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4 May 2022

The Hon. Christopher Rath, BEc, MMgt MLC
Chair, Standing Committee on Law and Justice
Legislative Council, Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: law@parliament.nsw.gov.au

Dear Chair

Inquiry | Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021

1. The New South Wales Bar Association (the **Association**) welcomes the Standing Committee on Law and Justice's (the **Standing Committee's**) inquiry into the Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021 (NSW) (the **Bill**).
2. The Association supports the enactment of legislation to amend the *Road Transport Act 2013* (the **Act**) to provide an exemption for those who are legally prescribed medicinal cannabis from the offence of driving with the presence of a prohibited drug where that drug is legally prescribed Delta-9-tetrahydrocannabinol (**THC**).
3. The Association notes that the proposed amendment does not urge for a similar exemption to s 112 of the Act, being an offence of use or attempted use of a vehicle under the influence of alcohol or any other drug.

Background

4. Pursuant to s 4 of the Act, THC is a prescribed illicit drug. Under s 111 of the Act, driving with the presence of THC in blood, oral fluid or urine is an offence with no defence for those properly prescribed medicinal cannabis. An offence contrary to s 111 of the Act does not require proof of any impairment or that the person was under the influence of THC. Mere presence of THC is sufficient to prove the offence.
5. The Judicial Commission of New South Wales records 11,483 total cases of first offences against s 111(1) of the Act from September 2018 to September 2021. The vast majority of these prosecutions resulted in pleas of guilty.¹ The statistics do not differentiate between the various illicit drugs captured by this section.

¹ 8449 cases.

Current exemptions

6. Section 111(3) of the Act provides for an offence of driving with the presence of morphine in a person's blood or urine. Section 111(5) of the Act provides for a defence if the accused '*proves to the court's satisfaction*' that the presence of morphine '*was caused by the consumption of a substance for medicinal purposes*'. The term '*medicinal purposes*' means that the substance was consumed if prescribed by a medical practitioner and taken in accordance with the prescription, or if a codeine-based medicinal drug from a pharmacy, it was taken in accordance with the manufacturer's instructions.² There is no such exemption for those with THC detected in their system.

The prevalence of lawfully prescribed medicinal cannabis

7. The *Narcotic Drugs Amendment Act 2016* (Cth) established a national licensing and permit scheme for the cultivation, production and manufacture of cannabis for medicinal and scientific research purposes.
8. As of 31 March 2021, over 100,000 approvals for medicinal cannabis products had been granted by the Australian Therapeutic Goods Administration (TGA).³
9. Persons who use cannabis for medicinal purposes are vulnerable in that they are far more likely to suffer from chronic pain, mental illness, psychological distress and hypertension.⁴ There is evidence to support its efficacy in treating a number of conditions, including chronic pain, chemotherapy-induced nausea and vomiting, and spasticity in multiple sclerosis.⁵

THC and driving

10. There is an emerging significant body of evidence supporting the proposition that use of medicinal cannabis does not necessarily impact upon driving. A number of major recent studies have demonstrated no increases in crash or culpability risk for THC-positive drivers, particularly when drivers had low blood THC concentrations.⁶ Some studies have demonstrated that driving impairment persists for only a few hours after use of cannabis, but detectable levels of THC in blood and urine can persist for days, weeks and months.⁷ Other studies have concluded that in medical-only cannabis access models, there is little evidence to justify the differential treatment of

² Section 111(6) of the Act.

³ TGA. (2021a). Access to medicinal cannabis products: SAS Category B approval statistics in Perkins D, Brophy H, McGregor IS, O'Brien P, Quilter J, McNamara L, Sarris J, Stevenson M, Gleeson P, Sinclair J, Dietze P (Nov 2021) Medicinal cannabis and driving: the intersection of health and road safety policy International Journal of Drug Policy, Volume 97 <https://www.sciencedirect.com/science/article/pii/S0955395921002127>

⁴ Australian Institute of Health and Welfare, National Drug Strategy Household Survey 2019, p4, <https://www.aihw.gov.au/getmedia/108d1761-b523-492b-81cc-a09db6740e85/aihw-phe-270-Chapter6-Medicinal-cannabis.pdf.aspx>

⁵ Medicinal Cannabis and Driving, Arkell T, McCartney D, McGregor IS (June 2021), Australian Journal of General Practice, Volume 50, Issue 6 <https://www1.racgp.org.au/ajgp/2021/june/medical-cannabis-and-driving>

⁶ Compton RP, Berning A, 2015, National Highway Traffic Safety Administration (United States) Drug and Alcohol Crash Risk (February 2015), by references to studies of Romano, Elvik.

⁷ Medicinal Cannabis and Driving, Arkell T, McCartney D, McGregor IS (June 2021), Australian Journal of General Practice, Volume 50, Issue 6 <https://www1.racgp.org.au/ajgp/2021/june/medical-cannabis-and-driving>

medicinal cannabis patients compared with those taking other prescription medications with potentially impairing effects.⁸

11. Currently, if THC is detected in oral fluid, blood or urine of a driver, they face a fine of up to \$2,200.00 for a first offence and \$3,300.00 for a second or subsequent offence as well as licence disqualification of up to 6 months.⁹ If the matter is dealt with by way of a court attendance notice rather than penalty notice, the person also faces the prospect of having a criminal record, as well as the stress and cost of court proceedings. The cost of prosecution extends to both the courts and the police.
12. The current regime unnecessarily deters those in possession of a valid and lawful prescription for medicinal cannabis from complying with their medication regime while at risk of being criminalised. This disproportionately affects those who are unable to access public transport for reasons such as ill health or living in a rural or remote location.
13. The current regime may operate to force medicinal cannabis users to choose between medical treatment or driving at risk of detection, and potentially push them to seek and to take other prescription medication such as opioids instead of medicinal cannabis so that they may lawfully drive.

Other jurisdictions have recognised the need for an exception

14. Tasmania is the only Australian jurisdiction with a legislated defence for use of prescription medicinal cannabis.¹⁰ There have been proposals to create a medical defence in Victoria and South Australia. In the Northern Territory, there is a medical defence for having certain drugs in a person's blood or oral fluid if they are prescribed, however this does not include THC.¹¹
15. In Victoria, the Government has set up the Medicinal Cannabis and Safe Driving Working Group. The final report, *Assisting Medicinal Cannabis Patients to Drive Safely*, was released in February 2021. Ultimately, the Working Group had conflicting and irreconcilable views about whether there is road safety risk associated with medicinal cannabis use¹² and agreed point-of-prescription processes are critical and created a decision tree support tool to assess whether patients can drive safely.¹³
16. Internationally, there is no universal approach to managing medicinal cannabis and driving. The United Kingdom, New Zealand, Norway, Germany and Ireland have comparable approaches to medicinal cannabis access as Australia (in that it can be accessed with a prescription). These jurisdictions have a 'medical defence' available to driving charges associated with cannabis being

⁸ Perkins D, Brophy H, McGregor IS, O'Brien P, Quilter J, McNamara L, Sarris J, Stevenson M, Gleeson P, Sinclair J, Dietze P (Nov 2021) Medicinal cannabis and driving: the intersection of health and road safety policy International Journal of Drug Policy, Volume 97 <https://www.sciencedirect.com/science/article/pii/S0955395921002127>

⁹ See s 111(1) of the Act.

¹⁰ Section 6A(1)-(2) *Road Safety (Alcohol and Drugs) Act 1970* (Tas) – it is an offence to drive with a prescribed illicit drug present in a person's blood or oral fluid. It is not an offence if the prescribed illicit drug was obtained and administered in accordance with the *Poisons Act 1971* (Tas). THC is a prescribed drug (*Road Safety (Alcohol and Drugs) Regulations 2018* (Tas), s 15).

¹¹ Sections 27A, 28 *Traffic Act 1987* (NT) – it is an offence to drive while a prohibited drug is detectable in a person's saliva or blood. THC is a prohibited drug (*Traffic Regulations 1999* (NT), reg 55A, Sch 1A -Part A). There is a medical defence for driving with the presence of morphine, methadone and amphetamine in saliva or blood if it is prescribed (*Traffic Act 1987* (NT), ss 29(1)-(2); *Traffic Regulations 1999*, reg 55A, Sch 1A -Part B).

¹² *Ibid.*, 3.

¹³ *Ibid.*, 13.

detected.¹⁴ Generally, under the medical defences available in these jurisdictions, medicinal cannabis patients can drive with THC in their system if they are not impaired and are using the drug as directed.¹⁵

Onus and standard of proof

17. The proposed wording of the Bill is not completely clear as to whether it introduces a positive defence to a charge of driving with the presence of THC in a person's oral fluid, blood or urine. On one reading, the proposed subsection might result in a requirement for the prosecution to disprove that an individual obtained and administered a THC substance in accordance with the *Poisons and Therapeutic Goods Act 1966* (NSW) (PTGA) or a corresponding State or Territory law before that person could be convicted of an offence contrary to s 111(1) of the RTA.
18. If the intention is that the Bill introduces a defence where the accused bears the legal burden, for an abundance of caution it should be expressly stated, so that it is clear whether the burden is upon the accused to prove (to the civil standard)¹⁶ that they obtained and administered THC in accordance with the PTGA. If the intention is that the Bill introduces a defence where the accused bears the evidentiary burden (that is, to adduce evidence that the criteria for exemption is a reasonable possibility) it should also be made clear.
19. Either way, the legislation and its application should be sufficiently flexible to permit an accused to adduce admissible evidence in the proceedings without the onerous and inaccessible cost associated with calling expert evidence from a medical professional.
20. The Association recognises that placing such a burden on the accused necessarily encroaches upon both the accused's right to silence and the presumption of innocence, and may disproportionately disadvantage those who are not legally represented or have other challenges in gathering the relevant evidence to support their defence. However, the Association notes that if the onus is placed on the prosecution to prove, in every case, that the person was *not* using cannabis medically and in the approved way, it would be unnecessarily burdensome on the prosecution and incentivise erosion of the accused's right to silence in order to prove the offence.
21. The Association encourages consistency between the proposed amendment and s111(5) of the Act, which provides the defence relating to the presence of morphine in a person's blood or urine. The accused would be required to prove, on the balance of probabilities, that the presence of THC in the accused's system was as a result of lawfully consumed medicinal cannabis.

¹⁴ Office of Medicinal Cannabis, Department of Health and Human Services Victoria, *Medicinal Cannabis and Driving: Issues Paper* (Issues Paper) in Medicinal Cannabis and Safe Driving Working Group (n 1) 58, 67.

¹⁵ Medicinal Cannabis and Safe Driving Working Group (n 1) 12.

¹⁶ In accordance with s 141(2) of the *Evidence Act 1995* (NSW).

22. The Association thanks the Standing Committee for the opportunity to comment on the Bill. Should members of the Committee have any questions about this submission, please contact Senior Policy Lawyer Mr Richard Easton at reaston@nswbar.asn.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'MMH', with a stylized flourish extending from the end.

Michael McHugh SC
President