



Legislative Council Legal and Social Issues Committee  
Parliament House  
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## Submission to the Inquiry into Workplace Drug Testing in Victoria

### About 360Edge

#### 360Edge

360Edge is Australia's leading specialist alcohol and other drugs consultancy. We provide a full suite of policy and practice advisory services across the spectrum of alcohol and other drug use, as well as allied areas such as mental health, justice and education, supporting governments and frontline services to improve policy and practice in line with the latest evidence.

#### WorkEdge

One of 360Edge's core programs is WorkEdge, which harnesses our expertise in alcohol and other drugs to support the development and implementation of workplace alcohol and other drug policy. We have worked with a range of sectors including building and construction, resources and mining, energy, and parliamentary workplaces.

#### Professor Nicole Lee, CEO

CEO, Professor Nicole Lee, is an international leader in alcohol and other drug responses with 34 years' experience in policy and practice implementation. Professor Lee is Adjunct Professor at the National Drug Research Institute, Curtin University; CEO of Hello Sunday Morning; and Board Member at The Loop Australia. Professor Lee is a member of the Australian National Advisory Council on Alcohol and other Drugs (ANACAD), Australia's key expert advisory council to the Australian Government on alcohol and other drugs, which provides policy advice directly to the Health Minister and their Department. Professor Lee is also the Alcohol and other Drug Adviser to the Department of Veterans' Affairs.

## Background

Thank you for the opportunity to make a submission to the inquiry into workplace drug testing in Victoria.

Our comments are based on evidence about effectiveness of workplace drug testing as well as decades of experience in workplace drug policy. Our submission is also predicated on the premise that drug use should be treated as a health and safety issue, with the health and safety of people who may use drugs and their colleagues top of mind.

### **Use of illicit and prescribed cannabis, stimulants and opioids is widespread**

We know that around 40% of Australian adults have tried an illicit drug in their lifetime, but only a small proportion of those (16.8%) have used in the last year and most of those used only a handful of times.<sup>[1]</sup> The majority of people who use illicit drugs only do so a couple of times a year and do not use drugs at risky levels that would interfere with their ability to carry out their work duties.<sup>[1]</sup> Most of the people who use illicit drugs (67%) are employed.<sup>[2]</sup>

In addition to recreational drug use, a number of people are prescribed cannabinoids, stimulants and opioids for a wide range of medical conditions; the medical uses for these drugs are widening and the number of prescriptions is increasing as more research is undertaken showing a range of benefits.

Between 2020 and 2022, nearly 300,000 medicinal cannabis prescriptions were written compared to just over 1000 between 2016 and 2019. In 2023 alone, 131,914 people were approved to access medicinal cannabis.<sup>[3]</sup> In 2022, over 3 million stimulant medications were dispensed<sup>[4]</sup> and in 2021–22, over 13.3 million opioid medications were dispensed.<sup>[5]</sup>

There are at least 100 different medicinal cannabis products available in Australia with varying levels of THC (tetrahydrocannabinol), the psychoactive ingredient in cannabis, and CBD (cannabidiol). Both are used to treat a range of health conditions, including chronic pain.<sup>[6]</sup> Only 21% of people approved for medicinal cannabis in 2023 were approved for a CBD only product and 79% were prescribed products with at least some THC.<sup>[3]</sup>

### **Drug testing cannot determine impairment**

Whether illicit or medically prescribed, these drugs may cause impairment, but no workplace drug tests are able to detect intoxication or impairment other than alcohol breathalyser tests.<sup>[7]</sup> Unlike other drug tests, alcohol breathalyser tests reliably identify a person's current blood alcohol level. Although impairment varies between people at the same blood alcohol level, it is reasonable to assume that with a positive breathalyser test result, the person is at least somewhat impaired.

A positive drug test cannot determine whether a person is intoxicated or impaired, nor when they used the drug, how much they used, or the frequency that they use it. Sometimes, a person may return a positive test for a drug that they had consumed weeks prior to taking the test, long after any potentially impairing effects of the drug have worn off.<sup>[8]</sup> Most onsite urine tests will detect drugs up to 72 hours after they have been consumed. Given the short half life of most drugs, after 3 days the person using will no longer be intoxicated or impaired.

On the other hand, the risk of false negatives is relatively high, so even when someone produces a negative test it does not conclusively determine that no drugs have been taken.<sup>[7]</sup> In addition, in the case of accident or injury, a positive test result does not reliably indicate that drug use caused the accident or injury.<sup>[7]</sup>

### **A range of risk factors**

A range of risk factors contribute to accident and injury risk, including workplace environmental factors such as heat, noise, or poor equipment maintenance;<sup>[7, 9]</sup> and a number of personal factors such as fatigue, mental health issues and workplace conflict.<sup>[7, 10, 11]</sup>

Given the poor correlation between drug test results and impairment and the wide range of risks to workplace safety, except in very specific circumstances, drug tests are not a useful tool to mitigate workplace risks. Only in highly safety sensitive industries is workplace drug testing potentially justified as a mechanism to protect workers from serious harm. In these cases, it is a type of 'precautionary principle', or a 'just in case', approach in which safety sensitive workplaces keep anyone who may be a risk to health and safety, however remote, away from dangerous work.

### **Sanctions**

If the purpose of alcohol and drug testing is health and safety, sanctions are not warranted for people who have tested positive. Taking a health approach to legal and illegal drug use, a person who tests positive for drugs may be declined entry to a high risk worksite for safety reasons, but there is no reason to single out drug use from the many other potential workplace safety risks.

Taking an enforcement approach to only illicit drugs impacts on, and causes a dilemma for, the response to prescribed psychoactive drugs. A change to the way that all drug use, whether illicit or prescribed, is treated at work offers a health approach that can both improve the safety of workplaces and also provide support for those using illicit and prescribed medications.

Thinking about other risks to workplace safety, it is unlikely for example that someone who was fatigued or had a mental health incident, also posing a risk to safety, would be sanctioned or dismissed from their employment. Most likely they would be sent home on sick leave and able to return to work when they are no longer a potential safety risk.

### **Risk of discrimination**

Drug testing exposes workers to the risk of being discriminated against solely for using drugs when there are a range of other factors that contribute to the risk of workplace injury. There is no way to differentiate illicit and prescribed cannabis use on a drug test, meaning that an equitable solution is to reduce the circumstances in which drug testing can be carried out and curtail the use of sanctions as a response to positive drug test results.

Victoria's regulatory framework for workplace drug testing places many employees at risk of being sanctioned for taking a prescribed medication without any evidence of impairment. While workplace drug testing may be beneficial to promoting health and safety in safety sensitive industries, its utility in other industries is not justified.

Victoria's workplace drug testing regulations, set out by WorkSafe Victoria, should be extended to ensure that workplace drug testing is undertaken in line with best practice principles. The addition of 'medication or medical treatment' as a protected attribute in Victoria's Equal Opportunity Act 2010 would also be a reasonable step to prevent unjust discrimination against employees.

## TOR 1: The legislative and regulatory framework for workplace drug testing

The current Occupational Health and Safety (OHS) Act and Regulations do not mandate, require or prohibit testing.<sup>[12]</sup> Under the OHS Act, employers must provide a working environment that is safe and without risks to health and must consult with employees when introducing changes that may affect employee health and safety.

Under the Privacy and Data Collection Act 2014, personal information must not be collected unless it is necessary for an organisation's functions or activities and must not be collected in an unreasonably intrusive way.<sup>[13]</sup>

Under current legislation, workplace drug testing is permitted in Victoria if employees are consulted with prior to its implementation and it is accompanied by a drug and alcohol policy, justified by a reasonable risk to health, safety or productivity and does not unreasonably invade an employee's privacy.<sup>[13, 14]</sup>

Workplace drug testing most commonly occurs, and is most easily justified, in safety sensitive industries, including building and construction, manufacturing, mining, transport and aviation, where workplace alcohol and other drug impairment can pose a risk to the safety of employees. However, while there are standards and procedures regarding specimen collection and some industry specific legislation, there exists no explicit Victoria wide legislation regarding workplace drug testing, leaving it a largely unregulated practice.<sup>[15]</sup>

WorkSafe Victoria, Victoria's workplace health and safety regulator and insurer, recommends that:<sup>[12]</sup>

- Employers undertake a risk assessment before considering the introduction of workplace drug testing to ensure that it is appropriate to the level of risk in the workplace
- The implementation of drug testing is a part of a comprehensive alcohol and other drug program supported by clear policies and procedures and the provision of information, education and support to employees
- Drug testing policies and procedures are developed in consultation with employees
- Appropriate safeguards are put in place, including that testing is conducted in alignment with relevant Australian standards, there is no discrimination when testing employees and confidentiality is protected

In our work, one of the most common mistakes we see employers make is introducing testing without a comprehensive policy that includes training for staff and managers; reasonable measures to respond to risk, impairment and fitness for work; an avenue for support; and a clear outline of testing procedures and consequences of positive test results. Drug testing without a proper drug policy increases the risk of discrimination and unfair treatment of people who use both illicit drugs and psychoactive medicines.

## TOR 2: The treatment of prescription medicinal cannabis as compared to other prescription medications, under that workplace drug testing framework

Workplace drug tests can detect alcohol, amphetamines, benzodiazepines, cocaine, opioids and cannabis.<sup>[16]</sup> This means that they can detect both prescription and illicit drugs. Because no general workplace drug testing legislation exists, workplaces may respond differently to test results. There is a dearth of literature examining how workplaces in Victoria respond to positive test results for cannabis when the employee has a prescription.

Sanctions for returning a positive test result can range from referral to counselling or employee assistance schemes to instant dismissal.<sup>[15]</sup> Workplaces reserve the right to dismiss employees solely for returning a positive test result, even when the employee is not impaired, as long as it is a breach of the employer's policies, the employee is aware of the policies and these policies are consistently enforced.<sup>[17]</sup>

In a recent Fair Work Commission case, an employee was dismissed for using medicinal cannabis with a prescription even though he took precautions to ensure he was not impaired at work and had passed a drug test.<sup>[18]</sup> The decision was upheld because he did not inform his employer that he was taking medicinal cannabis and this was a breach of the employer's policy that employees must declare any potentially impairing medications.

In another case, an employee was dismissed because he had returned a positive test for codeine, which was at the time an over the counter medication, and had not disclosed his use of the medication to his employer.<sup>[19]</sup> The decision was also upheld in this case. Both of the employees were employed in safety sensitive industries.

Although workplaces may lawfully dismiss employees for returning a positive result for any tested drug, including medicinal cannabis and other medications, there is no data that indicates whether workplaces consistently apply sanctions for the detection of medicinal cannabis and prescription drugs.

Given the high level of stigma around illicit drugs, including cannabis, it is not unlikely these prejudices will flow through to people who are prescribed psychoactive substances and there is a risk that sanctions will be more heavily applied to people using psychoactive medicines that are also sold as illicit drugs. Therefore, a clear framework is needed that ensures that people who use psychoactive medicines and illicit drugs are not discriminated against and receive harsher sanctions than people posing other risks to the workplace.

### TOR 3: Whether the framework for occupational health and safety and workplace drug testing may be improved to benefit medicinal cannabis patients, ensuring due process and natural justice in workplace settings, balanced against risks to occupational health and safety

Any framework for workplace drug testing should take into consideration current evidence and not be driven by an ideological objection or a misunderstanding of psychoactive drug use, whether that is illicit or prescribed.

There is very limited high quality evidence that workplace drug testing deters employees from using drugs or reduces alcohol or drug related workplace injuries.<sup>[20, 21]</sup>

In addition, workplace drug testing can potentially result in unintended negative consequences, including employees modifying their drug taking behaviours to avoid detection and being less likely to report minor accidents and near misses to avoid a test.<sup>[7, 20, 21]</sup>

Aside from alcohol breath testing, there are no workplace drug tests that detect intoxication or impairment.<sup>[7]</sup> There is no way for tests to differentiate between medicinal and illicit cannabis. In the case of employees who use cannabis, drug tests can only identify if it has been consumed in the past days or weeks.<sup>[7, 22]</sup>

Research has demonstrated that the use of cannabis on the evening before work has no major impact on employees' performance;<sup>[23]</sup> cannabis use is not associated with any increase in the rate of work related injuries;<sup>[24]</sup> and the legalisation of medicinal cannabis is actually associated with an expected decrease in workplace deaths.<sup>[25]</sup>

Despite this evidence, under current legislation, an employee may demonstrate no signs of impairment and still be lawfully dismissed for returning a positive test for cannabis even with a prescription, which raises significant ethical concerns.

There is no valid rationale to support workplace drug testing in employees whose potential alcohol or drug use presents no risk to workplace health and safety. In such workplaces, productivity concerns can be effectively managed through a workplace drug and alcohol policy or fitness for work policy without unnecessarily impinging on employees' rights to privacy.<sup>[15, 20]</sup>

For workers employed in safety sensitive or integrity based (such as policing) roles only, drug testing may be justified as a mechanism to address an explicit risk to the integrity, health or safety of employees.<sup>[7, 15]</sup> It is essential that any drug testing regime is implemented in line with best practice principles.

To ensure this, WorkSafe Victoria's workplace drug testing guidelines should be extended to include:<sup>[7, 15, 20]</sup>

- A comprehensive risk assessment covering not only workplace risks associated with drug and alcohol use, but also workplace risks influencing employee alcohol and drug use (such as workplace culture) and the risks of introducing drug testing must be undertaken

- A positive test result must not result in dismissal and instead result in counselling, treatment or rehabilitation as appropriate
- Procedures must be carried out fairly and consistently
- Testing should be restricted to oral fluid testing and breath analysis only, as these are the least intrusive methods available

A number of prescription medications can impair employees; workplace drug testing regimes should therefore test for prescription medications alongside alcohol and illicit drugs and all positive test results must be responded to consistently.<sup>[15]</sup> If a workplace drug testing regime tests only for alcohol and illicit drugs, employees who test positive for cannabis and hold a valid prescription should not be sanctioned in any way and treated in the same manner as any employee using a potentially impairing prescription medication.

Our suggested approach is in line with a general move by governments away from sanctions for drug use and towards a health approach, for example through diversion to treatment rather than arrest. So a shift in the way prescribed and illicit drugs are dealt with in the workplace, towards a more health based approach, would be in line with the approach to drugs in the community and community expectations.

## TOR 4: Whether current workplace drug testing laws and procedures are discriminatory in nature and could be addressed by the addition of a further protected attribute such as ‘medication or medical treatment’, in Victoria’s anti-discrimination laws

Employees who have a disability are protected under the Equal Opportunity Act 2010.<sup>[26]</sup> While the definition of a ‘disability’ in the Act will cover some employees, this definition may not extend to the numerous medical conditions that medicinal cannabis may be used to treat, including epilepsy and chronic pain which may not classify as a standalone disability in some cases.<sup>[26]</sup>

Under current workplace drug testing laws and procedures, employees can be sanctioned solely for using a prescription medication with no evidence of impairment. This treatment of employees who require prescription medication is clearly discriminatory in nature because employees are treated unjustly on account of a medical condition.

As such, it would be appropriate to amend the Equal Opportunity Act 2010 to include ‘medication or medical treatment’ as a protected attribute to ensure that employees are not unfairly discriminated against on the basis of their medication.

In addition, it is our view that changes to workplace drug testing legislation also offer an opportunity to address the discrimination of people who use illicit drugs, which is in line with community expectations. There has been a significant increase in the percentage of the community that does not support penalties and sanctions for cannabis and a range of other drugs. This can be achieved by a regulatory framework that stops employers sanctioning people who test positive for cannabis and other drugs, whether illicit or prescribed, and requires them to take a health approach, focused on fitness for work, in line with other risks to workplace safety.

Thank you for the opportunity to provide a submission to this important inquiry. 360Edge are specialists in alcohol and other drug policy and can be called upon to provide further advice if required.

Yours sincerely,



Professor Nicole Lee, CEO



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