, Guide for developing a workplace alcohol and other drugs policy, <<https://www.worksafe.vic.gov.au/guide-developing-workplace-alcohol-and-other-drugs-policy>> accessed 19 June 2024.

<sup>26</sup> Seear et al., response to questions on notice, p. 1.

<sup>27</sup> Health and Community Services Union, *Submission 22*, p. 18.

about the relative effects of CBD and THC. This also helps explain why some AOD policies may be, as discussed above, overly harsh.

As Jordon Carlisle from Master Electricians Australia told the Committee, employers have to be ‘a safety expert, an employment expert and now a medical expert in terms of determining the level of impairment that somebody is going to have ... The questions I get about medical cannabis are ‘Well, what do I do next?’.<sup>28</sup>

The evidence received, then, shows that employers are asking for certainty on medicinal cannabis so they can treat workers fairly while also keeping workplaces safe. For employees, they are looking for assurances on how they can take prescribed medicinal cannabis without losing their jobs or being otherwise punished.

This is why the Committee believes that WorkSafe should update its advice on AOD policies to include information on medicinal cannabis, in particular that it should be considered in the same way as all prescription medications that may cause impairment.

This includes being clear around personal medical information and when employees should tell their employers what medication they are taking – either as soon as they begin taking it or prior to being tested. This is determined by how likely the medication is to affect how an employee carries out their work (i.e. it is a matter of fitness for work).<sup>29</sup>

Mr Calafiore clarified that WorkSafe only considers the impact a drug has on workers. He said: ‘... we take the approach that occupational health and safety issues in this context arise from the effects of the drug on the worker, not its legal status. Whether that is medicinal cannabis or any prescription drug or any illegal drug, we treat it all the same way.’<sup>30</sup>

However, Mr Calafiore agreed that WorkSafe could revise its guidance material in response to the large increase in medicinal cannabis use in Victoria in recent years.<sup>31</sup>

**FINDING 3:** Alcohol and other drugs policies vary because they depend on the workplace and the nature of work in each workplace. However, the absence of specific guidance from WorkSafe on some issues – including medicinal cannabis – has resulted in uncertainty and therefore inconsistencies in the approach taken by different workplaces.

<sup>28</sup> Jordon Carlisle, Master Electricians Australia, Melbourne, 22 May 2024, *Transcript of evidence*, p. 28.

<sup>29</sup> Health and Community Services Union, *Submission 22*, p.24; Australian Manufacturing Workers Union, *Submission 40*, p. 4; Wayne Gatt, The Police Association Victoria, Melbourne, 21 May 2024, *Transcript of evidence*, p. 44.

<sup>30</sup> Joe Calafiore, *Transcript of evidence*, p. 3.

<sup>31</sup> *Ibid.*, p. 5.

### Committee comment

The recent large increase in the use of medicinal cannabis has created uncertainty in many workplaces. The Committee found that while WorkSafe provides thorough advice on AOD policies – through its ‘Guide for developing a workplace alcohol and other drugs policy’, ‘Drug and alcohol policy tipsheet’, ‘Alcohol and other drugs policy’ and ‘Alcohol and drugs in mines’ documents – it should update its advice to provide more information on medicinal cannabis.

**RECOMMENDATION 4:** That WorkSafe update its advice on alcohol and other drugs policies with information on medicinal cannabis, in particular that it should be considered in the same way as all medications that cause impairment. The advice should include but not be limited to:

- The legal status of prescribed medicinal cannabis
- The difference between CBD and THC
- The relationship between the presence of THC and impairment
- When employees should be required to disclose that they are taking medicinal cannabis.

**RECOMMENDATION 5:** That WorkSafe convene a working group consisting of industry stakeholders including employees and employers’ representatives, government departments, and public sector Alcohol and Other Drug (AOD) providers to:

- a. Update the ‘Guide for developing a workplace alcohol and other drugs policy’ which is no longer it-for-purpose.
- b. Develop a Compliance Code covering, but not limited to:
  - Obligations of employers and workers in relation to impairment and safety at work, including the right to privacy and dignity,
  - General awareness training of impairment,
  - Appropriate policies and procedures,
  - Obligations and rights of HSRs to provide a health led response to impairment,
  - Reasonable workplace adjustments in the workplace for impairment, and
  - Advice on available alcohol, drug and gambling support.

The Compliance Code should be accompanied by a complementary and comprehensive education campaign, emphasising a health-based approach to AOD in the workplace, and the development of a Health and Safety Representative refresher training program.

**RECOMMENDATION 6:** That WorkSafe establish a framework to ensure that workplace drug policies are communicated in a clear and easily understandable manner which is visible and accessible to all employees.

**RECOMMENDATION 7:** That WorkSafe investigate impairment testing methodologies, including the results of the current medicinal cannabis closed track driving trial, and publicly advise on their applicability to workplace drug testing.

**Adopted by the Legislative Council Legal and Social Issues Committee  
55 St Andrews Place, East Melbourne  
16 August 2024**





# Appendix A

## About the Inquiry

### A.1 List of submissions

1	Jason Turner	24	Alcohol and Drug Foundation
2	Confidential	25	Montu Group Pty Ltd
3	Drug Free Australia	26	Independent Analytical Forensic Services
4	Name withheld	27	Workplace Drug Testing Australasia Ltd
5	Name withheld	28	Australasian Medical Review Officers Association
6	Confidential	29	Mr Jesse Walton
7	Confidential	30	AI Group (Australian Industry Group)
8	Mrs Yvonne Mercante	31	Master Electricians Australia
9	Mrs Katrina Thorpe-Birkett	32	Astrid Dispensary and Clinic
10	Mr Wayne Taylor	33	Penington Institute
11	Ms Julie Van Der Harst	34	360edge
12	Confidential	35	The Drug Detection Agency (TDDA)
13	Mrs Shirley Chesterman	36	Confidential
14	Dr Grant Smith	37	Victorian Trades Hall Council
15	MedReleaf Australia	38	Australian Services Union
16	Associate Professor Vicki Kotsirilos AM	39	Lambert Initiative for Cannabinoid Therapeutics
17	Drug Advisory Council of Australia	40	Australian Manufacturing Workers Union-Victorian Branch
18	Dr Michael White	41	Mining and Energy Union
19	The Police Association Victoria	42	Harm Reduction Australia
20	Victorian Equal Opportunity & Human Rights Commission	43	Kate Seear et al
21	HACSU - Health & Community Services Union	44	Australian Medicinal Cannabis Association
22	Fit4Duty Pty Ltd		
23	Safework Health		

## A.2 Witnesses at hearings

### 21 May 2024

Davui Room, G1 & G2, East Melbourne, VIC

Witness	Position and Organisation
Joe Calafiore	Chief Executive Officer, WorkSafe
Ben Wright	Manager Earth Resources and Silica, WorkSafe
Scott Osborne	Treasurer, Workplace Drug Testing Australasia Ltd
Patrick Cook	Chair, Workplace Drug Testing Australasia Ltd
Dr Phil Tynan	National Toxicologist, Safework Health
Wayne Gatt	Secretary, The Police Association Victoria
Adam Jacka	National Legal Officer, Mining and Energy Union
Tony Piccolo	Assistant State Secretary, Australian Manufacturing Workers' Union
Stephanie Thuesen	Projects and Political Liaison Officer, HACSU – Health & Community Services Union

### 22 May 2024

Davui Room, G1 & G2, East Melbourne, VIC

Witness	Position and Organisation
Robert Taylor	Manager, Policy and Engagement, Alcohol and Drug Foundation
Professor Kate Seear	La Trobe University
Sean Mulcahy	Research Officer, La Trobe University
John Ryan	Chief Executive Officer, Penington Institute
Rhys Cohen	Policy Officer, Penington Institute
Tracey Browne	Manager – National WHS & Workers' Compensation, Policy and Membership Services, AI Group (Australian Industry Group)
Scott Barklamb	Principal Advisor – Workplace Relations Policy, AI Group (Australian Industry Group)
Georgia Holmes	Policy and Communications Advisor, Master Electricians Australia
Jordon Carlisle	Employment Adviser, Master Electricians Australia
Nathan Davis	Executive, MedReleaf Australia
Professor Iain McGregor	Academic Director, Lambert Initiative for Cannabinoid Therapeutics
Dr Danielle McCartney	Postdoctoral Research Associate, Lambert Initiative for Cannabinoid Therapeutics
Dr Katinka van de Ven	Program Lead for Workplace Drug and Alcohol Policy, 360edge
Jan Kronberg	National President, Drug Advisory Council of Australia
Dr Karen Broadley	Researcher, Drug Advisory Council of Australia

# Appendix B

## Workplace drug testing survey results

### B.1 Overview

The Committee's survey was available on the Workplace Drug Testing Inquiry website from 21 February 2024 to 28 March 2024. It was intended to complement the evidence already received by the Committee from submissions to the Inquiry and was promoted by Committee Members and Inquiry stakeholders.

The Committee received 487 responses to the survey. The responders were self-selecting i.e. the Committee did not contact or engage with any responder directly.

Section B.2 shows the questionnaire and Section B.3 some key responses and findings from the survey.

### B.2 Questionnaire

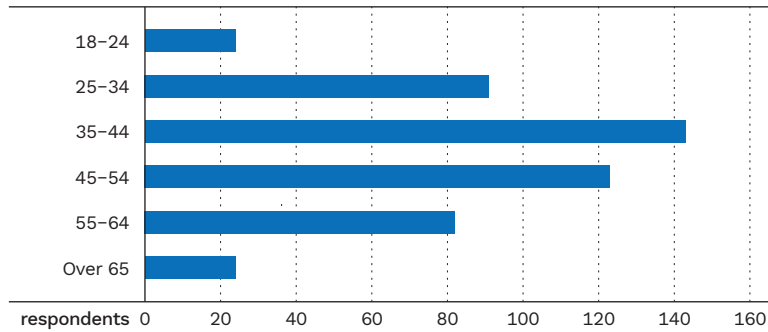
1. What industry do you work for?
  - Building and Construction
  - Transport and Logistics
  - Education and Training
  - Emergency Services
  - Health services
  - Professional services
  - Scientific and Technical services
  - Retail
  - Tourism and events
  - Academic and research
  - Other (please specify)

2. How would you describe your work status?
  - Full-time employee
  - Part-time employee
  - Employer
  - Self-employed
  - Short-term contract
  - Long-term contract
3. Have you been prescribed medicinal cannabis?
  - Yes
  - No
4. Is your workplace subject to workplace drug testing?
  - Yes
  - No
5. Have you been prevented from using prescribed medicinal cannabis due to workplace drug policies?
  - Yes
  - No
6. If yes, did you use other medications in place of medicinal cannabis?
  - Yes
  - No
7. What medications did you use in place of medicinal cannabis?
8. Has the use of medicinal cannabis had any other adverse effects on your employment? Please describe
9. Which of the following age ranges do you fall into?
  - 18 - 24
  - 25 - 34
  - 35 - 44
  - 45 - 54
  - 55 - 64
  - Over 65

## B.3 Key responses and findings

### B.3.1 Age range of respondents

Which of the following age ranges do you fall into? (Q9)

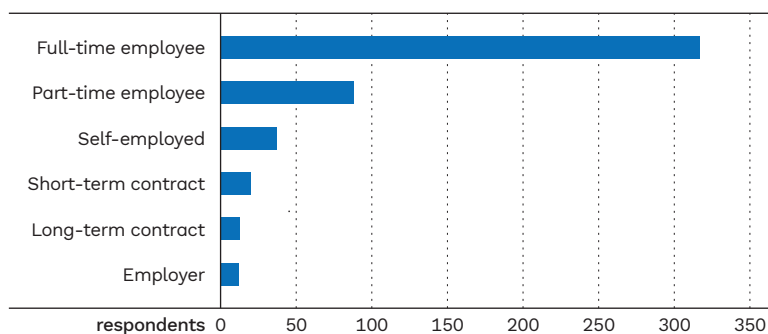


Number of participants:

- 143 participants between the ages of 35 and 44
- 123 participants between the ages of 45 and 54
- 91 participants between the ages of 25 and 34
- 82 participants between the ages of 55 and 64
- 24 participants between the ages of 18 and 24
- 24 participants between 65 years of age and above.

### B.3.2 Employment status

How would you describe your work status? (Q2)



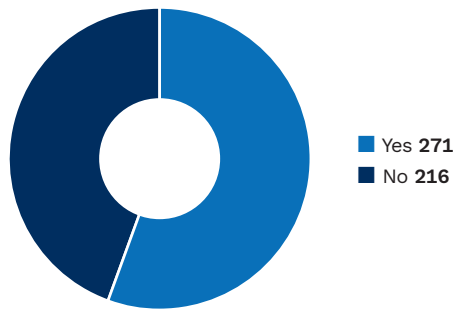
Participants' employment status:

- 317 participants indicated they are full-time employees
- 88 participants are employed part-time
- 37 participants are self-employed

- 20 participants are on short-term contracts
- 13 participants are on long-term contracts
- 12 participants are employers.

### B.3.3 Testing

Is your workplace subject to workplace drug testing? (Q4)



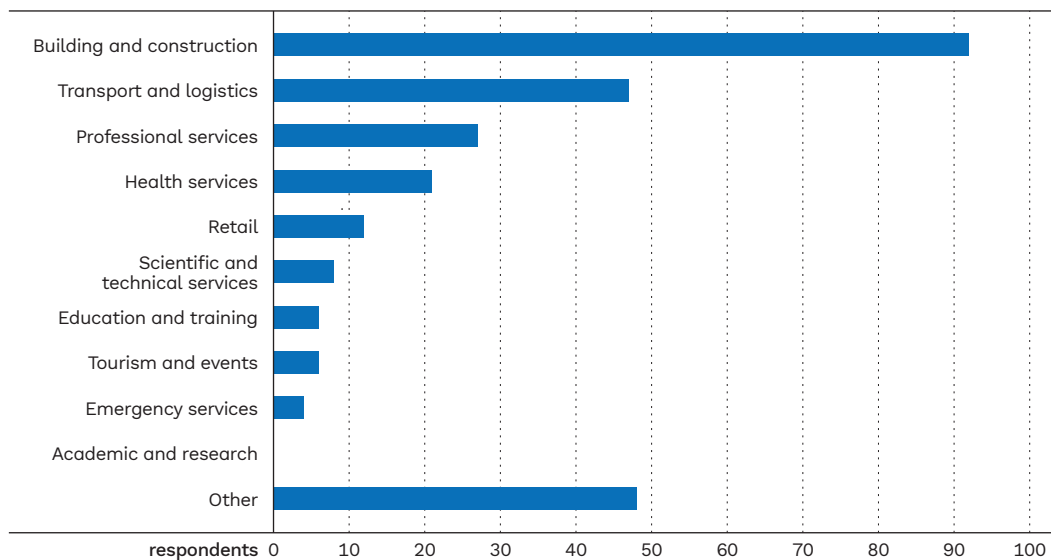
271 participants declared that they ARE subject to testing in their workplace.

The remaining 216 participants ARE NOT subject to testing.

### B.3.4 Industry

The 271 participants who declared to be subject to testing in their workplace work in the following industries (see image below).

What industry do you work for? (Q1)

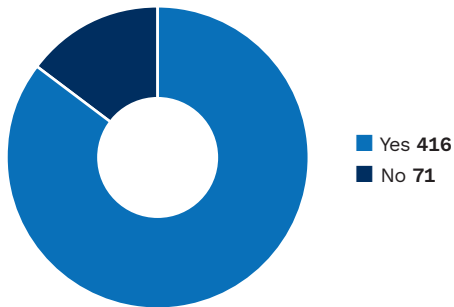


48 participants selected the option 'Other' regarding the industry in which they work.

### B.3.5 Quantitative data

Below are the answers provided to the quantitative (yes/no) questions in the survey.

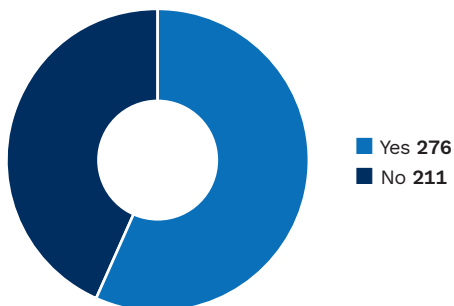
#### Have you been prescribed medicinal cannabis? (Q3)



416 participants HAVE been prescribed medical cannabis.

71 participants replied they HAVE NOT.

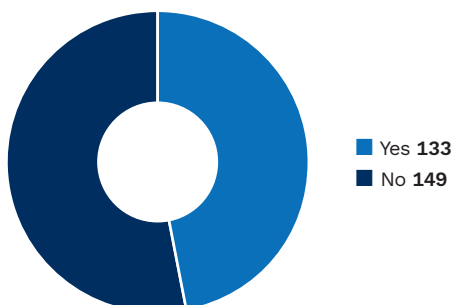
#### Have you been prevented from using medicinal cannabis? (Q5)



276 participants responded they HAVE BEEN prevented from using medicinal cannabis.

211 participants responded they HAVE NOT.

#### Did you use other medication in place of medicinal cannabis? (Q6)



133 participants said THEY USE other medications to replace medicinal cannabis.

149 participants said they DO NOT USE other medications.

### B.3.6 Qualitative data

#### What medication do you use in place of medicinal cannabis? (Q7)

133 participants provided information on alternative medication used in place of medicinal cannabis. The list includes a range of medications, from anti-inflammatories like Panadol and Nurofen to benzodiazepines like Valium and Xanax.

Moreover, participants have indicated the use of opioids like oxycodone and oxycontin to manage pain when not using medical cannabis. Sleeping pills are also used by participants in place of medical cannabis.

#### Has the use of medicinal cannabis had any other adverse effects on your employment? Please describe (Q8)

Almost 52 per cent of respondents indicated that the use of medicinal cannabis has not had adverse effects on their employment. It should be noted that some participants replied 'not yet' suggesting that there may be issues in their workplace. Other respondents indicated that they have not experienced any issues because they have not disclosed the use of medicinal cannabis to their employers.

The other ~48 per cent of participants replied that their employment has been affected by using medicinal cannabis, including:

- stigma among colleagues
- lost the ability to drive while using medicinal cannabis
- concerns over random drug testing
- scared to be fired if disclosing the use to the employer
- limited opportunities to change jobs.



# Appendix C

## Unique patients dispensed medicinal cannabis products

**Table C.1** Number of unique patients in Victoria who have been dispensed medicinal cannabis products by month, 1 April 2020 to 31 May 2024

Month	2020	2021	2022	2023	2024
January	-	550	2,851	8,699	19,833
February	-	651	3,110	9,362	21,199
March	-	694	3,756	11,374	22,004
April	583	680	3,805	11,026	23,077
May	644	723	4,884	12,786	24,462
June	721	721	5,257	13,147	-
July	858	802	5,801	13,959	-
August	950	1,050	6,666	16,012	-
September	1,054	1,280	6,706	15,738	-
October	985	1,448	7,275	17,184	-
November	554	2,121	8,416	19,590	-
December	674	2,864	8,859	19,552	-

- a. Data sourced from SafeScript database.
- b. Data is of dispensing events.
- c. Most cannabis medicines available in Australia are unregistered or unapproved medicines. To include these products the SafeScript data provided includes both Australia Medicines Terminology (AMT) coded medicines, and dispensed medicines that contain keywords linked to medicinal cannabis products. This can lead to poorer quality data collection in SafeScript for medicinal cannabis products compared to other monitored medicines.
- d. Records for Victorian patients only and may not be up to date if they have moved from the State.

Source: Department of Health.



# Extracts of proceedings

Extracts of proceedings Legislative Council Standing Order 23.20(5) requires the Committee to include in its report all divisions on a question relating to the adoption of the draft report. All Members have a deliberative vote. In the event of an equality of votes, the Chair also has a casting vote.

The Committee divided on the following questions during consideration of this report. Questions agreed to without division are not recorded in these extracts.

## Committee Meeting – 16 August 2024

Mr Ettershank moved, that in Chapter 3 a new recommendation is added ‘The presence of a drug, in the absence of evidence of impairment, should not form, in isolation, the basis for any disciplinary action.’

The question was put. **The Committee divided.**

Ayes 2	Noes 6
Rachel Payne	Trung Luu
Sarah Mansfield	Ryan Batchelor
	Lee Tarlamis
	Joe McCracken
	Michael Galea
	Renee Heath

### Question negatived.

Mr Ettershank moved, that in Chapter 3, a new recommendation is added ‘That the Victorian Government support the principle that in non-mandated industries, drug testing should only occur where employers have a well-founded belief that an employee may be impaired at work and should only then occur in the context of a comprehensive, alcohol and other drug policy and accompanying support framework, as agreed by employers & employees within a workplace relations context.’

The question was put. **The Committee divided.**

Ayes 5	Noes 3
Ryan Batchelor	Trung Luu
Michael Galea	Joe McCracken
Sarah Mansfield	Renee Heath
Lee Tarlamis	
Rachel Payne	

### Question agreed.

Mr Ettershank moved, that in Chapter 4, a new recommendation is added 'That the Victorian Government amend the Occupational Health and Safety Act 2004 and/or regulations to state key principles around alcohol and other drugs testing, including prescription medication. These principles should include, but not be limited to, *the rights of workers to privacy and dignity, a commitment to workplace education, appropriate support measures and when and how alcohol and other drugs testing can or should be carried out.*'

The question was put. **The Committee divided.**

Ayes 5	Noes 3
Ryan Batchelor	Trung Luu
Michael Galea	Joe McCracken
Sarah Mansfield	Renee Heath
Lee Tarlamis	
Rachel Payne	

**Question agreed.**

Mr Ettershank moved, that in Chapter 4, a new recommendation is added:

That WorkSafe convene a working group consisting of industry stakeholders including employees and employers' representatives, government departments, and public sector Alcohol and Other Drug (AOD) providers to:

1. update the "Guide for developing a workplace alcohol and other drugs policy" which is no longer it-for-purpose.
2. develop a Compliance Code covering, but not limited to:
  - obligations of employers and workers in relation to impairment and safety at work, including the right to privacy and dignity,
  - general awareness training of impairment,
  - appropriate policies and procedures,
  - obligations and rights of HSRs to provide a health led response to impairment,
  - reasonable workplace adjustments in the workplace for impairment, and
  - advice on available alcohol, drug and gambling support.

The Compliance Code should be accompanied by a complementary and comprehensive education campaign, emphasising a health based approach to AOD in the workplace, and the development of a Health and Safety Representative refresher training program.

The question was put. **The Committee divided.**

<b>Ayes 5</b>	<b>Noes 3</b>
Ryan Batchelor	Trung Luu
Michael Galea	Joe McCracken
Sarah Mansfield	Renee Heath
Lee Tarlamis	
Rachel Payne	

**Question agreed.**



# Minority report







# Inquiry into workplace drug testing Minority Report

**August 2024**

## Executive Summary and Introduction

Workplace safety, especially in high-risk industries, is non-negotiable. The Inquiry into Workplace Drug Testing in Victoria has brought to light deficiencies in the current approach to managing drug-related risks in the workplace. While the intention behind existing frameworks may be to balance safety with the rights of employees, the evidence presented during this Inquiry has shown that these frameworks often fall short in ensuring the highest standards of safety for all Victorians.

This minority report is a considered and evidence-based response to the findings of the Inquiry, representing the perspectives of the Liberal Members of Parliament represented on the Committee.

We reject several premises of the majority report that suggest the current legislative framework may be inherently flawed or discriminatory. A distinctive point of difference in our conclusions from the majority report is that we believe the most compelling evidence to the Inquiry indicates the need for more, not less, support for workplace drug testing in high-risk environments. We have also concluded that there is a need for more, not less oversight and regulation of the labelling and content of substances that could impair an employee's performance and expose them and their workplace to risk.

Employers must be empowered with clear, actionable authority to conduct workplace drug testing as an essential safeguard under the *Occupational Health and Safety Act 2004*. The psychoactive effects of THC, prevalent in many medicinal cannabis products, present undeniable risks in safety-critical environments. Cannabis use has been linked to cognitive deficits, motivational issues, and perceptual distortions, which justifies employers' legitimate interest in preventing on-the-job impairment.

One of the most concerning findings from the Inquiry is the profound lack of clarity and support provided to employers, who are frequently left to navigate a legal minefield without adequate resources or guidance. Industry representatives made it clear that there is an urgent need for a stronger, more supportive framework that empowers employers to enforce safety standards without fear of legal repercussions.

Our recommendations are a necessary overhaul of the current approach to workplace drug testing in Victoria. We advocate for the targeted amendment of the *Occupational Health and Safety Act* (or the introduction of enforceable guidelines) to provide clear legal support for workplace drug testing in relevant settings, as well as supporting, enforceable guidelines for testing of THC in high-risk industries. We also argue for advocacy with the Federal Government (via the Therapeutic Goods Authority) to strengthen labelling and oversight of medicinal cannabis.

These measures are critical to safeguarding the integrity of Victoria's workplaces and ensuring that the safety of all workers is upheld with the utmost seriousness.

**Trung Luu MP**  
**Chair, Legal and Social**  
**Issues Committee**

**Joe McCracken MP**  
**Member, Legal and Social**  
**Issues Committee**

**Renee Heath MP**  
**Member, Legal and Social**  
**Issues Committee**

## Summary of findings and recommendations

Findings	Recommendations
<p><b>Finding 1:</b> The existing legal framework under the Occupational Health and Safety Act 2004 is inadequate and does not provide sufficient clarity or support for employers to implement effective drug testing policies, particularly in high-risk industries.</p>	<p><b>Recommendation 1:</b> Amend the <i>Occupational Health and Safety Act 2004</i> or issue explicit guidelines under the <i>Occupational Health and Safety Act 2004</i> to clarify the lawful authority of employers to conduct workplace drug testing, and the circumstances in which it is permitted</p>
<p><b>Finding 2:</b> The failure to properly regulate or oversee medicinal cannabis threatens the legitimacy and credibility of medicinal cannabis as a therapeutic option in Australia</p> <p><b>Finding 3:</b> The regulatory oversight of medicinal cannabis products is inadequate, posing significant risks of unintended workplace impairment due to mislabelled or inaccurately controlled THC content.</p>	<p><b>Recommendation 2:</b> Immediately develop robust guidelines specific to Victoria for detecting and managing THC-related impairment in high-risk occupations, ensuring a balance between employee rights and workplace safety</p>
<p><b>Finding 4:</b> Employers find managing THC-related impairment in the workplace complex and confusing, compounded by the lack of clear, scientifically-based definitions of impairment</p>	<p><b>Recommendation 3:</b> Demand urgent federal intervention to implement stricter regulation of medicinal cannabis products, including mandatory THC labelling standards, rigorous compliance audits, and penalties for non-compliance</p>

### Clarify and strengthen employers' authority

Employer authority to conduct drug testing in the workplace is essential for ensuring safety, particularly in industries where impairment can lead to catastrophic consequences. Evidence to the Inquiry, however, made clear that the current legal framework does not provide sufficient clarity or support for employers, especially regarding the unique challenges posed by THC in medicinal cannabis.

The legislative regime for workplace drug testing, as outlined in the *Occupational Health and Safety Act 2004*, is designed with the primary objective of ensuring workplace safety. This framework is not inherently discriminatory, as assumed by the majority report of the Inquiry. It applies uniformly to all employees and is focused on mitigating risks that could lead to workplace accidents or injuries. The emphasis on safety over other considerations is crucial in high-risk industries, where the consequences of impairment, particularly from substances like THC, can be severe.

The current legal framework for workplace drug testing in Victoria is primarily governed by the *Occupational Health and Safety Act 2004* (Vic). Under Section 21 of the Act, employers have a general duty to ensure, so far as is reasonably practicable, that their workplaces are safe and without risks to health. This duty extends to managing risks associated with drug and alcohol impairment, empowering employers to implement drug and alcohol testing policies as a means of maintaining safety, particularly in high-risk industries where impairment could result in catastrophic consequences.

Section 35 of the Act further obliges employers to identify hazards and eliminate risks, but the absence of explicit guidelines on how to manage THC-related impairment leaves a gap in the legal framework. This gap has led to uncertainty and inconsistent application of drug testing policies across different industries, making it difficult for employers to confidently enforce safety standards without the risk of legal challenges.

While the Act provides a broad framework, however, it needs to be more robust and specific. The Act does not specifically enable or address workplace drug testing and its utility in screening for substances that could drive worker impairment. This gap has led to uncertainty and inconsistent application of drug testing policies across different industries, making it difficult for employers to confidently enforce safety standards without the risk of legal challenge.

Evidence to the Inquiry made clear that the current legal framework does not provide sufficient clarity or support for employers, especially regarding the unique challenges posed by THC in medicinal cannabis. The evidence from peak employer association Ai Group strongly supported the necessity for clear legal provisions that enable employers to implement drug testing policies, particularly for THC, which is known for its psychoactive effects.

Witnesses appearing before the Inquiry on behalf of Ai Group stated:

Employers are currently navigating a minefield when it comes to drug testing, especially with the rise of medicinal cannabis use. Without clear guidance, the risk of legal challenges and inconsistent application is high<sup>1</sup>.

In their written submission, Ai Group further emphasised that workplace drug testing remains the only objective measure available to assess the potential risk of impairment, particularly in high-risk industries; and that the current legal framework is inadequate, leaving employers vulnerable to significant challenges in maintaining safety standards<sup>2</sup>.

The Police Association of Victoria echoed this concern, recognising the complexities of managing THC-related impairment in particular:

The current legal ambiguity surrounding THC and its impact on workplace safety is unacceptable. Employers need the tools and authority to ensure their workplaces are free from impairment.<sup>3</sup>

The Police Association highlighted the necessity for a nuanced approach to managing THC-related impairment, given the psychoactive properties of THC and the non-psychoactive nature of CBD, which is often used in medicinal cannabis. The Association's written submission underscored the importance of balancing employee rights with workplace safety, particularly in safety-critical roles<sup>4</sup>.

Given this evidence, the Victorian Government should amend the *Occupational Health and Safety Act 2004*, allowing employers to conduct drug testing in high risk, safety-sensitive roles.

**Finding 1:** The existing legal framework under the *Occupational Health and Safety Act 2004* is inadequate and does not provide clarity or support for employers to implement effective drug testing policies, particularly in high-risk industries.

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<sup>1</sup> Browne, T. (2024, May 22). Oral testimony before the Legislative Council Legal and Social Issues Committee: Inquiry into Workplace Drug Testing in Victoria. Legislative Council, Parliament of Victoria.

<sup>2</sup> Ai Group. (2024). *Submission to the Inquiry into Workplace Drug Testing in Victoria*. Melbourne, VIC: Ai Group.

<sup>3</sup> Police Association of Victoria. (2024). Oral testimony presented to the Inquiry into Workplace Drug Testing in Victoria. Legislative Council, Parliament of Victoria.

<sup>4</sup> Police Association of Victoria. (2023). *Submission to the Inquiry into Workplace Drug Testing in Victoria*. Melbourne, VIC: Police Association of Victoria.

**Recommendation 1:** Amend the *Occupational Health and Safety Act 2004* or issue explicit guidelines under the *Occupational Health and Safety Act 2004* to clarify the lawful authority of employers to conduct drug testing in high-risk industries

## Targeted guidance for the use of medicinal cannabis involving THC

The evidence presented during the Inquiry highlights the critical importance of maintaining rigorous safety standards in high-risk industries and for the need of robust guidance concerning the potential impact of THC on workplace safety.

The Ai Group emphasised that employers' paramount concern is to ensure the health and safety of workers, particularly in environments where the presence of THC from medicinal cannabis could lead to impairment. Employers are not only concerned with compliance but with the potential loss of life or severe injury, which underscores the need for robust and enforceable policies tailored to the unique demands of sectors where there is greater exposure to physical safety risks.

### Box 1.0: Medicinal Cannabis Use in Australia

In Australia, medicinal cannabis became more accessible after 2016 reforms to the *Narcotic Drugs Act 1967*, allowing pharmaceutical-grade, non-smokeable cannabis products to be used for specific medical conditions<sup>5</sup>.

Currently, only one medicinal cannabis product, Nabiximols, is officially registered in Australia, used mainly for managing muscle spasms in multiple sclerosis patients. Other products are not registered and require special approvals, which raises concerns about their safety<sup>6</sup>. The Royal Australian College of General Practitioners advises that medicinal cannabis should only be considered when other treatments have not worked and should be prescribed carefully, as it can cause side effects like memory problems and impaired coordination<sup>7</sup>.

The evidence supporting the benefits of medicinal cannabis, however, remains still limited, with the Therapeutic Goods Authority (TGA) and Royal Australian College of General Practitioners agreeing on the need for more robust research to better understand its effectiveness and safety.

The Police Association of Victoria has also pointed out that different approaches are needed depending on the industry and the risks involved. The Association's evidence indicated that, in high-risk industries, even minor impairment due to THC can have catastrophic outcomes, and policies must reflect this reality. This perspective aligns with the need for flexibility in policy implementation, allowing employers to adjust their approaches based on the specific safety requirements of their industry, while still maintaining the overall goal of workplace safety.

Oral evidence from Jordon Carlisle of Master Electricians Australia reinforced the dangers in high-risk environments, stating:

<sup>5</sup> Royal Australian College of General Practitioners. (2024). \*Use of medicinal cannabis products: 2019 update\*. Retrieved from <https://www.racgp.org.au/advocacy/position-statements>

<sup>6</sup> Therapeutic Goods Administration. (2017). \*Guidance for the use of medicinal cannabis in Australia: Patient information\*. Canberra, Australia: TGA. Retrieved from <https://www.tga.gov.au/resources/resource/guidance/guidance-use-medicinal-cannabis-australia-overview>

<sup>7</sup> Royal Australian College of General Practitioners. (2024). \*Use of medicinal cannabis products: 2019 update\*. Retrieved from <https://www.racgp.org.au/advocacy/position-statements>

Employers are expected by legislation to be, you know, a safety expert, an employment expert, and now a medical expert in terms of determining the level of impairment that somebody is going to have.<sup>8</sup>

Carlisle's testimony highlights the multifaceted challenges that employers face in navigating the complexities of drug use in the workplace, particularly with the legal use of substances like medicinal cannabis. The expectation for employers to act as quasi-medical experts is unrealistic and places undue pressure on them to make decisions that should be guided by clear, evidence-based policy.

In addition to the amendment of the *Occupational Health and Safety Act 2004* to explicitly permit workplace drug testing, we recommend the development of robust, enforceable guidelines concerning detecting and managing THC-related impairment in high risk occupations. These guidelines should balance employee rights against the paramount concern for workplace safety, and include clear, scientifically based definitions of impairment.

**Finding 2:** The failure to properly regulate or oversee medicinal cannabis threatens the legitimacy and credibility of medicinal cannabis as a therapeutic option in Australia

**Finding 3:** The regulatory oversight of medicinal cannabis products is inadequate, posing significant risks of unintended workplace impairment due to mislabelled or inaccurately controlled THC content.

**Recommendation 2:** Immediately develop robust guidelines specific to Victoria for detecting and managing THC-related impairment in high-risk occupations, ensuring a balance between employee rights and workplace safety

## Advocate for better regulation of medicinal cannabis

The introduction of medicinal cannabis in Australia has introduced significant challenges, particularly concerning the accuracy of THC content labelling, has significant implications for workplace safety.

Drug Free Australia's testimony identified a significant flaw in the regulation of medicinal cannabis products, particularly regarding the accuracy of THC content labelling. Their submission emphasised that mislabelled products could lead to unintended impairment in the workplace, especially in safety-critical environments where even minor lapses in concentration could result in severe consequences.<sup>9</sup>

Research has shown that the THC in cannabis can impair coordination, cognitive functioning, and motivation, all of which are vital for workplace performance. Australia's Therapeutic Goods Authority (the TGA) has acknowledged these potential risks, noting that THC concentrations can linger in the body for days after consumption, complicating impairment assessments<sup>10</sup>.

The lack of regulatory oversight potentially jeopardises worker safety and undermines the credibility of medicinal cannabis as a therapeutic option. Victoria cannot afford to rely on the Federal Government to act: the Victorian Government must take an active role in advocating for stronger national standards.

<sup>8</sup> Carlisle, J. (2024). Oral testimony presented to the Inquiry into Workplace Drug Testing in Victoria. *Master Electricians Australia*.

<sup>9</sup> Drug Free Australia. (2024). *Submission to the Inquiry into Workplace Drug Testing in Victoria*. Sydney, NSW: Drug Free Australia.

<sup>10</sup> Therapeutic Goods Administration. (2017). *Guidance for the use of medicinal cannabis in Australia: Patient information*. Canberra, ACT: TGA. Retrieved from <https://www.tga.gov.au/resources/resource/guidance/guidance-use-medicinal-cannabis-australia-overview>.

This includes advocating for mandatory, accurate THC labelling, regular compliance audits, and harsh penalties for non-compliance. Anything less would continue to leave both employers and employees vulnerable to the dangers of unregulated medicinal cannabis products.

There must be immediate reform to improve the regulation of medicinal cannabis products. This includes accurate labelling of THC content and ensuring products meet safety standards. Failure to regulate these products adequately poses a significant risk of unintended impairment in the workplace.

**Finding 4:** Employers find managing THC-related impairment in the workplace complex and confusing, compounded by the lack of clear, scientifically-based definitions of impairment

**Recommendation 3:** Demand urgent federal intervention to implement stricter regulation of medicinal cannabis products, including mandatory THC labelling standards, rigorous compliance audits, and penalties for non-compliance

