



## Full Day Hansard Transcript (Legislative Council, 28 May 2014, Proof)

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Extract from NSW Legislative Council Hansard and Papers Wednesday, 28 May 2014 (Proof).

### ROAD TRANSPORT AMENDMENT (ALCOHOL AND DRUG TESTING) BILL 2014

**Bill introduced, and read a first time and ordered to be printed on motion by the Hon. Duncan Gay.**

#### Second Reading

**The Hon. DUNCAN GAY** (Minister for Roads and Freight, and Vice-President of the Executive Council) [11.23 a.m.]: I move:

That this bill be now read a second time.

The purpose of this bill is to improve road safety by updating and enhancing some elements of the alcohol and drug testing regimes. In November 2012 we celebrated 30 years of random breath testing [RBT] in New South Wales and it is estimated that during that time, around 7,000 lives were saved as a result of RBT. Last year, police conducted over five million breath tests, which resulted in more than 20,000 drivers being charged with drink-driving offences. This extensive enforcement is supported by public education and awareness campaigns, and is reinforced by tough penalties including fines and licence disqualification as well as imprisonment for serious offences.

Police also detect drivers impaired by drugs other than alcohol, and roadside random drug testing commenced in 2007. Last year police conducted nearly 34,000 roadside tests and, as a result, 843 drug-driving charges were laid. The impact of these alcohol and drug programs on road safety has been a massive reduction in trauma from road crashes. Importantly, there is also strong community support for them and an expectation that high-risk drink- and drug-drivers will be caught and penalised. The current drink- and drug-driving offences and testing regimes are well established. The offences and powers that underpin them can be found in the Road Transport Act 2013, with most of the "nuts and bolts" set out in schedule 3 of that Act.

To assist successful prosecution of drink- and drug-drivers, the legislative framework provides for: police powers to test impaired drivers at the roadside; powers to collect breath, oral fluid, urine and blood samples from drivers; technical and evidentiary requirements for hospital staff regarding the collection of samples, including following a crash; requirements for a prescribed laboratory to analyse the samples to provide evidence—for example, a driver's blood alcohol concentration level; and available offences that the offender can be charged with.

Over time the regime has been continually developed and improved to ensure that it is robust and effective; for example, the introduction of mobile RBT in 1987, zero blood alcohol concentration limits for novice drivers introduced in 2004, and roadside random drug testing introduced in 2007. In keeping with this process of continuous improvement, this bill brings forward some further amendments to update and strengthen the current arrangements. The Government has a strong commitment to improving road safety in New South Wales, and this bill maintains the clear message that drink- and drug-driving is unacceptable.

In the development of these amendments, extensive consultation has occurred with NSW Police, the Ministry for Police and Emergency Services, Transport for NSW, the Department of Police and Justice, the NSW Forensic and Analytical Science Service, which is the prescribed laboratory, the NSW Ministry of Health, and the Independent Transport Safety Regulator. I will now outline the amendments proposed in this bill.

The first key element of the bill is a new power to facilitate the collection of blood samples from drivers who are physically unable to submit to breath analysis. The inability may be a result of a medical condition, but often it is because they are too intoxicated to do so. It would apply only to persons who are physically unable—not unwilling—to submit to a breath analysis. Drivers unwilling to provide a sample will continue to be dealt with as having refused a breath analysis. The amendment will permit police to take a driver who has been arrested under the existing provisions following a failed breath test, or who has failed to submit to a breath test, to a hospital or prescribed place for the purpose of obtaining a blood sample instead of a breath sample. The blood sample can then be analysed to determine the person's blood alcohol concentration and whether they should be charged with a prescribed concentration of alcohol offence.

From time to time police have encountered drivers who, having failed their preliminary roadside test, have fallen asleep or passed out or their gross motor skills have become so impaired they are physically unable to submit to

the evidential breath analysis undertaken at the police station.

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Other instances have arisen when a person has suffered a panic attack or a medical emergency that prevents them from supplying a breath sample. Police will, of course, ensure that they receive the necessary, proper medical treatment. But in those instances if the driver cannot provide a breath sample this prevents the collection of evidence required to determine whether they have in fact been driving with a prescribed concentration of alcohol. Remember that these drivers will have already failed or failed to submit a preliminary roadside test.

Under the current law police may charge those drivers with refusing or failing to submit to a breath analysis, which incurs serious penalties equivalent to high-range drink driving. The law provides for a defence in instances where a driver can satisfy the court that they were willing but unable to submit to the breath analysis on medical grounds. The possibility of the defence being exploited can be an issue. Enabling police to obtain a blood sample in lieu of a breath sample provides a suitable alternative to collecting evidence for a drink driving offence when a person is physically unable to submit to the breath analysis. Let me clarify that a person who provides a blood sample under this new provision will not be charged with refusing or failing to provide a breath sample as they provided a blood sample instead of a breath sample.

However, the bill makes it an offence if they get to the hospital and then refuse to provide the blood sample. In those circumstances the bill treats this refusal to provide blood the same as a refusal to provide breath analysis and imposes the same penalties, including licence suspension and disqualification. A similar power already applies with respect to the roadside random drug testing provisions for drivers who are physically unable to provide an oral fluid sample. This amendment reinforces the clear road safety message that drink driving is dangerous and if people drink and drive they will be caught.

The second key element of the bill is to reinforce the power for police to direct drivers to remain at or near the place of testing until the roadside random drug testing process is complete, including the collection of additional samples for laboratory analysis. The bill also makes it an offence for a driver to fail to comply with this direction. When conducting roadside random drug testing, some drivers are leaving the scene after providing an oral fluid sample as requested but before the results become available, which can be several minutes. Unlike random breath testing, it can take a few minutes for the results of a roadside random drug test to be known to police. However, there is no explicit power for police to direct a driver to remain at the scene for the entirety of the process.

Some drivers have left as soon as the initial test has been administered but before the results are known. If the roadside test is negative the driver will be permitted to leave. If it is positive they will be subject to the appropriate next steps, which include providing another sample for further analysis and a 24-hour driving ban. If the further oral fluid analysis returns a positive reading for the presence of drugs the driver will later be charged. Obviously it is more difficult for police to arrest the driver if they have left the scene and also to collect the second sample for analysis within the required two-hour limit to prove that the driver had drugs in their system. The third aspect of the bill is to ensure that under the current law police can conduct a sobriety assessment on a driver if they have a reasonable belief that the driver may be under the influence of a drug but a random breath test is negative for alcohol.

Under existing provisions, police can require a driver who has failed a sobriety assessment to submit to a blood or urine sample to be analysed for the presence of drugs. In that way drivers impaired by drugs can be identified and prosecuted. However, police can conduct a sobriety assessment only where the officer has formed a reasonable belief that the person may be under the influence of a drug on the basis of a person's manner of driving or attempted driving. This limits the applicability of the sobriety assessment as there are situations where a driver may appear to be drug impaired even if the officer did not personally observe the person's manner of driving, for example, at a random breath testing site a driver may be observed to have dilated or constricted pupils, slurred speech, drowsiness or agitated behaviour.

The requirement to have observed the manner of driving also fails to address situations in which drugs can impair judgement and reaction times but not necessarily result in erratic driving. Problems have also arisen at crash scenes when police arrive after the fact and are only able to observe the driver's behaviour rather than the manner of driving or take witness statements regarding the manner of driving prior to the crash. The current requirement, that an officer must have witnessed the manner of driving, severely limits their ability to conduct a sobriety assessment, which in turn prevents them from properly investigating some impaired drivers. Police are well trained and experienced in dealing with drug-affected individuals, and will often form a belief about drug impairment based on the behaviour or appearance of a person, for example, dilated or constricted pupils, slurred speech, drowsiness or, as I said, agitated behaviour. All of these observations will be recorded to demonstrate the basis of their assessment.

These observations go to formation of the police officer's reasonable belief that the person is affected by drugs. I must make it clear, however, that this proposed amendment does not create a general power for police to conduct sobriety tests on anyone at any time. As with existing powers for conducting sobriety assessments, the additional power is permitted only when an officer has reasonable cause to believe that the person is or was

driving a vehicle and after they have conducted a breath test at the roadside to preclude alcohol as the source of impairment. Another amendment updates and improves the process for sample taking in hospitals for drug and alcohol testing. This amendment streamlines the urine sampling process for drug testing to make the process simpler, less cumbersome and less costly, consistent with the Government's commitment to cut red tape.

Currently a portion of the urine sample is provided to the driver and the other portion is sent for analysis at the prescribed laboratory. However, in reality, most people decline to take their portion, meaning that police have to store the sample until it can be disposed of. Therefore, to be consistent with current blood sampling requirements, the bill removes the requirement for the sampler to take or give the driver a portion of their urine sample; instead, the entire sample will be stored at the prescribed laboratory for 12 months. Importantly, they will be stored securely and at the correct temperature. As with blood samples, the driver will be provided with a certificate enabling them to identify the sample kept by the laboratory. They can still exercise their right and apply to the laboratory within 12 months for the sample to be sent for independent analysis. Importantly, like blood samples, the urine samples will be stored correctly so that the results of any later tests are accurate and useful for the driver.

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Another amendment relates to the analysis of the blood and urine samples for drug and alcohol testing, and the evidence surrounding this process. This bill amends evidence certificates tendered in court to accurately reflect current process in the lab whilst also confirming that samples have been handled and analysed correctly so that the results are accurate and the driver can be assured that they have not been tampered with.

**The Hon. Walt Secord:** NCIS Duncan!

**The Hon. DUNCAN GAY:** We do not need NCIS to know where you have been. Often prescribed laboratories for alcohol and drug testing receive a high volume of samples that need to be analysed. It is therefore necessary to have different steps in the process being completed by different staff members employed by the laboratory while following the prescriptive processes outlined in legislation. Indeed, this method enables secondary testing of samples to double-check the accuracy of the results. Current legislation and evidence certificates suggest that an individual analyst personally completed these steps.

The Act already has a deeming provision that recognises and provides for other staff to perform these steps. However, the wording of the evidence certificates is prescriptive and creates the impression that one person completed every step—this has resulted in a number of requests from legal representatives for additional information regarding first-person statements in the certificates. I assure the House that amending the wording will not alter the process and rigour by which the samples are analysed in any way. The bill updates the prescriptive language for the evidence certificates to accurately reflect processes in a modern laboratory. It also clarifies that there does not need to be a direct supervisory relationship between the senior analyst signing the certificate and the analyst or technical officer who performed the relevant tasks.

By making these changes we also help remove any doubts about the admissibility of certificates from interstate labs that do not use the same form of words as New South Wales. That has been an issue in some cross-border areas. If a drink or drug driving incident occurs in a cross-border area such as Queanbeyan, the person will be taken to the closest hospital—even if it is across the border—and the sample will be analysed by the prescribed laboratory in that State or Territory.

**The Hon. Walt Secord:** What about the Tweed?

**The Hon. DUNCAN GAY:** You would be taken across the border. The current legislation already provides that such evidence is admissible if the interstate legislation "substantially corresponds" with the New South Wales legislation. However, there have been some instances in New South Wales in which the results of a laboratory in another State were ruled inadmissible, and a defendant has avoided a drug- or alcohol-related conviction, on the basis that the wording of the interstate certificate is not an exact match with New South Wales. The removal of first-person references in the New South Wales evidence certificate provisions will help address this, as will the creation of a definition of an "interstate analyst" and "interstate sample taker". This will maintain the intention that interstate evidence certificates are admissible in New South Wales if the sample taking, handling and analysing processes substantially correspond with the New South Wales provisions, without getting tied up about the exact wording of the certificates.

Finally, police officers are required to undergo training to conduct breath analysis. After completing this training, they are authorised under delegation by the Commander of the Education and Training Command of the NSW Police Force to conduct breath analysis. Previously, confirmation of the certification of police who have successfully completed the training has been done using an electronic signature. This bill simply confirms those officers have been appropriately certified in accordance with the legislation. Changes to the Marine Safety Act 1998 also provide for consistent amendments to schedule 1 which contains powers and processes to conduct breath, blood and urine testing. The corresponding rail and passenger alcohol and drug testing schemes are provided in relevant regulations, which also need to be amended to be consistent with this amendment bill. These proposed amendments improve the current regime and reduce red tape, to ensure that drink and drug

driving continues to be effectively deterred on New South Wales roads, and to aid the detection and prosecution of drink and drug drivers in New South Wales. I trust all members will lend their support to the bill. I commend the bill to the House.