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Inquiry into Drug Law Reform

Introduction

1. Liberty Victoria is committed to the defence and advancement of human rights and civil liberties. We seek to promote Australia's compliance with the rights recognised by international law and the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**). We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community.
2. We welcome the opportunity to contribute to this timely inquiry. Clear evidence from other jurisdictions, the medical profession and respected human rights organisations demonstrates that drug reform is a health and human rights issue that demands immediate attention. We believe that now is the time for a paradigm shift Victoria. Thank you for the extension of time granted to make this submission.
3. Our submission is divided into three parts:
 - (1) **Part One** outlines principles that we have identified to guide any reform to drug laws and policies. Broadly speaking, we support a health and human right-based approach that gives primacy to prevention over punishment;

- (2) **Part Two** proffers reforms to improve Victoria's response to drug harms, specifically, introducing decriminalisation for possession and personal use of illicit drugs; and
- (3) **Part Three** identifies two concerning aspects of our current drug laws that require immediate attention and resolution: the deeming provisions in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic); and the provisions of the *Residential Tenancies Act 1997* (Vic) that link drug offences to public housing.

Part One: Guiding principles

- 4. There is no doubt that drugs can cause severe physical and mental harm, and in the worst cases, death. The State usually provides that as the justification for the criminalisation of certain forms of drug use and supply. However, evidence now suggests that the prevailing 'law and order' approach is doing more harm than good.¹
- 5. The criminalisation of personal drug use has obvious negative ramifications for individuals caught up in the system. The stigma and impact on a person's social and economic wellbeing associated with having a criminal history are immense, and have a community-wide impact on social cohesion and equality. In response, many jurisdictions are changing their approach.² Liberty Victoria believes that it is time for Victoria to do the same.
- 6. We think four key principles should underpin any policy or law reform response arising from this inquiry:
 - (1) **Health-based prevention:** It is a core tenet of medicine that prevention is better than cure, and drug addiction is a medical problem that requires health-based solutions. We believe in a focus on prevention and early-intervention;
 - (2) **Harm minimisation and risk mitigation:** It is inevitable that people will continue to use drugs. A key role for drug reform must therefore be to implement policies

¹ The Drug Policy Modelling Program at the University of New South Wales has put together a comprehensive bibliography of studies. This is available online at: https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/Drug%20law%20reform%20annotated%20bibliography%202016_0.pdf.

² Jurisdictions that have decriminalised drug use and/or possession include: the United States (12 States), Netherlands, Switzerland, France, Germany, Austria, Spain, Portugal, Belgium, Italy, Czech Republic, Denmark, Estonia, Ecuador, Armenia, India, Brazil, Peru, Colombia, Argentina, Mexico, Paraguay, Uruguay, Costa Rica and Jamaica.

that reduce the risk involved in drug use and minimise the harmful impacts of drug use at individual and community levels;

- (3) **Human rights:** Under the *Charter* and international human rights law individuals are entitled to certain rights and freedoms. Respect for these rights benefits both individuals and communities, and makes for better public policy; and
- (4) **Equality:** Related to human rights, reforms must be equal in substance and in effect. Drug laws should not have a disproportionate impact on minority groups and/or groups with lower socio-economic status.

Part Two: Reforms

Decriminalisation

What is decriminalisation?

7. In any debate about drug reforms, there is a lot of confusion around what decriminalisation is and how it differs from legalisation. To clarify, in this submission we use the term *decriminalisation* to refer to policies that divert offenders away from the criminal justice system. This differs from *legalisation* in one key way: use and possession is still unlawful; it just doesn't carry the same criminal penalties.
8. Our submission also draws a distinction between two kinds of decriminalisation:
 - (1) **Decriminalisation at law (de jure)** meaning changes that are legislated; and
 - (2) **Decriminalisation in practice (de facto)** meaning policies that decriminalise drug use and/or possession in practice, but are not legislated. An example would be police discretion to issue a caution notice.

Our position

9. Liberty Victoria supports the decriminalisation of personal drug use and possession.
10. The benefits of decriminalisation have been well documented.³ They include:
 - (1) Benefits to those impacted, including improved health, employment and rehabilitation prospects;
 - (2) A reduced burden on an already stretched criminal justice system and associated positive economic implications; and
 - (3) The associated social and community benefits that flow from the above.

³ We again refer the Committee to the comprehensive bibliography of drug reform studies compiled by the Drug Policy Modelling Program at the University of New South Wales, available online at: https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/Drug%20law%20reform%20annotated%20bibliography%202016_0.pdf.

11. In contrast, the prevailing punitive approach compounds social inequity and negative physical and mental health outcomes. The situation in Victoria is further compounded by the fact that we are the only Australian jurisdiction without a legislated spent convictions scheme.⁴
12. We note that experiences in other jurisdictions indicate that decriminalisation does not increase drug use or other types of crime.⁵
13. The effectiveness and benefits of decriminalisation will necessarily depend on how it is implemented. To that end, the following section identifies the best way forward, taking into account the need to ensure reforms are applied consistently across the community and do not discriminate against minority groups and/or people from lower socio-economic status groups.

Pathways for reform

Approaches in other Australian jurisdictions

14. In Australia, drug law reform has been mostly the remit of the states, resulting in a patchwork approach across the country. The Australian Capital Territory, Northern Territory and South Australia, for example, have legislated to decriminalise certain forms of cannabis possession and use. Each of these states has a system whereby people can pay a fine (civil penalty) instead of facing criminal charges. In South Australia, this can be paid by way of community service. In each state, non-compliance can result in the imposition of a criminal penalty. All other states, including Victoria, have in place some form of de facto decriminalisation, such as diversion or caution programs.⁶

⁴ *Crimes Act 1914* (Cth); *Criminal Records Act 1991* (NSW); *Spent Convictions Act 2000* (ACT); *Anulled Convictions Act 2003* (TAS); *Spent Convictions Act 2009* (SA); *Spent Convictions Act 1988* (WA); *Criminal Records (Spent Convictions) Act 1992* (NT); *Criminal Law (Rehabilitation of Offenders) Act 1986* (QLD).

⁵ Joanne Csete et al, 'Public Health and International Drug Policy' (2016) 387:10026 *The Lancet* 1427, 1429, 1444. Although we note that other jurisdictions have experienced 'net-widening', whereby a wider 'net' of people become involved in criminal law processes due to the relative ease with which police can process drug charges. On balance, we believe that the risk can be mitigated by the way in which decriminalisation is implemented and policed. See further M Shiner, 'Drug policy reform and the reclassification of cannabis in England and Wales: a cautionary tale' (2015) *International Journal of Drug Policy* 696-704.

⁶ The Drug Policy Modelling Program at the University of New South Wales has prepared a useful table, which summarises the approach of each state. This is available online at: <https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/Decriminalisation%20briefing%20note%20Feb%202016%20FINAL.pdf>.

The current situation in Victoria

15. In Victoria, there is no legislated decriminalisation. However, decriminalisation has occurred in practice in two key ways:

- (1) The first is that at the discretion of the informant, police can give drug offenders a caution, often accompanied by a requirement to complete a drug education course. If the person complies, the matter is finalised with no criminal charge being laid. If the person does not comply, the matter can then be referred to court; and
- (2) The second form of de facto decriminalisation occurs in summary matters where police charge the person, but make a recommendation for diversion. If the offender admits guilt, and certain other conditions are met, then the court can order diversion. This will often involve paying a sum of money to charity or taking an education course, but no formal criminal history is recorded: the person is 'diverted' from the criminal justice system.⁷ Usually an accused person is only afforded one opportunity to undertake diversion. This has obvious limitations with regard to people committing multiple drug offences due to addiction.

How should Victoria respond?

The need for legislated decriminalisation

16. We are concerned that the current Victorian approach, characterised by de facto measures, unduly relies on the discretion of Victoria Police, and is not properly adapted to the situation presented by repeat offenders who are affected by drug addiction.

17. There is no mechanism for ensuring that the discretion of police officers to refuse to recommend diversion is applied consistently. In some instances that have come to our attention, police have denied diversion on the basis that a person gave a no comment record of interview — that is, that they exercised a common law right. Further there

⁷ *Criminal Procedure Act 2009* (Vic) s 59.

appear to be very different standards as to the kind of offences that are and are not suitable for diversion. In our view, this underscores the pressing need for legislative intervention.

18. This coheres with our experiences in other areas of related concern, such as racial profiling bias. We direct the Committee's attention to our previous detailed submission on this issue, which outlines key studies about both the existence of racial profiling bias and its impacts on affected communities.⁸

The content of legislated decriminalisation

19. Decriminalisation can take many forms, from civil penalties to diversion programs. The essence of decriminalisation is that offenders are diverted away from punitive sentencing dispositions and the stigma of having a criminal record in favour of an approach that gives primacy to harm minimisation and rehabilitation.
20. Any approach that diverts offenders away from the criminal justice system will yield better results for individuals and communities. Therefore, an approach that ensures no criminal record would be most appropriate.
21. Where possible, such outcomes should also be combined with education and rehabilitation programs to help prevent further offending and improve health outcomes. We note the very significant work undertaken by the CREDIT bail support program in the Magistrates' Court of Victoria, and would strongly recommend that it be expanded to the County Court of Victoria.
22. Importantly, we think civil penalties can be a constructive alternative for some types of illicit drug offences. However, as recent Victorian experience with infringements has shown,⁹ they often have a disproportionate impact on poorer communities, causing an array of administrative, social and economic problems. When failure to comply with a civil debt leads to a criminal penalty, the objectives of decriminalisation are undermined, and its benefits are denied to those who most need it. Policy makers need to be cognisant to

⁸ Liberty Victoria, 'Submission to Victoria Police Community Consultation on Field Contacts and Cross-Cultural Training' (14 August 2013). This is available online at:

<https://libertyvictoria.org.au/sites/default/files/LV%20Profiling%20Subm%20Web.pdf>.

⁹ See, eg, Sentencing Advisory Council, 'Imposition and Enforcement of Court Fines and Infringement Penalties' (30 May 2014). This is available online at:

<https://www.sentencingcouncil.vic.gov.au/publications/imposition-and-enforcement-court-fines-and-infringement-penalties-victoria>.

avoid the pitfall of creating a civil infringement system whereby more people will be ultimately exposed to the criminal justice system.¹⁰

Recommendation 1: Legislate a de jure decriminalisation scheme that diverts offenders away from the criminal justice system.

Recommendation 2: This scheme should be supported by rehabilitation and education programs and should be careful to avoid a civil debt system that disproportionately impacts poorer communities.

23. Finally, we note that the lack of spent convictions legislation remains a pressing issue for Victoria, particularly when considering the social harms of the ‘law and order’ approach to illicit drug regulation. As has been the case for some time, we support a legislated spent convictions scheme, which would necessarily encompass personal use and possession offences.¹¹

¹⁰ For further information, see the resources collected by the Alcohol Tobacco & Other Drug Association ACT at <http://www.atoda.org.au/policy/act-infringement-system/>.

¹¹ See Aggy Kapitaniak, ‘The Need for a National Spent Convictions Scheme’, available online at: <https://libertyvictoria.org.au/node/74>.

Part Three: Current laws that demand change

24. Part Three of this submission highlights two concerning aspects of our current drug laws that require immediate attention and resolution: the deeming provisions in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic); and the provisions of the *Residential Tenancies Act 1997* (Vic) that link drug offences to public housing.

Deeming provisions

25. Sections 5 and 73(2) of the *Drugs, Poisons and Controlled Substances Act 1981* (the **Drugs Act**) fundamentally alter the balance between the State and the accused in the prosecution of drugs offences. In either form or substance, these provisions relieve the prosecution of its responsibility to prove the offence beyond reasonable doubt, and instead place some burden on the accused to establish his or her innocence. These provisions undermine principles of criminal justice that protect the dignity of the individual and ensure the State does not punish people who are innocent. They should be repealed.

Deemed possession: section 5 of the Drugs Act

26. Section 5 of the Drugs Act is a deeming provision that radically interferes with core principles of our criminal justice system. Section 5 is not reasonably necessary for the enforcement of Victoria's drug laws. Indeed, the Crown has expressly submitted in argument before the Court of Appeal in *R v Momcilovic* that it is not needed to secure convictions.¹² It should be repealed or reformed.

Section 5 interferes with fundamental principles of criminal justice

27. Section 73(1) of the Drugs Act makes it an offence to possess a drug of dependence. The offence of possession carries the following penalties:

¹² (2010) 25 VR 436, [145]-[146].

- (1) if the person satisfies the court on the balance of probabilities that the offence was not committed for any purpose relating to trafficking – a maximum of one year’s imprisonment and a fine of \$4,600;
- (2) in any other case – a maximum of five years’ imprisonment and a fine of not more than \$62,000.¹³

28. To establish possession at common law, the prosecution must prove the following elements beyond reasonable doubt:

- (1) the accused had physical custody or control of the drug; and
- (2) the accused intended to possess a drug, which may be inferred from the accused’s knowledge or awareness of the likelihood that the substance was a drug.¹⁴

29. Section 5 of the Drugs Act drastically alters the prosecution of this offence. Section 5 states that:

Without restricting the meaning of the word “possession”, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

30. The effect of section 5 is that, in prosecuting offences under section 73, the prosecution only needs to establish that the drug was on any land or premises occupied by the accused. The accused is then deemed to be in possession of the drug. The onus of proof shifts to the accused to establish that he was *not* in possession of the drug.

31. To overcome the effect of section 5, the accused must prove, on the balance of probabilities, that he was unaware that the drug was on the premises, or had no intention to exercise control over the drug or the place where it was kept.¹⁵

32. Section 5 is an alarming provision. First, on proof that the drug was on land or premises controlled by the accused, section 5 shifts the onus of proof from the prosecution to the accused.

¹³ Except where the person possesses a small quantity of cannabis: Drugs Act s 73(1)(a).

¹⁴ *He Kaw Teh v The Queen* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *Kural v The Queen* (1987) 162 CLR 502; *R v Page* [2008] VSCA 54.

¹⁵ *R v Tran* [2007] VSCA 19, [27] (Redlich JA, Nettle and Neave JJA agreeing).

33. Second, section 5 imposes a legal onus on the accused.¹⁶ A legal onus (also sometimes described as a persuasive onus) is significantly more onerous than an evidentiary onus. An evidentiary onus merely requires the accused to point to evidence which puts the presumed fact in issue. A legal onus requires the accused to disprove the presumed fact on the balance of probabilities. As Lord Steyn noted in *R v Lambert*, '[a] transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden of the accused.'¹⁷

34. Third, section 5 requires the accused to prove a negative. The accused must establish that he was unaware that the drug was on the premises, or had no intention to exercise control over the drug or the place where it was kept. This kind of reverse onus is particularly unfair, as Justice Anderson of the New Zealand Supreme Court described in *Hansen v The Queen*:

Because of prosecutorial difficulty in proving a positive, an accused who does not have equality of arms in terms of resources, and may lack articulateness, is forced to carry the even heavier burden of proving a negative. That such negative is subjective and intangible only exacerbates the difficulty for an accused.¹⁸

35. A recent decision of the Victorian Court of Appeal, *Ta v Thompson*, illustrates the practical operation of section 5.¹⁹ On 5 January 2010, police officers searched Mr Ta's house and discovered a clear ziplock bag containing 0.1 grams of heroin in the walk-in wardrobe of his bedroom. None of Mr Ta's fingerprints or DNA were found on the bag. Mr Ta denied that the heroin belonged to him and said he did not know how it came to be there. He gave evidence that there had been a New Year's Eve party at his house. At the time of the search, there were unopened beer bottles in Mr Ta's bathtub, consistent with it being used as an ice bucket for party. Nevertheless, the judge was not satisfied by Mr Ta's account on the balance of probabilities, and fined him \$1,200. The Court of Appeal upheld Mr Ta's conviction.

36. Section 5 overthrows a 'cardinal principle' of our criminal justice system: that an accused is presumed innocent until the prosecution proves all elements of the charge beyond reasonable doubt.²⁰ Section 5 relieves the prosecution of having to prove all the elements

¹⁶ *Momcilovic v The Queen* (2011) 245 CLR 1, [79] (French CJ), [510] (Crennan and Kiefel JJ), [659] (Bell J).

¹⁷ [2002] 2 AC 545, [37].

¹⁸ [2007] 3 NZLR 1, [280].

¹⁹ [2013] VSCA 344.

²⁰ *Woolmington v DPP* [1935] AC 462; *Howe v R* (1980) 32 ALR 478; *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Momcilovic v The Queen* (2011) 245 CLR 1, [52]-[55] (French CJ); *Charter of Human Rights and Responsibilities* s 25(1).

of the offence of possession, and instead casts the onus on the accused to prove his or her innocence. It also requires a jury to convict an accused even if there is a reasonable doubt as to whether he or she committed the offence. An accused might adduce sufficient evidence to raise a reasonable doubt as to whether he possessed the drug. But if the jury is not convinced on the balance of probabilities that his account is true, they must still convict him. For this reason, in *Momcilovic v The Queen*, a majority of the High Court found that section 5 interferes with the right to the presumption of innocence.²¹

37. Section 5 also undermines the accused's right not to be compelled to testify against himself or herself. The right against self-incrimination is a fundamental principle of the common law.²² As Justice McHugh of the High Court noted in *Environment Protection Authority v Caltex Refining Co Pty Ltd*, to require an accused to convict himself from his own mouth is oppressive.²³ This right is now enshrined in section 25(2)(k) of the *Charter*.

38. Section 5 interferes with the right against self-incrimination because, faced with the reverse onus, an offender is effectively compelled to testify to establish his innocence. As Justice Hugo Black of the United States Supreme Court observed in *United States v Giney*:

The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances...The compulsion here is of course more subtle and less cruel physically than compulsion by torture, but it is nonetheless compulsion and it is nonetheless effective.²⁴

This interference is not justified

39. Section 5 is an unwarranted intrusion on these fundamental principles.

40. First, this intrusion is radical. As the Victorian Court of Appeal noted in *R v Momcilovic*, in relation to the offence of possession, section 5 effects 'not so much an infringement of the presumption of innocence as a wholesale subversion of it.'²⁵ The Court of Appeal went on to note that:

²¹ *Momcilovic v The Queen* (2011) 245 CLR 1, [79] (French CJ), [581] (Crennan and Kiefel JJ), [659], [673] (Bell J).

²² *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [20] (French CJ), [125] (Crennan J), [159], [175] (Kiefel J); *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622, [61] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

²³ (1993) 178 CLR 477, 544.

²⁴ 380 U.S. 63, 87 (1965).

²⁵ (2010) 25 VR 436, [152] (Maxwell P, Ashley and Neave JJA).

In the course of argument, two apparently contradictory propositions emerged as relevant to proportionality in a case such as the present. The first proposition is that an infringement of the presumption of innocence becomes harder to justify the more serious is the punishment to which the defendant is exposed. The second is that an infringement of the presumption of innocence becomes harder to justify the less serious is the offence in question. In our view, both propositions are correct, and both have application to the present enquiry.²⁶

41. As this passage illustrates, any attempt to justify section 5's subversion of the presumption of innocence suffers from a crippling internal tension.
42. Second, section 5 is arbitrary. The rationality of any deeming provision depends on the strength of the connection between two facts:
 - (1) the proved fact: the fact which a party has to establish beyond reasonable doubt, by adducing relevant evidence; and
 - (2) the presumed fact: the fact which is presumed upon proof of the proved fact.
43. For example, if the Drugs Act deemed a person to be in possession of any drugs found in any house in their street, this would be entirely arbitrary. There is no rational basis on which a judge or jury could, in every case, link these two facts. To require a judge or jury to convict on this basis would be unfair and unjust. For this reason, the United States Supreme Court has held that a criminal presumption breaches the guarantee of due process under the Fifth and Fourteen Amendments unless 'it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'.²⁷
44. This cannot be said for section 5. There are a multitude of reasons for why drugs might be present on land or premises occupied by a person, only some of which are consistent with the person having legal possession of those drugs. The presumed fact (legal possession of the drugs) does not follow from the proved fact (presence of drugs on land) with sufficient certainty to save section 5 from arbitrariness.
45. Section 5 creates a substantial risk that people will be mistakenly charged and convicted for possession of drugs, and thereby exposed to irreparable harm. This is inconsistent with the principles of harm minimisation, risk mitigation and human rights that should guide Victoria's drug policy.

²⁶ (2010) 25 VR 436, [148] (Maxwell P, Ashley and Neave JJA).

²⁷ (1969) 395 US 6, 36 (Harlan J).

46. Third, section 5 is not necessary for the successful prosecution of possession offences. In *R v Momcilovic*, the Crown conceded that there was no evidence which showed that the reverse legal onus was essential to the prosecution of drug offences.²⁸
47. Fourth, section 5 is exceptional. The majority of Australian jurisdictions do not use deemed possession provisions. Only Queensland, Tasmania and the Northern Territory join Victoria in tipping the scales so starkly in favour of the prosecution.²⁹
48. For these reasons, section 5 is incompatible with the right to the presumption of innocence. Again, borrowing the words of the Victorian Court of Appeal, ‘there is no reasonable justification, let alone any “demonstrable” justification, for reversing the onus of proof in connection with the possession offence.’³⁰

Section 5 should be repealed or amended

49. In light of the above, section 5 is an unjustifiable limitation on the presumption of innocence. Liberty Victoria’s preferred approach is for section 5 to be repealed altogether.

Recommendation 3: Section 5 of the Drugs Act should be repealed.

50. If section 5 is to be retained, however, it should be amended to impose an evidentiary, rather than a legal, onus on the accused.

Recommendation 4: If section 5 of the Drugs Act is not repealed, it should be amended as follows to impose an evidentiary onus, rather than a legal onus, on the accused:

Without restricting the meaning of the word “possession”, any substance shall be *taken* for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by that person or is used, enjoyed or controlled that person in any place whatsoever, unless *evidence is adduced* to the contrary, in which case the prosecution must prove that the person was in possession of the substance beyond reasonable doubt.

²⁸ *R v Momcilovic* (2010) 25 VR 436, [142], [145] (Maxwell P, Ashley and Neave JJA).

²⁹ *Drugs Misuse Act 1986* (Qld) s 129(1)(c); *Misuse of Drugs Act* (NT) s 40(1)(c); *Misuse of Drugs Act 2001* (Tas) s 3(3).

³⁰ (2010) 25 VR 436, [152] (Maxwell P, Ashley and Neave JJA).

Possession as evidence of trafficking: section 73(2) of the Drugs Act

51. Section 73(2) of the Drugs Act is also arbitrary, unnecessary and inconsistent with fundamental principles of criminal justice. It should be repealed.

The operation of section 73(2)

52. Section 71AC(1) of the Drugs Act makes it an offence for a person to traffic in a drug of dependence. Trafficking is punishable by a maximum of 15 years' imprisonment.

53. To establish this offence, the prosecution must prove:

- (1) the accused intentionally committed an act of trafficking; and
- (2) the accused intentionally trafficked in a drug of dependence.

54. 'Trafficking' includes preparing, manufacturing or selling, and (relevantly) having in one's possession for sale.³¹

55. Section 73(2) of the Drugs Act is an evidentiary provision which assists the prosecution to make out a charge of trafficking. Section 73(2) states that:

Where a person has in his possession, without being authorized by or licensed under this Act or the regulations or the *Access to Medicinal Cannabis Act 2016* or the regulations under that Act to do so, a drug of dependence in a quantity that is not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence.

56. The 'traffickable quantity' of a drug is defined in section 70(1) and schedule 11 of the Drugs Act. The traffickable quantity in Victoria for several common drugs, in mixed grams, is set out below:

- Heroin: 3g
- Methamphetamine: 3g
- Cocaine: 3g
- Ecstasy: 3g

³¹ Drugs Act s 70(1).

- Cannabis: 250g

57. The effect of section 73(2) is that, where a person possesses a ‘traffickable quantity’ of a drug, his possession is ‘prima facie evidence’ of trafficking in that drug (namely, having the drug in possession for sale).

58. It is important to make two initial points in this regard. First, the prosecution cannot rely on section 5 of the Drugs Act to establish possession of a traffickable quantity for the purposes of section 73(2). The prosecution must establish that the accused possessed the drugs at common law. This is because the High Court read down these provisions of the Drugs Act in *Momcilovic v The Queen*, to reduce their interference with the presumption of innocence.³²

59. Second, strictly speaking, section 73(2) does not reverse the onus of proof. Prima facie evidence is evidence that is sufficient to convict a person in the absence of any evidence the contrary. However, the prosecution still bears the burden of establishing that the accused is guilty. The jury must still decide whether, on the whole on the evidence, they are satisfied beyond reasonable doubt that the accused had the drug in possession for sale.³³

60. Nevertheless, for the following reasons, section 73(2) should be repealed.

Section 73(2) is arbitrary, unnecessary and inconsistent with core principles of criminal justice

61. First, section 73(2) is arbitrary. As noted above, a deeming provision is only justifiable where there is a robust, rational connection between the proved fact and the presumed fact. As Willis argues:

There are strong reasons for believing that it is impossible to establish with any acceptable degree of accuracy quantities for each drug which would be an accurate determinant of a possessor's intentions.³⁴

62. This is supported by recent empirical research. Hughes et al have found that Australian drug users often purchase, or use in a heavy session, an amount of a drug that exceeds the

³² (2011) 245 CLR 1, [72]-[79] (French CJ), [198] (Gummow J), [280] (Hayne J), [611] (Crennan and Kiefel JJ).

³³ *Stavropoulos v Zamouzaris* (1990) 50 A Crim R 315, 318-9 (McGarvie J, Murphy and Brooking JJ agreeing); *R v Tran* [2007] VSCA 19, [50] (Redlich JA, Nettle and Neave JJA agreeing).

³⁴ John Willis, ‘The Traffickable Quantity Presumption in Australian Drug Legislation’ (1980) 12(4) *Melbourne University Law Review* 467, 489.

traffickable quantity for that drug. This is a particular problem in the case of heroin and ecstasy. Section 73(2) thus exposes drugs users to a real risk of unjustified charge and punishment as traffickers.³⁵

63. This risk is alarming and inconsistent with the principles of harm minimisation and risk mitigation identified above. Hughes et al make the following important points in this respect:

- (1) The most marginalised drug users are the most likely to be caught around the margins of drug trafficking thresholds;³⁶ and
- (2) An 'unjustified conviction for dealing will often impose social and individual harms which far exceed the harm associated with the drug in question'.³⁷

64. Second, section 73(2) is unnecessary. In cases involving very large quantities of drugs, the judge or jury can readily draw an inference of an intention to traffic. In cases involving smaller quantities of drugs, the judge or jury can rely on other evidence to support such an inference (such as possession of scales, large amounts of cash, and so on). Willis summarises this point crisply:

Put simply, if a large amount of a drug is involved, the jury will convict of trafficking; if an amount is only slightly over the trafficable quantity, on that evidence alone the jury should not convict.³⁸

65. Third, section 73(2) intrudes on the fundamental principles of criminal justice identified above: the presumption of innocence and the right against self-incrimination. As the Victorian Court of Criminal Appeal noted in *R v Elem*:

... once there is evidence of possession for the purpose of trafficking then slight evidence of acts which might amount to trafficking may be all that is necessary to complete the Crown case.³⁹

³⁵ Caitlin Hughes et al, 'Australian threshold quantities for 'drug trafficking': Are they placing drug users at risk of unjustified sanction?' (Australian Institute of Criminology, March 2014). This is available online at: http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi467.pdf.

³⁶ Ibid.

³⁷ Ibid, quoting Model Criminal Code Officers Committee, *Serious drug offences (Model Criminal Code)* (Model Criminal Code Officers Committee, 1998) 87.

³⁸ John Willis, 'The Trafficable Quantity Presumption in Australian Drug Legislation' (1980) 12(4) *Melbourne University Law Review* 467, 489.

³⁹ [1982] VR 295

66. While the onus still formally rests on the prosecution, section 73(2) ‘will in many cases effectively compel the accused to lead or give evidence to disprove trafficking.’⁴⁰

Section 73(2) should be repealed or amended

67. In light of the above, section 73(2) should be repealed. It is inconsistent with drug laws and policies premised on harm minimisation, risk mitigation and human rights.

Recommendation 5: Section 73(2) of the Drugs Act should be repealed.

Drugs and public housing

68. The *Residential Tenancies Act 1997* (Vic) (**the Residential Tenancies Act**) links drugs policy with public housing policy. In doing so, it exposes public housing tenants to a risk of arbitrary eviction, contrary to the right to privacy, family or home under section 13(a) of the *Charter*.

The operation of section 250A of the Residential Tenancies Act

69. Section 250A of the Residential Tenancies Act states that:

- (1) The Director of Housing may give a tenant a notice to vacate rented premises of which the Director of Housing is the landlord if the tenant has, on the rented premises or in a common area, illegally—
 - (a) trafficked or attempted to traffick a drug of dependence; or
 - (b) supplied a drug of dependence to a person under 18 years of age; or
 - (c) possessed a preparatory item with the intention of using the item for the purpose of trafficking in a drug of dependence; or
 - (d) possessed, without lawful excuse—
 - (i) a tablet press; or
 - (ii) a precursor chemical; or

⁴⁰ John Willis, ‘The Trafficable Quantity Presumption in Australian Drug Legislation’ (1980) 12(4) *Melbourne University Law Review* 467, 471.

- (da) intentionally caused another person to traffick in a drug of dependence by threatening to harm that person or another person or by using violence against that person or another person; or
- (db) intentionally permitted another person to use those premises or the common area for—
 - (i) trafficking in a drug of dependence; or
 - (ii) cultivating a drug of dependence; or
- (e) cultivated or attempted to cultivate a narcotic plant.

70. In effect, section 250A authorises the Director of Housing to give a tenant a notice to vacate their public housing if they have done one of the acts enumerated in paragraphs (a) to (e) (**drug-related conduct**) on the rented premises or in a common area.

71. The process for eviction from public housing under the Residential Tenancies Act is as follows:

- (1) First, the Director of Housing (**Director**) must give the tenant a **notice to vacate**;
- (2) Second, the Director may apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for a **possession order**.⁴¹ VCAT must make a possession order on the application of the Director if it is satisfied that the Director was entitled to issue the notice to vacate;⁴² and
- (3) Third, when making a possession order, VCAT must direct the tenant to leave the premises, and must direct the registrar of VCAT to issue a **warrant of possession** if one is requested.⁴³ A warrant of possession authorises the person to whom it is directed to enter the rented premises and evict all persons living there, and give possession of the premises to the Director.⁴⁴

72. A notice to vacate is consequential. It sets in motion the process for eviction. In *Burgess v Director of Housing*, the Supreme Court found that the decision to issue a notice to vacate exposes the tenant to the risk of losing their house, such that the Director must observe the rules of natural justice in so deciding.⁴⁵

⁴¹ Residential Tenancies Act, pt 7.

⁴² Residential Tenancies Act, s 330.

⁴³ Residential Tenancies Act, s 333.

⁴⁴ Residential Tenancies Act, s 355(2).

⁴⁵ [2014] VSC 648.

73. After the notice to vacate is issued, VCAT has little power to counter hardship or injustice that may flow from the Director's decisions.⁴⁶ Notably, VCAT cannot review whether the Director has acted compatibly with, or given proper consideration to, the tenant's human rights.⁴⁷ Currently, the tenant's only option is to seek judicial review of the Director's decision in the Supreme Court, which is more costly and less accessible than VCAT. As recommended in the *2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, we believe that VCAT should be given original jurisdiction to hear and determine claims that a public authority has acted incompatibly with, or failed to give proper consideration to, the human rights protected by the *Charter*.⁴⁸

Section 250A interferes with the right to home in section 13(a) of the Charter

74. Section 13(a) of the *Charter* guarantees the right not to have one's privacy, family or home unlawfully or arbitrarily interfered with. Section 250A creates a substantial risk that a tenant in public housing will be arbitrarily evicted from their house, because either:

- (1) they are not actually responsible for the drug-related conduct that has taken place on their premises; or
- (2) while they are responsible, eviction is a disproportionate response, given the prospect of criminal sanctions and the harmful and destructive consequences that eviction entails for them and their family.

Eviction of people not responsible for drug-related conduct on their premises

75. Section 250A does not require that the tenant has been charged or convicted with an offence. VCAT's only task is 'to decide whether the facts alleged in the notice to vacate have been proved on the balance of probabilities, although the seriousness of an allegation of illegality requires [VCAT] to be cautious'.⁴⁹ This creates an alarming risk that a person

⁴⁶ Under section 352, VCAT may postpone the issue of a warrant of possession for not more than 30 days, if it is satisfied that the hardship to the tenant would outweigh the hardship to the landlord.

⁴⁷ *Director of Housing v Sudi* (2011) 33 VR 559.

⁴⁸ Michael Brett Young, *The 2015 Review of the Charter of Human Rights and Responsibilities* (1 September 2015) 129. This is available online at: <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>.

⁴⁹ *Director of Housing v Hogg (Residential Tenancies)* [2013] VCAT 1256 (Vassie SM)

may be evicted from their house although they are not actually responsible for the drug-related conduct that has taken place on those premises. The following two case studies illustrate this risk.

76. In *Director of Housing v TP (Residential Tenancies)*,⁵⁰ TP had lived for 15 years in a home managed by Aboriginal Housing with her four kids. TP was the victim of domestic violence at the hands of DG, the father of two of her children, and had obtained two previous intervention orders against him.

77. In March 2007, DG showed up at TP's house with several pots of cannabis. TP initially refused him entry because of the cannabis, but ultimately relented after feeling threatened. After three days, following an anonymous tip, the police attended TP's house and arrested DG for cultivating cannabis. Two months later, the Director of Housing served TP with a notice to vacate under section 250 of the Residential Tenancies Act. Section 250 is very similar to section 250A. It authorises a landlord to give a tenant a notice to vacate rented premises if the tenant has used the rented premises, or permitted their use, for any purpose that is illegal at common law or under an Act.

78. VCAT dismissed the Director's application for an order for possession, because:

- (1) TP's premises were not 'used' for an illegal purpose, because there was not a sufficient connection between the premises and the illegal activity. The premises were 'merely the scene of the commission of an offence',⁵¹ and
- (2) In any case, TP did not 'permit' the illegal activity, as she did not have power to prevent it due to DG's history of violence towards her.⁵²

79. In *Director of Housing v Smith (Residential Tenancies)*,⁵³ Ms Smith was a tenant in public housing with her partner, Mr Perry. In June 2015, police executed a search warrant at the premises and allegedly found a commercial quantity of methamphetamine. Mr Perry was later charged with offences relating to those drugs. The Director of Housing subsequently served Ms Smith with a notice to vacate under section 250 of the Residential Tenancies Act. Ms Smith gave evidence that the drugs were not hers and that she did not take drugs.

⁵⁰ [2008] VCAT 1275 (*TP*).

⁵¹ [2008] VCAT 1275, [27]-[39] (Nihill M).

⁵² [2008] VCAT 1275, [40]-[43] (Nihill M).

⁵³ [2015] VCAT 1478 (*Smith*).

80. VCAT again dismissed the Director's application for an order for possession, because:

- (1) Ms Smith did not 'use' the premises for an illegal purpose, because there was no evidence that she was positively involved in the illegal act;⁵⁴ and
- (2) Ms Smith did not 'permit' the premises to be used for an illegal purpose, because there was no evidence that she knew or approved of the presence of the drugs in the house.⁵⁵

81. It is true that, in both *TP* and *Smith*, the tenant was not ultimately evicted from their house.

However, this result depended on the following factors:

- (1) The tenant chose to remain the rented premises, rather than move out, after receiving the notice to vacate;
- (2) The tenant chose to attend VCAT and contest the application for an order for possession; and
- (3) The tenant obtained legal advice and representation at VCAT, and was thus able to test the evidence on which the Director based his or her decision to issue the notice to vacate.

82. These factors will frequently be absent in the case of those in public housing, who are among the most vulnerable members of our community.

83. In the absence of these factors, the only safeguard against arbitrary eviction is the Director of Housing. We recognise that the Director and his or her employees endeavour in good faith to pursue the best interests of Victorians, consistently with human rights. However, cases like *TP* and *Smith* underline how section 250A exposes vulnerable people to the risk of arbitrary interference with their right to privacy, family and home.

Eviction as a disproportionate response

84. Even if a person has engaged in drug-related conduct, or permitted it to occur, eviction will often be a disproportionate response.

⁵⁴ [2015] VCAT 1478, [14]-[16] (Wilson M).

⁵⁵ [2008] VCAT 1275, [17]-[22] (Wilson M).

85. Criminal law sanctions under the Drugs Act are available in relation to the drug-related conduct set out in section 250A. People should not be punished a second time for such conduct with the loss of their housing. This is particularly so given the harmful and destructive consequences that eviction (and often subsequent homelessness) entails for a person and their family.

86. The Victorian Scrutiny of Acts and Regulations Committee has highlighted the potentially disproportionate operation of section 250A:

The Committee notes that new sections 250A and 250B do not require proof of any 'deliberate use of the premises for the illegal purpose'. For example, new section 250A(1)(c) would allow the Director of Housing to issue a notice to vacate if a tenant merely downloads instructions for cultivating cannabis on a computer in the premises or parks a car containing an instrument for cultivating cannabis in the premise's car park, even if the tenant's intention is to grow and traffick the cannabis elsewhere.⁵⁶

87. This is in part because section 250A goes further than section 250 (the provision at issue in *TP and Smith*). Section 250A requires merely that the tenant has 'on the rented premises or in a common area', engaged in drug-related conduct. Section 250 imposes the more stringent requirement that the tenant have 'used the rented premises or permitted their use for any purpose that is illegal'. In *Director of Housing v TK*, Deputy President Lambrick made the following comments in relation to section 250:

I am persuaded that it is not sufficient that the premises are merely the scene of the commission of the crime. There must be a deliberate use of the premises for the illegal purpose. There must be some real connection between the use of the rented premises and the illegal activity alleged. It is not sufficient that there be a passing connection to the rented premises. The purpose of the legislation is not to re-punish tenants for crimes they commit, but to prevent rented premises from being used for a purpose that is illegal. This interpretation is an interpretation which is consistent with the important right to a home as articulated in s 13(a) of the Charter.⁵⁷

Section 250A should be repealed

88. In light of the above, we recommend that section 250A be repealed or reformed.

Recommendation 6: Section 250A of the Residential Tenancies Act should be repealed.

⁵⁶ Residential Tenancies Amendment (Public Housing) Bill 2011 (Alert Digest No 3 of 2011) 12-4.

⁵⁷ [2010] VCAT 1839, [92].

Recommendation 7: If section 250A of the Residential Tenancies Act is not repealed, it should be amended in one or more of the following ways to safeguard public housing tenants against the risk of arbitrary eviction:

- (1)** VCAT should have jurisdiction to review whether a public authority, such as the Director of Housing, has acted compatibly with the human rights protected by the *Charter*, for instance in issuing a notice to vacate and applying for an order for possession;
- (2)** Section 250A should only apply where the tenant has been convicted of the drug-related conduct; and
- (3)** Section 250A should only apply where the tenant has ‘used’ the premises, or permitted the ‘use’ of the premises, for drug-related conduct.

Conclusion and recommendations

Liberty Victoria recommends as follows:

- **Recommendation 1:** Victoria should establish a de jure decriminalisation scheme that diverts offenders away from the criminal justice system.
- **Recommendation 2:** This scheme should be supported by rehabilitation and education programs and should be careful to avoid a civil debt system that disproportionately impacts poorer communities.
- **Recommendation 3:** Section 5 of the Drugs Act should be repealed.
- **Recommendation 4:** If section 5 of the Drugs Act is not repealed, it should be amended to impose an evidentiary onus, rather than a legal onus, on the accused.
- **Recommendation 5:** Section 73(2) of the Drugs Act should be repealed.
- **Recommendation 6:** Section 250A of the Residential Tenancies Act should be repealed.
- **Recommendation 7:** If section 250A of the Residential Tenancies Act is not repealed, it should be amended to safeguard public housing tenants against the risk of arbitrary eviction.

Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President, Michael Stanton, or the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential.

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