

An aerial photograph of a coastline, showing a road winding along the edge of a forested hillside. The water is visible in the lower left, and the land is covered in dense vegetation. The overall color palette is dominated by greens and blues, with a dark teal overlay.

Consultation Report

Medicinal Cannabis and Driving in Victoria:
An Interim Proposal for Law Reform

Tony Parsons & Hamish McIntosh
October 2024

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Suggested Citation

Parsons, T., & McIntosh, H. (2024, October). *Consultation Report: Medicinal Cannabis and Driving in Victoria: An Interim Proposal for Law Reform*. Legalise Cannabis Party Victoria.

Cover Image

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Acknowledgement of Country

On behalf of the commissioning parties and the Victorian Government, the authors acknowledge the Traditional Owners of the Lands upon which we live and work. The authors extend this respect to Elders past, present, and emerging, and in doing so recognise the customs of care that have persisted on Country for thousands of generations.

Foreword



Since the advent of the *Access to Medicinal Cannabis Act 2016*, Victorians have enjoyed a relatively balanced approach to accessing medically prescribed cannabis.

During my tenure in the Magistrates' Court of Victoria and as Supervising Magistrate of the Drug Court Division (2012-2021), I was fortunate to work closely with stakeholders from the harm-reduction, health and medical professions who have warmly embraced the enlightened approach embodied by this legislation.

However, I have also seen how our current legislation can fail some of the most vulnerable Victorians; those who rely on medically prescribed cannabis to manage debilitating pain and illness.

As the proposed reform discusses, a level of inequity exists for Victorian motorists who are prescribed medicinal cannabis.

Currently, Victorians with a valid doctor's prescription for medicinal cannabis, who take that medication as instructed, are sanctioned for taking their medicine if they return positive roadside test, even in the absence of any evidence of impairment. They have committed a criminal offence by virtue of the drug's presence in their system alone. No other prescribed medicine is treated in this way in Victoria.

With these facts in mind, I have undertaken this consultation, which considers a reform of these laws, with a sense of optimism. I believe that we are approaching an important milestone in introducing interim, more equitable legislation for medicinal cannabis users who drive. I recognise the Victorian Government's ongoing efforts to achieve a fairer Victoria. By reflecting on the findings of this consultation, I hope we might arrive at a position where the law no longer unduly impacts those in our community with genuine medical needs.

I thank Mr Ettershank and his team for his invitation to conduct these consultations, and for the opportunity to produce this report on behalf of the Victorian Government. I also extend my thanks to Dr Hamish McIntosh, who assisted me with researching and writing this report.

A handwritten signature in black ink that reads "A. Parsons".

Tony Parsons

Consultation Chair

07/10/24

Contents

Acknowledgement of Country.....	2
Foreword.....	3
Contents	4
1. Summary	5
1.1 Context & Issue	5
1.2 Method	5
1.3 Findings & Recommendations.....	5
2. Background.....	7
2.1 Consultation Issue	7
2.2 Proposed Reform.....	8
3. Report Aims & Scope	9
3.1 Consultation Process	9
3.2 Overview of Topics	10
4. Findings	11
4.1 Confidence in the Science.....	11
4.2 Confidence in Judicial Discretion	13
4.3 Confidence in Harm Reduction	14
5. Conclusion	16
5.1 Summary of Stakeholder Views	16
5.2 Report Recommendations.....	17
6. Concluding Commentary—Tony Parsons	18
7. References	21
Appendix A: Consultation Paper Provided to Stakeholders.....	23
Appendix B: Interview Protocol	31

1. Summary

1.1 Context & Issue

Medicinal cannabis has been legal in Victoria since 2016. However, it remains an offence under the *Road Safety Act 1986 (Vic)* to drive with THC (the psycho-active compound in cannabis) in one's system. This places medicinal cannabis in a unique position under the law relative to all other prescription medications. It is further complicated by THC remaining in the patient's system for an extended period, generally well after any induced impairment has ceased.

The Victorian Government has commissioned a study by Swinburne University of Technology of patients prescribed medicinal cannabis to investigate possible impairment while driving under real road conditions. With the findings of this study due in mid-2026, the government is considering an interim proposal to amend the Road Safety Act to provide for judicial discretion on matters of license disqualification for drivers with a prescription for medicinal cannabis who test positive for THC but were driving unimpaired when tested.

1.2 Method

The consultations canvassed observations about and attitudes to the current law, responses to the proposed reform, any implications that might flow from the reform and how the reform, if it proceeds, might best be implemented (a copy of the Consultation Paper is attached at Appendix A).

Mr Parsons, assisted by Dr McIntosh, interviewed 18 stakeholders from five key community sectors:

- The judiciary (Magistrates' Court; Coroner's Court)
- Legal (Victorian Bar; Criminal Bar Association; Law Institute of Victoria; Fitzroy Legal Service)
- Law enforcement (The Police Association Victoria)
- Medical & social (Australia Medical Association Victoria; Pharmaceutical Society of Australia; Victoria Council of Social Service; Victorian Alcohol and Drug Association) and
- Policy (Road Safety Victoria) sectors.

1.3 Findings & Recommendations

Stakeholder perspectives from the consultation interviews were analysed and calibrated according to their support for the proposed reforms. These can be understood in relation to the following 3 areas:

- Science - What areas or gaps in the scientific literature might intersect with this reform?
- Judicial Discretion - What is the role of discretion in this reform?
- Harm Reduction - How will this reform facilitate harm reduction?

Stakeholder responses to the consultation process were diverse, but the majority expressed favourable but careful opinions of the proposed interim reform. The Judiciary, Legal, and Medical & Social sectors were on average more in favour of the proposed reform, with Policy and Law Enforcement more cautionary. This report concludes that the proposed reform to the Road Safety Act is generally supported by stakeholders and may be an appropriate interim measure. The following recommendations are made bearing the above findings in mind:

1. That the Victorian Government **enact the proposed interim reform**.
2. That patients prescribed medicinal cannabis during the interim reform period be **provided with clear, plain language advice** about the legal limitations of the reform (e.g. that driving while testing positive for THC is still an offence, with penalties attached). This recommendation is made on the basis of harm minimisation, enhanced transparency, and access to justice.

2. Background

2.1 Consultation Issue

Cannabis is a widely used illicit and therapeutic drug, derived from two main subspecies of the cannabis plant (Atakan, 2012). Cannabis contains multiple, complex chemical compounds called cannabinoids. Cannabinoids found in cannabis include delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD). Whereas THC is the primary psychoactive agent in cannabis, pharmaceutical researchers have identified and developed several therapeutic uses for CBD, including as pain relief, seizure relief, and as an anti-inflammatory (Bridgeman & Abazia, 2017).

Since 2016, Victorian and Commonwealth legislation has permitted the prescribing and consumption of certain medicinal cannabis products (Lintzeris et al., 2020). Laws and guidance around the prescription and consumption of medicinal cannabis are relatively strict given the use of non-medicinal cannabis as an illicit drug.

Driving, Medicinal Cannabis, and the Law in Victoria

Currently, the *Road Safety Act 1986* (Vic) makes no distinction between illicit cannabis and medicinal cannabis when drivers present with the presence of THC in their oral fluid. In Victoria, it is illegal to drive and present a positive test for THC even if the motorist has a valid medical prescription and drives in the absence of any evidence of driving impairment. The law mandates that the motorist's licence must be suspended or cancelled for a minimum of six months for a first offence and financial penalties will also apply.

The relevant sections of the Road Safety Act make this explicit:

s 49(1)(bb)

A person is guilty of an offence if he or she drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of drugs or more than the prescribed concentration of drugs is present in his or her blood or oral fluid;

and;

s 49(1)(h)

A person is guilty of an offence if he or she within 3 hours after driving or being in charge of a motor vehicle provides a sample of oral fluid in accordance with section 55E and (i) the sample has been analysed by a properly qualified analyst within the meaning of section 57B and the analyst has found that at the time of analysis a prescribed illicit drug was present in that sample in any concentration; and (ii) the presence of the drug in that sample was not due solely to the consumption or use of that drug after driving or being in charge of the motor vehicle.

2.2 Proposed Reform

Currently, section 50(1E) of the Road Safety Act mandates license disqualification for an offence relating to the presence of THC in oral fluid in the following terms:

s 50(1E)

On convicting a person, or finding a person guilty of an offence under section 49(1)(bb), (h) or (i), the court must, if the offender holds a driver licence or learner permit, cancel that licence or permit and, whether or not the offender holds a driver licence or learner permit, disqualify the offender from obtaining one for (a) in the case of a first offence, a period not less than 6 months; and (b) in the case of a subsequent offence, a period not less than 12 months.

Rather than mandating license disqualification, the proposed interim reform would give the courts a judicial discretion to not interfere with the motorist's licence if that person is prescribed medicinal cannabis. In exercising the discretion a court may consider, on a case by case basis, whether there was any evidence that the person's driving was impaired, were they taking their prescribed medication in accordance with their doctor's advice, whether there is a history of unacceptable driving or other behaviour etc.

The proposed reform's focus on license disqualification is a response to a significant body of anecdotal data on the often very significant impact of license loss on medicinal cannabis users. Note that the proposed reform is confined to the question of orders against a patient's licence.

Presenting a positive test for THC while driving would remain an offence, other penalties for this offence would also remain in place. The interim proposal above would act as a bridge between the present legislation and the findings of a closed-circuit driving trial.

This closed track driving trial, commissioned by the Victorian Government, is being led by Professor Luke Downey of Swinburne University of Technology. The objective of this extensive trial is to study and measure driving impairment for motorists prescribed medicinal cannabis under 'real-life' driving conditions. The findings will be delivered in 2026 and will inform future policy directions for motorists prescribed this medicine. Arising from consideration of the proposed interim reform by the Legislative Council in July 2024, the Council has sought consultation on the interim reform to be undertaken, documented and tabled before 18 October 2024.

3. Report Aims & Scope

The purpose of this report is to provide an overview of stakeholder positions on the proposed amendment to the Road Safety Act 1986 which would furnish magistrates with a discretion whether or not to make an order against a motorist's drivers licence when the motorist is prescribed medicinal cannabis and is guilty of driving while testing positive to having cannabis in their body. The key aims of this report are:

1. To develop insight into stakeholders' perspectives on the current legislation regarding drivers who are prescribed medicinal cannabis; the proposed interim change to the law; and the impacts of implementing that change;
2. To analyse stakeholder perspectives to generate recommendations to the Victorian Government about interim law reform pending the outcome of the medicinal cannabis driving study commissioned by the Victorian Government and being undertaken by Swinburne University of Technology.

3.1 Consultation Process

This report condenses expert opinion on the proposed interim law reform and combines insight from the judicial, legal, law enforcement, medical, social and policy sectors to inform the strengths, challenges, and contexts of the proposed amendment. To explore key stakeholders' views on this interim proposal, eighteen professionals were invited to participate in consultation interviews between August and October 2024.

Participants were all provided with a summary of the proposed legislative reform prior to their consultation meetings to ensure a common understanding of the issues. The eighteen consulted parties, arranged by interest group, were:

Judiciary

- The Honourable Justice Lisa Hannan, Chief Magistrate of the Magistrates' Court of Victoria
- His Honour Judge John Cain, State Coroner of the Coroners Court

Legal

- Colin Mandy SC, Vice-President of the Victorian Bar
- Sarah Keating, Honorary Treasurer of the Victorian Bar
- Sally Flynn KC, Chair of the Criminal Bar Association
- Sam Andrianakis, Consultative Member of the Criminal Bar Association
- Adam Awty, CEO of the Law Institute of Victoria (LIV)
- Donna Cooper, General Manager, Policy, Advocacy and Professional Standards, LIV
- Jarrod Behan, Co-Chair of Criminal Law Section, LIV
- Amity Mara, Manager (Policy Advocacy and Projects), Fitzroy Legal Service

Law Enforcement

- Wayne Gatt, CEO of The Police Association Victoria
- The Chief Commissioner of Victoria Police **Shane Patton APM** was also invited to consult. Commissioner Patton's office acknowledged the invitation but declined to participate

Medical & Social

- Dr Jill Tomlinson, President of the Australian Medical Association Victoria
- Lewis Horton, Policy Manager of the Australian Medical Association Victoria
- Jarrod McMaugh, State Manager Victoria, Pharmaceutical Society of Australia
- Juanita Pope, CEO of the Victorian Council of Social Service
- Chris Christoforou, CEO of the Victorian Alcohol and Drug Association

Policy

- Marcelo Vidales, Head of Road Safety Victoria, Department of Transport & Planning
- Dominique Torpy, Senior Advisor, Office of Minister for Roads and Road Safety (observing)

All consultations were undertaken by Tony Parsons, former Supervising Magistrate of the Drug Court Division of the Magistrates' Court of Victoria, with the assistance of Dr Hamish McIntosh.

This report was developed by Mr Parsons and Dr McIntosh on behalf of David Ettershank MP, member of the Victorian Legislative Council for Western Metropolitan. As this report is designed as an overview of stakeholder perspectives, quotes and insights have been left unattributed to preserve stakeholder privacy.

3.2 Overview of Topics

The interviews undertaken as part of this project were semi-structured, based on a protocol of set of questions, but ultimately were free-flowing (Magaldi & Berler, 2020).

This approach allowed for candid conversations between Mr Parsons and the stakeholders. Noting this flexibility, the set questions that served as the basis for the consultations and to promote dialogue are summarised under three themes below:

1. **Current Laws:** Stakeholder attitudes and perspectives on the present legislation and its impact on those who drive while using medicinal cannabis as prescribed and without impairment;
2. **Proposal:** Stakeholder attitudes and perspectives regarding the proposed reform;
3. **Implementation:** Stakeholder attitudes and perspectives about the impact and realisation of the proposed reform from the perspective of their particular stakeholder group.

4. Findings

As described in the preceding section, the consultation process for this report involved interviews with 18 high-level stakeholders from key interest groups: the judiciary, legal, law enforcement, medical & social, and policy sectors. All but one of the interviews was recorded and transcribed.

One consultee did not want to be recorded so that consultation was written up from our contemporaneous notes. From these records, an analysis was undertaken to inform the twin aims of this report: to document stakeholder perspectives and insights, and to process those into recommendations.

Given the dual status of cannabis as both illicit drug and prescribed medicine, the Victorian Government appears to recognise that the issue of medicinal cannabis is controversial amongst certain groups in our community and therefore a matter of concern for some stakeholders.

As such, confidence in the proposed legislative reform was varied across the stakeholder groups consulted, and is treated as one of the core themes of this report's analysis.

Across the consultation interviews, three contexts for confidence were consistently described. These areas were:

- Confidence in **medical and scientific evidence** about driving while using medicinal cannabis as prescribed;
- Confidence in **judicial discretion**, its place in the 'chain of events' and its eventual execution; and
- Confidence in **harm reduction** as a holistic endeavour and goal of both the proposed reform and all stakeholders.

The following provides an overview of our discussions of these areas, providing additional insight into stakeholder perspectives on the current laws about medicinal cannabis and driving in Victoria, the proposed reform, and impact of any reform that might occur. The quotes that follow are intended as illustrative and should be read keeping in mind the narrow but important scope of the proposed reform to the Road Safety Act.

4.1 Confidence in the Science

While undertaking the consultations that form this report, the authors noted a discrepancy between those with a material understanding of the science about cannabis use and driving, and those without. Comments provided by the medical sector were specific, circumspect and informed:

There is also disputation within the medical community on how therapeutically effective cannabis is. For example, it is widely accepted to be an effective medication for childhood epilepsy where, presumably, the patient wouldn't be driving and so is not relevant to this consultation. That is a relevant and widely endorsed use of the medication. There is less certainty about, and some

uneasiness amongst some doctors in respect of, medications that are not listed on the Therapeutic Goods Act 1989 listings. There are also variations in the THC and CBD content of the medications and, therefore, uncertainty about the level of the therapeutically effective components of the medication.

What became clear during the 18 consultations was a shared desire for more data. Stakeholders spoke positively of the Swinburne University of Technology study on driving and medicinal cannabis; many looking forward to the findings of that study. Some perspectives were more conservative however, and despite an interest in the Swinburne study's findings, one stakeholder suggested patience was a better option than interim reform:

In a perfect world you'd wait until the outcome of the medicinal cannabis driving trial before making the change set out in the Consultation Paper... are we being too reckless, are we jumping too quickly and too far forward?

This stakeholder group also voiced concerns about doctors who prescribe medicinal cannabis. They were concerned about so-called 'cowboy' medical practitioners, who might abuse their position to provide prescriptions for medicinal cannabis as a means of providing their customers with access to cannabis for recreational and therefore illicit purposes. This stakeholder group asked:

Who is prescribing medicinal cannabis products and how?

They added that, in order for them to have confidence in the legitimacy of a medicinal cannabis prescription, the prescribing medical professional should have accreditation above and beyond their ordinary discretion to prescribe medicines. This accreditation could take the form of a 'road safety' endorsement which would corroborate the professional standing of the prescriber and provide the community with confidence that the risks associated with medicinal cannabis and road safety were understood. The stakeholder also argued that consideration should be given to endorsing the drivers licence of people prescribed medicinal cannabis, much like licences are endorsed for people who must wear bifocals.

This perspective was, however, roundly challenged by stakeholders in the medical community:

As far as licence endorsements or defensive driving programs for people prescribed medicinal cannabis, my personal view is that I can't think of any precedent for that with any other medication. On a practical level, having fact sheets for patients that set out best practice information that there may be a potential issue with driving would be reasonable [...] We say it would be a hard 'no' to putting it all on doctors to do additional certification in order to prescribe cannabis.

Indeed, one stakeholder from the medical sector was plain in their concern with the law as it currently stands relative to the evidence, and spoke favourably of the interim proposal in pursuit of what they hoped might be broader reform around medicinal cannabis use:

But the idea that, regardless of impairment, the presence of this particular active ingredient, THC, will result in patients being fined or loss of license or both is certainly inconsistent with hundreds and hundreds of other medicines that have the same potential.

4.2 Confidence in Judicial Discretion

Adding to these medico-scientific perspectives, those consulted with legal expertise noted the robustness of the proposal, with one consultee explaining that they were,

[Unable] to see an argument against it.

For some, the legal element of the reform was seen as a 'stepping stone' towards greater change, albeit one with limitation given the focus on license disqualification:

Is the introduction of a court discretion whether to interfere with a person's license the best that can be accommodated? Can't we include medicinal cannabis into s 49(3B) and s 49(3C) now? It seems to be an easy and fair change that could and should be made even now.

As a stakeholder from the legal sector noted:

Having the drug being present does not necessarily mean impairment.

This understanding of the roadside testing was shared by other stakeholders who noted repeatedly that the law currently penalises presence of cannabis, despite presence being a result of lawful, prescription medicine use. Building on this, one judicial stakeholder was clear in their preference for increased discretion around license disqualification:

The situation that you've described seems, frankly, unfair. That someone who is prescribed a drug for very legitimate purposes should have their drivers license cancelled or suspended, without the court having any discretion, I think that that is a good thing to rectify.

Additionally:

[The] interim step involves looking at licence loss, and licence loss is a huge issue. While the science may not be there yet, in that scenario discretion is a good way to go because if I was sitting I would want to know if there were any observable signs of impairment, because once you are impaired you are going to lose your licence. But if you have just got a trace in your system, why should you lose your licence? Why should it be an offence?

Furthermore, several consultees also suggested that this should be a discretionary matter for police, rather than the courts. One judicial stakeholder observed:

My starting point is that police should deal with this at the roadside. The best test in the end might be the police body worn camera. If someone tests positive to medicinal cannabis an

interview is conducted, a series of questions are asked or there's some process they go through on the spot. It's recorded on body-worn camera. That can be played in the court. If the magistrate concludes that 'What I see in front of me here today and what I see from the body warn camera looks like pretty much the same, then there's nothing to see here.'

While there are a range of views as illustrated in the above consultee quotes, the authors of this report received almost unanimous approval for enhanced judicial discretion described by the proposed reform. In tandem with this confidence in judicial discretion, some stakeholders made clear the need for additional clarity when sharing the outcome of this proposed legislative reform.

Speaking to the intentions of the proposed reform and the reality of a positive THC test remaining an offence, one consultee explained the outstanding need for transparency:

If the reform proceeds, the profession and the judiciary need very clear language in the second reading speech and in any explanatory memoranda for this interim arrangement,... a clear message that it is the intention of Parliament that people who are prescribed cannabis and who test positive for cannabis should not have their licenses taken from them in the absence of any evidence of impairment.

4.3 Confidence in Harm Reduction

When reflecting on those patients prescribed medicinal cannabis in Victoria and the community at large, stakeholders expressed varying levels of confidence in the proposed reform's ability to reduce harm.

The majority position was that the proposed reform will minimise harm by allowing for discretion on matters of license disqualification which, in turn, would reduce the reportedly terrible burden endured by many patients prescribed medicinal cannabis who suddenly find themselves unable to drive because they followed their doctor's advice and took their prescribed medication.

However, the view was also taken by some that this measure is does not go nearly far enough:

The current situation seems particularly untenable in terms of the huge effect license cancellation can have on people's lives and the flow on effect it can have on their ability to maintain work, to fulfil caring responsibilities and the like and all those other issues we see with our clients. Even if the proposal is adopted, we are still quite concerned about the remaining consequences, that people prescribed cannabis would nevertheless be required to interact with the criminal justice system. What I mean by that is that people will still be charged.

This conundrum was also touched upon by the judiciary, with one consultee reflecting on the tension between a right to access and use medicine versus the risk of committing a criminal offence:

It is an odd situation to have a legal right. Then if you comply strictly with the obligations that come with that right, you can still be guilty of an offence.

Summarising these views, a group of stakeholders with a legal advocacy and community background explained that the focus on license disqualification was an encouraging yet relatively limited measure in terms of holistic harm reduction. This group explained that, although the provision to grant magistrates discretion in matters of license disqualification was commendable and supported, more could be done in future to further reduce the harms associated with being charged with an offence, attending court, or having a criminal record:

There are residual and continuing issues, barriers, inequities that result from a prescription drug user who is doing the right thing—taking their medication as prescribed—ending up with a criminal record.

Reiterating their worry that the proposed reform could still leave members of our community with a criminal record—in turn affecting their applications for, for example, a Working With Children Check or police check for employment—stakeholders asked whether future reform (though beyond the current report's scope) might include immunity from prosecution in the absence of evidence of impaired driving, essentially establishing parity between medicinal cannabis patients and patients prescribed any other medication.

Finally, stakeholders who work closely with minority members of our community, culturally and linguistically diverse Victorians, Victorians with English as a second language and Victorians who may not have the money to engage an advocate, argue that even if the courts have a discretion not to cancel a licence, these people must travel a more difficult path to persuade a court to exercise a discretion in their favour by virtue of their disadvantaged status.

This feedback highlighted the need for accessibility considerations when designing and implementing the proposed reform; the need for the legislation, if revised, to be provided in plain language, in languages other than English, and disseminated in an easily accessed and understood public forum. These considerations were also extended to the consumer experience of patients using medicinal cannabis themselves and how it might impact on their medical treatment plans:

[It] would be a great idea to give people information about the legal dimensions of the use of medicinal cannabis. It's important to recognise that the risk to a person's drivers licence is a huge disincentive for many people to actually take the drug that their doctor has prescribed for them.

The idea of a factsheet was not uncontentious. As such, this report recommends the development of a concise, accessible plain language document to be disseminated to medicinal cannabis patients that synthesises the risks and legal consequences for using medicinal cannabis during this interim period, should the proposed reform be adopted.

In short, there is a need for a take home document that reiterates that patients should take their medicine as prescribed, but that even though courts can exercise discretion about licence orders, testing positive for cannabis while driving is still an offence, and other penalties apply.

5. Conclusion

5.1 Summary of Stakeholder Views

This consultation report provides an overview of stakeholder perspectives on the proposal to give the courts the discretion whether or not to cancel or suspend the drivers licence of a person who is prescribed medicinal cannabis and is guilty of the offence of driving with more than the prescribed concentration of cannabis present in their oral fluid or blood.

From August to October 2024, 18 high-level Victorian stakeholders were consulted about this proposal by former magistrate Tony Parsons and Dr Hamish McIntosh.

These stakeholders were selected for their expertise and represented a range of peak community bodies and institutions from the judicial, legal, law enforcement, medical, social and policy sectors. Stakeholder insights on the proposed reform were diverse. Stakeholder attitudes and perspectives on the proposal reflected varying levels of confidence across 3 key areas:

- Confidence in the current state of the science about driving while using medicinal cannabis (an area all stakeholders agreed would be augmented with the publication of the 2026 closed circuit driving study from Swinburne University of Technology);
- Confidence in the judiciary in their exercise of discretion should the proposal be adopted; and
- Confidence in the proposal to contribute to a reduction in harm for individuals who are prescribed medicinal cannabis and who are also guilty of the offence of driving with cannabis in their oral fluid, with commensurate reduction in harm for the community as a whole.

On average, stakeholder support for the proposed reform was favourable but careful. The legal and social sectors generally held more progressive views and were less ambiguous about their support for the proposed reform. The law enforcement and policy makers took more conservative positions.

The authors express their gratitude for the candour of all the stakeholders across this spectrum of opinion. Overall, the more conservative opinions were in the minority. A small number of stakeholders took a neutral position. Those stakeholders who expressed “favourable” and “more favourable” attitudes towards the proposed reform were clearly in the majority.

This report therefore finds that the majority of key stakeholders generally support the proposed reform to allow a discretion about orders against drivers licences for people prescribed medicinal cannabis should they be prosecuted for driving with cannabis in their oral fluid.

5.2 Report Recommendations

Reflecting on the breadth of stakeholder feedback as collated through this report, and recognising that the Victorian Government has endeavoured to consult a diverse range of high-level parties, the following recommendations are made in good faith:

1. That the Victorian Government enact the proposed reform to the Road Safety Act 1986;
2. That patients prescribed medicinal cannabis during the interim reform period be provided with clear, plain language advice about the legal limitations of the reform (e.g. that driving while testing positive for THC is still an offence, with penalties attached). This recommendation is made on the basis of harm minimisation, enhanced transparency, and access to justice.

6. Concluding Commentary—Tony Parsons

Dr Hamish McIntosh and I consulted eighteen spokespeople from five community sectors. Broadly speaking, twelve of the eighteen with whom we consulted supported the reform proposed in the Consultation Paper, three were neutral, two were not in favour and one did not express a view.

Those in favour pointed to the unfair outcomes for motorists prescribed medicinal cannabis when patients prescribed any other medication, including medications known to impair driving, could lawfully drive in the absence of evidence of impairment.

Commentators who are neutral about the proposed reform nevertheless also recognised the inequity of the current law, for example:

Broadly we can say that we cannot oppose but we do not endorse. However... the loss of a driver's licence and what that means for people does appear to be a very substantial imposition, particularly in circumstances where it would appear that for many people there is no driving impairment [...] We would wish that people are not driving impaired. That does need to be balanced against the desire for people to use medications without having the imposition of licence cancellation [...] So that's where we stand, ours is a nuanced position.

Moreover;

It does seem that, from a social determinants point of view, fairness & equity requires a reconsideration of the current law. We also contacted [a sister organisation] in Tasmania where there is no driving prohibition for people prescribed medicinal cannabis and their response was that there have been no issues of concern as a result.

Four leaders from the medical, pharmaceutical and legal sectors spoke about patients and clients rejecting the advice of their doctors and refusing to take medicinal cannabis because of the risk to their licences:

It is certainly emerging [...] that people are avoiding the use of medicinal cannabis when they know that this could affect their ability to drive. Some people are choosing not to drive, some people are choosing to take their chances. As an overall approach we would like to see some parity with other medicines.

As a final note, two of Victoria's criminal justice sector leaders expressed parallel views regarding this issue, albeit one within the context of our consultations (Chief Magistrate Justice Hannan) and the other in a public forum (Victoria Police Commissioner Patton).

Justice Hannan observed that the proposed reform was a policy decision within the remit of Parliament and, accordingly, it was not appropriate for the courts to engage in the discussion. However, the Chief Magistrate was able to formally say that she was, as a matter of principle, in favour of discretion being given to the court.

Comparably, while Commissioner Patton declined to participate in this consultation project, he was asked about the proposed reform in an interview on 23 September 2024 (Epstein, 2024) and said:

Our position is simple, they are matters for government. While it's against the law to drive with cannabis in your system we'll continue to enforce it.

I see both perspectives as encouraging indicators for the Victorian Government, and I hope these inform the necessary will to reform the law.

Over the period of these consultations my views about the status of Victorian motorists who are prescribed cannabis have become far clearer as I have listened to the numerous accounts of systemic discrimination and suffering experienced by these citizens as a result of the current road laws that uniquely apply to them.

These people are prescribed medicinal cannabis because of ill health, sometimes very significant ill health.

They find themselves at risk of mandatory licence cancellation or suspension in addition to fines and a life-long criminal record if they test positive to a roadside random drug test, a consequence of taking a legally prescribed drug their doctors want them to take to address chronic illness. This sanction applies notwithstanding the absence of any evidence of driving impairment.

Medicinal cannabis is the only drug in the pharmacopoeia that attracts this sanction. According to several medical experts who engaged with this consultation, there are hundreds of other prescription drugs that have the same or greater capacity to impair driving performance – the benzodiazepines, opiates, anti-histamines and anti-depressants to name a few – but patients prescribed these medications cannot be prosecuted as long as there is no evidence of impairment.

One legal expert we consulted put the position succinctly:

[It] is an odd situation to have a legal right (to take prescribed medicinal cannabis) then if you comply strictly with the obligations that come with that legal right, you can still be guilty of an offence.

The consequences for medicinal cannabis patients can be crushing. Loss of a drivers licence often results in loss of livelihood and always means financial penalties, a life-time criminal record, barriers to future employment and the stigma of appearing in court.

Several consultees were aware of patients who refused to take their prescribed cannabis because of the risk of licence cancellation. Often they changed to other medications such as opiates or benzodiazepines, both of which have greater potential to impair driving as well as the potential for drug dependency but neither will trigger a prosecution just because they are present in the motorist's body.

The legal framework that applies to medicinal cannabis patients is, accordingly, grossly discriminatory and manifestly unfair.

As set out in the recommendations of this consultation report, I urge the government to enact the proposed amendment to the Road Safety Act to give the courts discretion to decide the issue of orders against drivers licenses for medicinal cannabis patients. Upon the conclusion of and subject to the results of the Cannabis closed-track driving trial, I urge consideration of further reform to bring medicinal cannabis into line with every other prescribed medication.

Tony Parsons

Consultation Chair ■

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Appendices



Appendix A: Consultation Paper Provided to Stakeholders

Parliament
of Victoria
Legislative
Council

Medicinal Cannabis and Driving in Victoria: An Interim Proposal for Law Reform

Consultation Paper

September 2024

Resolution of the Victorian Legislative Council

31/7/24

Question — That the motion, amended as follows, be agreed to —

That this House notes that —

- (1) since 2016 medicinal cannabis has been prescribed in Victoria and provided life-changing relief for many Victorians;
- (2) Victoria's driving laws treat medicinal cannabis patients indiscriminately, causing many to avoid their medication, putting their health at risk;
- (3) no other legally prescribed medication attracts this discrimination;
- (4) medicinal cannabis should be treated like other prescribed drugs which incur no offence if the driver is taking them as directed and is not impaired;
- (5) roadside drug testing is designed to measure presence rather than impairment;
- (6) in 2022-23 over 7,000 Victorians were charged for presence alone, compared to around 100 charged for impairment;
- (7) the resulting loss of licence is devastating for those who rely on driving to access work, education and health services;
- (8) in addition to the closed-circuit track trial, the Government has funded —
 - (a) a report by the Medicinal Cannabis and Safe Driving Working Group;
 - (b) a Monash University study into drivers who use medicinal cannabis;
 - (c) two Swinburne University of Technology studies into roadside screening;

and calls on the Government to:

- (a) consider a proposal to establish a legal defence for medicinal cannabis prescription holders charged with the presence of THC in their system, if they were taken in accordance with a prescription and were not impaired when tested,
- (b) ensure that this proposal includes widespread consultation with a range of legal and road safety stakeholders, and
- (c) table a report on this proposal in the Legislative Council by no later than 18 October 2024

Put and agreed to.

(Note: last paragraph formatted for ease of reading).

Medicinal Cannabis and Driving in Victoria: An Interim Proposal for Law Reform

Background

A Private Member's Bill to provide a statutory medical defence for medicinal cannabis drivers has been before the Victorian Parliament since February 2023.

In response to that Bill, the Victorian Government has made certain commitments to reform this law.

Then Premier Daniel Andrews said publicly on 28 February 2023 that allowing unimpaired Victorians to drive was a significant priority for his government:

"There are as many as 200,000 who are currently using medicinal cannabis with a script from a doctor, and they cannot drive. That's an issue that's bedevilled us. We need to find a way through that."

Premier Andrews also said he did not want people unable to access medicinal cannabis because they were worried about breaking the law:

"I don't want them to feel they can't access that care because we don't have [updated] driving laws".

Work on this reform has progressed under the Allan Government. On 15 October 2023, the government introduced a Bill into the Victorian Parliament to allow medicinal cannabis drivers to take part in a closed-circuit driving trial, as a step towards reform. That Bill, the *Transport Legislation Amendment Bill 2023*, passed both houses of the Victorian Parliament.

As part of the Victorian Budget 2024/25 the Labor Government confirmed its commitment, announcing it will invest \$4.9 million in the medicinal cannabis driving trial. However, the trial of 18 months duration will not deliver a result until mid-2026, making a legislated response unlikely in this term of Parliament. Understandably, such a delay is of significant concern to many patients.

In this context, and in response to a motion in the Victorian Parliament in July 2024, the Victorian Government has committed to consider an interim proposal and report back to Parliament by 18 October 2024.

This paper details that proposal for the Government's consideration.

The push for law reform in this area acknowledges that a statutory medical defence exists at section 49(3B) and (3C) of the Road Safety Act 1986 (RSA) for all other prescription medications taken in accordance with a prescription, irrespective of the fact that benzodiazepines, opioid analgesics and antihistamines can all be more impairing than medicinal cannabis.

It is anticipated that, ultimately, law reform will equalise the way all medications are treated under the RSA.

However, for the interim, this proposal outlines a middle ground solution that provides a greater level of fairness for medicinal cannabis patients.

Medicinal cannabis and driving

In 2016, Victoria became the first Australian state to approve the use of medicinal cannabis. At that time Victorian road laws were not amended in conjunction with this reform, meaning it remained an offence at Victorian law for a person to drive with any trace of cannabis in their system. This is not the case with any other medication, where the RSA provides a medical defence.

Pursuant to sections 49(1)(bb) and 49(1)(h) of the RSA, it remains an offence to drive with cannabis present in oral fluid. The section does not distinguish between medicinal and illicit cannabis, meaning a medicinal cannabis patient will be captured by a positive roadside test.

These offences were created and inserted into the RSA in 2003, well before medicinal cannabis became lawful in Victoria. The sections when inserted only contemplated a positive cannabis result derived from illicit cannabis use. But now, lawful medicinal consumption is being captured by the same sections and is subject to the same maximum penalty.

The current law in Victoria

Driving with illicit drugs present in oral fluid:

It is an offence under section 49(1)(bb) or section 49(1)(h) of the RSA to drive with cannabis¹ present in oral fluid.

This offence does not distinguish between a positive roadside test derived from illicit or medicinal cannabis. It is not an element of the offence that a person is impaired or affected by the substance, the mere presence of trace amounts of cannabis is sufficient to constitute an offence.

Penalty for this offence

The RSA provides at section 49(3AAA) that:

A person who is guilty of an offence under paragraph (bb), (eb), (h) or (i) of subsection (1), other than a supervising driver offence, is liable—

- (a) in the case of a first offence, to a fine of not more than 12 penalty units; and
- (b) in the case of a second offence, to a fine of not more than 60 penalty units; and
- (c) in the case of any other subsequent offence, to a fine of not more than 120 penalty units.

A penalty unit in Victoria is \$197.59 as of 1 July 2024.

¹ Note: for ease of reading, laws relating to 'delta-9-tetrahydrocannabinol' have been described as relating to cannabis.

Mandatory licence cancellation and disqualification

Pursuant to section 50(1E) of the RSA, on convicting a person, or finding a person guilty of an offence under section 49(1)(bb) or (h), the court must, if the offender holds a driver licence or learner permit, cancel that licence or permit and, whether or not the offender holds a driver licence or learner permit, disqualify the offender from obtaining one for—

- (a) in the case of a first offence, a period not less than 6 months; and
- (b) in the case of a subsequent offence, a period not less than 12 months.

The only exception is if a driver receives an infringement notice for drug driving. Drivers receiving an infringement will have their licence suspended instead of cancelled. This means that VicRoads will return their licence when the suspension period ends.

If a driver licence is cancelled, the driver will have to apply to be relicensed in court. This is an onerous process.

If a person's driver licence is cancelled their licence no longer exists, they do not automatically get their licence back. They must apply to court for another licence when the disqualification period ends.

To do that a person must first complete a drug driving behavioural change program. They must then attend court to list an application for a Licence Eligibility Order court hearing and then attend the hearing at least 28 days later. If the order is granted by a court, the person can then attend VicRoads to apply for their licence to be reissued.

Wait times and fees will apply to each of these steps and the paperwork is onerous.

Despite the offence not involving alcohol, a re-licensed driver will be given a 'Z' condition on their licence, meaning they cannot have any alcohol in their system when driving for the following three years.

Further, the requirement that a patient taking a lawful medication in accordance with their prescription must complete a behaviour change program designed for illicit drug use, without that program distinguishing between lawful and unlawful use, is stigmatising and disrespectful to medicinal cannabis patients.

For most patients, it is mandatory licence loss that they regard as the true penalty. For a person reliant on a vehicle for work, or to get to work, licence loss can be financially crippling. For those patients with young families, or serious medical conditions requiring ongoing treatment, particularly where public transport is limited, licence loss can be equally as devastating. This is compounded by the arduous process of reapplying for a licence after cancellation.

An inconsistent approach to other medicines

A statutory medical defence exists at section 49(3B) and (3C) of the RSA for all other prescription medications taken in accordance with a prescription, irrespective of the fact that benzodiazepines, opioid analgesics and antihistamines can all be more impairing than medicinal cannabis. It is inherently unfair that one medication, medicinal cannabis, is treated differently.

A focus on driver licence

Most medicinal cannabis patients describe the risk of driver licence loss as their greatest concern under the current legal framework. For this reason, the interim solution proposed focuses on driver licence loss specifically.

An interim solution

As the government progresses broader research and consultation, the following interim reform is proposed:

- **It will remain an offence under the RSA to drive with cannabis present in oral fluid**
- **The penalty provisions (maximum fine) for that offence will remain unchanged**
- **Mandatory licence loss will be replaced with judicial discretion as to licence loss for medicinal cannabis patients**
- **An order with respect to licence loss will be determined on the facts of each case, by a court**

The benefits of this solution

This is a sensible middle ground. It will remain an offence to drive with cannabis present in oral fluid and each individual matter will be considered by a court. However, a medicinal cannabis patient, who has done nothing other than drive with prescription medicine detectable in their system, will be able to argue before a court that their driver licence ought not to be cancelled and disqualified in their particular circumstances.

For most patients, it is the mandatory loss of driver's licence that is the true penalty, and this amendment recognises that.

The government can take comfort that each individual case will be oversighted by a court of law and a decision regarding license loss will turn on the facts of each case.

Achieving this solution

The government would legislate a simple amendment to section 50(1E) of the RSA.

That amendment would replace mandatory driver licence cancellation and disqualification with judicial discretion as to driver licence cancellation and disqualification.

The explanatory memorandum and second reading speech accompanying that amendment would direct the court in the way it should exercise discretion pursuant to the amendment.

Given the simple nature of the amendment, it could be included as part of an omnibus bill and progress with relative speed through the Victorian Parliament.

Drafting of the amendment

Ultimately, it is for the Government with the assistance of the Office of the Chief Parliamentary Council to determine the most appropriate amendment to give effect to this policy position. The authors of this proposal do not prescribe specific wording for the amendment to achieve this policy outcome.

Conclusion

As an interim measure, while broader research and consultation is undertaken, the Victorian Government should legislate an amendment to the RSA to make driver license cancellation and disqualification discretionary rather than mandatory for medicinal cannabis patients charged under sections 49(1)(bb) and 49 (1)(h) of the RSA.

FAQ

Why will it still be an offence to drive with medicinal cannabis?

This is an interim solution while the government considers broader reform in this via their driving trial. It is hoped that a full medical defence for medicinal cannabis patients will be legislated in the future. As an interim solution, the government and police can take comfort that each case will be assessed and determined by a court.

Why have you proposed this solution?

We understand that it is driver licence loss that generally affects medicinal cannabis patients the most. This proposal gives them the ability to retain their driver licence if they have not driven whilst impaired and have taken their prescription medication

Why should Magistrates have discretion?

The court exercises discretion every day in determining the appropriate sentence for a crime. Magistrates are skilled at assessing the circumstances of an offence and determining the appropriate penalty. They already make that same determination in relation to discretionary driver licence cancellation for a number of other offences on the Victorian statute. This amendment simply extends that same discretion to these particular offences. A Magistrate will determine whether to cancel a driver licence and for how long based on the facts of the case.

Why are you seeking this change?

Patients should not have to choose between being well and being able to drive. If medicinal cannabis is the most appropriate medication for someone's illness, then they should be able to take it without the fear of losing their licence.

How would police test for impairment?

Victoria Police already have a test for impairment and can, and do, already charge drivers with driving whilst impaired if they fail that test, whether they are impaired by cannabis or any other substance. No new test or change to the law is required to enable that.

What is the risk profile of medicinal cannabis

Dr Thomas Arkell is a Research Fellow at Swinburne University of Technology a lead researcher on the closed track driving trial that has been announced by the government. Dr Arkell completed his PhD on the topic of cannabis and driving with the Lambert Initiative for Cannabinoid Therapeutics at The University of Sydney in 2020. He has published more than 20 peer-reviewed articles on this topic. He has over 10 years research experience and has led a number of cannabis-related clinical trials, including the Swinburne University study that was funded by the Victorian Government (DHHS) in 2021.

Dr Arkell has found that the science on cannabis and driving is now unequivocal - that overall, the magnitude of impairment associated with cannabis is actually less than that associated with a blood alcohol concentration of

0.05%. He has also found that medicinal cannabis-related impairment dissipates within ~four hours on average, depending on how it is consumed, and further, that people who use cannabis regularly for medical reasons, at prescribed doses, and under medical supervision become tolerant to its effects over time.

This means that most medicinal cannabis patients will not have their driving impaired around four hours after dosing. For the many who dose in the evening before bed, there is virtually no risk of impairment should they drive the following morning. However, because of the way cannabis is metabolised by the body, it can remain detectable in their saliva for up to a week after consumption, and many days after it ceased having any impairing effect whatsoever.

Appendix B: Interview Protocol

Consultation Interview Protocol adopted.

1. Current Laws

Under the current RDT approach adopted by Victoria Police, medicinal cannabis is treated by the law in the same manner as Methamphetamine and MDMA.

- Do you believe the current laws are equitable?
- Do you believe medicinal cannabis should be treated differently by the courts?

2. Proposed Changes to Laws

You were provided with a document proposing a legal defence for medicinal cannabis patients, who are driving unimpaired, charged with the presence of THC in their system.

- Do you have any feedback on the proposal document or any specific elements of it?

The proposal seeks an amendment to the Road Safety Act to replace mandatory driver licence cancellation or disqualification with judicial discretion as to driver licence cancellation or disqualification.

- Do you see any issues with magistrates exercising discretion on these matters?
- Do you see any issues with magistrates making judgements on whether a driver was impaired (as opposed to having tested positive for the presence of cannabis in their system)?
- What, if any, sort of additional guidance would a magistrate be seeking from the revised legislation and/or any elaboration via a second reading speech?
- What evidence would defendants need to present to prove their prescription for medicinal cannabis is valid and up to date?

3. Implementation of Reforms

- What is the probable impact these reforms will have on [stakeholder sector]?
- Do you see any impediments to the implementation of these reforms, particularly for your sector?
- Are there issues you would want us to capture in second reading speech that would provide guidance to you?

