

Submission
No 63

**INQUIRY INTO ROAD TRANSPORT AMENDMENT
(MEDICINAL CANNABIS-EXEMPTIONS FROM
OFFENCES) BILL 2021**

Organisation: NSW Young Lawyers and NSW Young Lawyers Criminal Law
Sub-Committee

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Submission to the Inquiry into the *Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021*

28 April 2022

The Hon Chris Rath, MLC Chair, Standing Committee on Law and Justice

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The NSW Young Lawyers Criminal Law Sub-Committee makes the following submission to the Standing Committee on Law and Justice ('the Standing Committee') in response to the Inquiry into the *Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021*, ('the Inquiry').

NSW Young Lawyers

NSW Young Lawyers is a Committee of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate sub-committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers Criminal Law Sub-Committee

The NSW Young Lawyers Criminal Law Sub-Committee ('**the Committee**') is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the criminal justice system, and considers the provision of submissions to be an important contribution to the community. The Committee aims to educate the legal profession and the wider community about criminal law developments and issues. The Committee also facilitates seminars and programs that help to develop the careers of aspiring criminal lawyers, with the aim of providing a peer support network and a forum for young lawyers to discuss issues of concern. The Committee's members are drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Summary of Recommendations

The Committee makes the following recommendations:

1. The Committee supports the proposed amendment to the *Road Transport Act 2013* (NSW) ('**the Act**'), as set out in the *Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021* ('**the bill**');
2. The Committee is of the view that certain clarifications could be made to the bill in order to remove any potential ambiguity and difficulties in implementation; and

3. The Committee is not in favour of imposing any further limitations to the applicability of the proposed exemption to s. 111 of the Act.

I. Support for the Bill

The Committee is in favour of the proposed bill. The Committee views the bill as a sensible extension of the existing exemption for morphine contained in sub-sections 111(5) and 111(6) of the Act in light of the legalisation of medicinal cannabis at a federal level in 2016. Despite this legislative change, s. 111 of the Act continues to prohibit a person driving with a prescribed illicit drug present in the person's oral fluid, blood or urine. A "prescribed illicit drug" includes delta-9-tetrahydrocannabinol (or 'THC') which is the main psychoactive ingredient in cannabis.

The Committee welcomes the important safeguard contained in the current draft of the bill that the medicinal cannabis was obtained and administered in accordance with the *Poisons and Therapeutic Goods Act 1966* or a corresponding Act of another State or Territory. Further, the exemption only applies if THC is the sole illicit drug present in a person's system at the time that they test positive.

The Committee notes that the time and monetary costs to both the community and the defendants when such cases are prosecuted through the court system could be circumvented by the bill.

The penalty for an offence contrary to s. 111 includes an automatic/mandatory licence disqualification, with the length of the minimum disqualification period dependent on whether it is a first or second offence. If the bill is not passed, the Committee is particularly concerned about the current risk of additional hardship to those who reside in a rural or remote area of Australia and find themselves disqualified from driving as a result of an offence contrary to s. 111 due to the presence of medicinal cannabis. The Therapeutic Goods Administration currently offers guidance for the use of medical cannabis in the treatment of:

- Epilepsy;
- Multiple sclerosis;
- Chronic non-cancer pain;
- Chemotherapy-induced nausea and vomiting in cancer; and
- Palliative care¹

Rural and remote sufferers of the above conditions already contend with limited access to public transport and lengthy travel distances between their homes and public facilities. In general, a disqualification from driving due to detection of medicinal cannabis would adversely impact those persons living in rural areas

¹ The Australian Government Department of Health, Therapeutic Goods Administration, 'Guidance for the use of medicinal cannabis in Australia: Patient information', (Brochure, December 2017)
<<https://www.tga.gov.au/publication/guidance-use-medicinal-cannabis-australia-patient-information>>.

more so than those living in an urban or densely populated area, with ample access to public transport and medical treatment.

II. Proposed clarifications

The Committee is of the view that certain clarifications could be made to the bill in order to remove any existing ambiguity.

The Committee understands that the changes to the bill relate to s. 111 of the Act rather than s. 112. Therefore, if a person is affected by medicinal cannabis to such an extent that their conduct would amount to the offence colloquially known as “driving under the influence”, s. 112 would continue to have operation, and the person could remain liable for an offence under that section. For the avoidance of all doubt however, the Committee suggests an addition to the bill, to state that:

"Nothing in subsection 1A affects the operation of s. 112 of this Act"

Further, the explanatory note to the bill indicates that clause 3 amends the Act so that:

“offences relating to driving while a prescribed illicit drug is present in a person’s oral fluid, blood or urine do not apply if the only drug present is delta-9-tetrahydrocannabinol (also known as THC) that the person had obtained and administered for medicinal purposes.”

The current wording of the bill is that “the delta-9-tetrahydrocannabinol was obtained and administered in accordance with the *Poisons and Therapeutic Goods Act 1966* or a corresponding Act of another State or Territory”. This wording differs from the current wording in subsections 111(5) and (6) of the Act in relation to morphine. The Committee suggests the following addition to the current wording in cl. 3 of the bill (new proposed s.111(1)(1A)(b)):

“..and taken in accordance with the manner in which it was prescribed”

The Committee is of the view that this would provide a further protection to ensure that the medicinal cannabis has been taken by the patient in accordance with the instructions of the prescription. This addition would make the bill more consistent with the current wording in subsections 111(5) and (6) of the Act. The proposed additional wording would also have the added benefit of capturing any instructions included as part of the prescription as to any recommended waiting periods between the time the medicinal cannabis is taken and the time when the patient may drive.

The Committee also notes that the bill is silent as to where the onus lies regarding proof of the application of the exemption. Subsection 111(5) of the Act currently provides, in relation to morphine, that it is a defence to a prosecution for the relevant offence “if the defendant proves to the court’s satisfaction” the relevant matters.

The same wording is not currently used in the bill. Given that the existence of a prescription for medicinal cannabis and the manner in which it was taken is particularly within the knowledge of the person who might otherwise be charged with an offence contrary to s. 111, the Committee suggests that the following wording in italics is added to proposed subsection 1A to avoid any confusion as to how the exemption is intended to apply:

Subsection (1) does not apply, *“if the defendant proves to the court’s satisfaction:”*.

III. Imposition of a time limit or waiting period

The Committee is not in favour of imposing a blanket or generally applicable waiting period after the administration of the medicinal cannabis and before a person can drive and fall within the proposed exemption to s. 111 of the Act.

Section 111 creates an offence of drug presence, not drug affectation. It is s. 112 that is focussed on the effect of the drug on the person’s driving ability. Accordingly, the Committee is of the opinion that there is limited utility in imposing a waiting period after the consumption or use of medicinal cannabis before the exemption to s. 111 applies, in circumstances where offences under s. 112 of the Act would continue to apply to persons whose driving is impacted by their ingestion of medicinal drugs, regardless of the proximity in time between the drug consumption to their driving.

Further, such a time limit would be difficult to enforce and would rely entirely on admissions by an accused person in most prosecutions. Further, the imposition of a blanket time limit, waiting time, or similar prohibition, would not take account of the varying effects on cognition of differing medicinal cannabis dosages and usages.

By way of case study, in the state of Colorado in the United States of America, medicinal marijuana has been legal since 2000, with recreational marijuana use becoming legal in 2012. Colorado does not impose time limits between the time of cannabis ingestion and driving. Instead, a Colorado driver is deemed intoxicated if their blood is found to contain five nanograms or more of THC per millilitre of whole blood, and such a fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs at the time of the offence.² As such, this law creates an offence of drug presence at a certain level, rather than one of drug affectation.

The Committee does not think that a similar approach should be taken in this instance, namely limiting the scope of the exemption in the bill to cases where there is a less than prescribed concentration of THC that had been ingested for medicinal purposes. Indeed, this would tend to defeat its very purpose. The Second Reading Speech for the bill indicates concerns that a person can test positive for THC days after

² *Motor Vehicles and Traffic Regulation*, Ch. 331, § 1.6(a)(iv), 2013, Colo Sess Laws, 1877, 1878.

consumption.³ Further, unlike alcohol, there is no consensus on how many nanograms per millilitre of THC represents impairment.

The Committee is of the view that the continuing availability of the s. 112 offence is sufficient in this regard.

In addition, the Committee is aware of a study conducted by a collaboration between the Lambert Initiative at the University of Sydney, Royal Prince Alfred Hospital and Tilray in 2019, which examined the accuracy of two of the most commonly used mobile drug testing devices, Securetec DrugWipe 5s and Draeger DrugTest 5000, in detecting oral fluid tetrahydrocannabinol.⁴ The method and conclusions, as reported in summary on the University of Sydney website, and published in more detail in the *Drug Testing and Analysis* Journal, indicate that there are limits to the sensitivity of devices and that confirmatory testing is essential, particularly in situations where positive test results may lead to criminal convictions.⁵ The Committee understands that such confirmatory testing is currently used by NSW Police.

Further, the study utilised controlled laboratory vaporisation of cannabis and observed a “magnitude of intra- and inter-individual variability following standardised cannabis administration”, which “may preclude its use as a meaningful marker of acute intoxication or impairment.”⁶ Further, as the researchers observed, different concentrations of cannabidiol (**CBD**) to THC in the cannabis consumed may affect concentrations in oral fluid.

In light of the above, although a combination of tests, including confirmatory testing, is available to NSW Police as a law enforcement agency, the Committee is concerned about the practical difficulties in medicinal cannabis users being able to ascertain when they fall under any prescribed limit that may be imposed for the exemption to s. 111 to apply. If a medicinal cannabis user cannot drive without confidence that they fall within the exemption, then the bill would not achieve its intended purpose.

³ See for example, a controlled laboratory study which found only a weak relationship between oral fluid THC concentrations and magnitude of impairment on a range of driving-related cognitive tasks following smoked cannabis: Ramaekers JG, Moeller MR, van Ruitenbeek P, Theunissen EL, Schneider E, Kauert G. Cognition and motor control as a function of 9-THC concentration in serum and oral fluid: limits of impairment. *Drug Alcohol Depend.* 2006; 85(2):114-122. Cited in Thomas R. Arkell et al, 'Detection of delta 9 THC in oral fluid following vaporised cannabidiol (CBD) content: An evaluation of two point-of-collection testing devices' (2019) 11(10) *Drug Testing and Analysis*, 1486-1497.

⁴ Thomas R. Arkell et al, 'Detection of delta 9 THC in oral fluid following vaporised cannabidiol (CBD) content: An evaluation of two point-of-collection testing devices' (2019) 11(10) *Drug Testing and Analysis*, 1486-1497.

⁵ Ibid. See also The University of Sydney Lambert Initiative for Cannabinoid Therapeutics, *Research – Driving*, The University of Sydney (Web Page, undated) <<https://www.sydney.edu.au/lambert/our-research/driving.html>>.

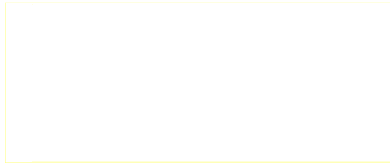
⁶ Ibid.

Concluding remarks

NSW Young Lawyers and the Committee thank the Standing Committee on Law and Justice for the opportunity to comment on the bill, and would welcome the opportunity to participate further in the review process.

If you have any queries or require further submissions, please contact the undersigned at your convenience.

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