



Our ref: 22-76

22 July 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](mailto: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**) writes further to its submission of 4 May 2022 (**enclosed**) to the Standing Committee on Law and Justice's (the **Committee's**) inquiry into the provisions of the Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021 (the **Bill**).

#### Introduction

2. The Association here responds to the supplementary questions posed by parliamentarians to Mr Nicholas Cowdery AO QC and Ms Rose Khalilzadeh during their testimony before the Standing Committee on 16 June 2022.
3. For the reasons given in detail below, the Association makes the following observations:
  - a. police may issue penalty notices to those found to be driving with delta-9-tetrahydrocannabinol (THC), methylamphetamine ('*speed*'), 3,4-methylenedioxymethylamphetamine ('*ecstasy*') or cocaine in their systems;
  - b. police are, however, not currently empowered to issue penalty notices to those found to be driving with morphine in their blood or urine;
  - c. the Association can offer no anecdotal evidence as to the operation of the medicinal-morphine defence to an alleged offence contrary to s 111(3) of the *Road Transport Act 2013* (NSW) (the **2013 Act**);
  - d. the Association's inability to provide anecdotal evidence on the operation of the defence under s 111(5) of the 2013 is due to the fact that only a very small number of persons appear to have been prosecuted for offences of driving with morphine in their blood or urine based on Local Court sentencing statistics; and,
  - e. penalty notices do not amount to '*convictions*' and do not appear on individuals' criminal records.

### The legislative history of s 111 of the 2013 Act

4. Section 111(1) of the 2013 Act makes it a summary-only offence for a person to drive or to be in charge of a motor vehicle if a '*prescribed illicit drug*' is present in his or her oral fluid, blood or urine.<sup>1</sup> The '*prescribed illicit drugs*' are THC, speed, ecstasy and cocaine.<sup>2</sup> Roadside tests administered by police in New South Wales are able to detect the presence of THC, speed, ecstasy and cocaine in individuals' oral fluid.
5. Section 111(3) of the 2013 Act provides for a separate summary-only offence of driving or otherwise being in charge of a motor vehicle with morphine present in one's system.<sup>3</sup> Roadside oral-fluid tests used in New South Wales do not screen for morphine. An offence under s 111(3) of the 2013 Act can only be committed where the substance in question was detected in one's '*blood or urine*'.
6. Prior to 1 July 2018, it was also an offence under s 111(3) of the 2013 Act to drive or to be in charge of a vehicle with the presence of cocaine in one's blood or urine.<sup>4</sup> On 1 July 2018, '*cocaine*' was omitted from s 111(3) and was included in the definition of '*prescribed illicit drug*',<sup>5</sup> thereby bringing the presence of cocaine in a driver's oral fluid, blood or urine within the scope of the offence under s 111(1) of the 2013 Act.
7. The removal of '*cocaine*' from subs (3) to subs (1) of s 111 of the 2013 Act was prompted by New South Wales's becoming the first jurisdiction in Australia to use roadside tests capable of testing individuals' oral fluid for the drug.<sup>6</sup>

### Medicinal-purpose defence: morphine

8. There is currently no medicinal-use defence to an offence under s 111(1) of the 2013 Act relating to the presence of THC, speed, ecstasy or cocaine in a driver's system.
9. It is, however, a defence to a charge under s 111(3) of the Act if the accused '*proves to the court's satisfaction*' that the presence of morphine in his or her blood or urine '*was caused by the consumption of a substance for medicinal purposes*'.<sup>7</sup> A substance is consumed for '*medicinal purposes*' if the drug was:
  - a. prescribed by a medical practitioner and taken in accordance with that prescription; or,
  - b. codeine-based medicine from a pharmacy taken in accordance with the manufacturer's instructions.

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<sup>1</sup> An offence contrary to s 111(1) of the 2013 Act can be committed by driving a vehicle (s 111(1)(a)), by occupying the driving seat of a motor vehicle and attempting to put the motor vehicle in motion (s 111(1)(b)) or by occupying the seat in a motor vehicle next to a learner driver who is driving the vehicle while one is the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence) (s 111(1)(c)). For convenience, offences contrary to s 111(1) of the 2013 Act committed when not driving a vehicle (namely offences under ss 111(1)(b) and (c)) will here be described as offences committed when '*in charge*' of a vehicle.

<sup>2</sup> Section 4(1) of the 2013 Act.

<sup>3</sup> The ways of committing an offence contrary to s 111(3) of the 2013 Act are the same as the ways outlined in f/n 1 above: see subs 3(a) to (c) of s 111 of the 2013 Act.

<sup>4</sup> See the amendments made to the 2013 Act by sch 1[2] to [3] to the *Road Transport Legislation Amendment (Road Safety) Act 2018* (NSW).

<sup>5</sup> See sch 1[1] to the *Road Transport Legislation Amendment (Road Safety) Act 2018* (NSW).

<sup>6</sup> NSW Parliament, Legislative Assembly, Hon. Melinda Jane Pavey, MP, Second Reading Speech, *Hansard*, 6 March 2018, p 61

<sup>7</sup> Section 111(5) of the 2013 Act.

10. The accused at trial bears the burden of proving, on the balance of probabilities, that the presence of morphine in his or her system was as a result of lawfully consuming medicinal morphine.
11. The wording of the medicinal-morphine defence has not changed since the enactment of the 2013 Act.

*The operation of the medicinal-morphine defence*

12. The Association can offer no anecdotal evidence on how the medicinal-morphine defence under s 111(5) of the 2013 Act has been invoked by defendants or has operated in practice and can offer no view as to what evidence has satisfied the Local Court that the presence of morphine in a person's blood or urine is due to consumption of the substance for medicinal purposes.
13. Nor is the Association able to offer any evidence as to:
  - a. the number of occasions on which the NSW Police Force has elected not to charge suspects found to be driving or otherwise in charge of a motor vehicle with morphine in their systems on the basis that the defence under s 111(5) of the 2013 Act appeared to operate; or,
  - b. what evidence police officers and police prosecutors have considered sufficient to justify discontinuing an investigation or prosecution against a suspect or not charging a suspect with an offence contrary to s 111(3) of the 2013 Act on the basis of the medicinal-purposes defence.
14. The Association notes that the evidence that could be relied upon by a defendant includes:
  - a. his or her own testimony that the presence of morphine is due to the medicinal use of the substance;
  - b. statements from prescribing physicians and dispensing pharmacists;
  - c. medical records, including My Health Record entries;
  - d. original hard-copy prescriptions; and,
  - e. blister packs containing medication in pill form, along with the boxes in which the medication is contained.

15. The inability of the Association to provide anecdotal evidence on the operation of the medicinal-morphine defence may be, in part, because of the small numbers of cases relating to s 111(3) of the 2013 Act that have been dealt with by the Local Court, as detailed below.

*Police discretion*

16. The exercise of police and prosecutorial discretion is '*an essential feature of the criminal justice system*'.<sup>8</sup> Any system of law enforcement '*that attempted to eliminate discretion would be unworkably complex and rigid*'.<sup>9</sup>
17. When investigating suspected crimes, deciding whether to discontinue investigations or making charging decisions, police officers do not mechanistically follow set rules to a pre-determined

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<sup>8</sup> *R v Beare* [1988] 2 S.C.R. 387, 410, La Forest J.

<sup>9</sup> *Ibid.*

conclusion. Officers are instead required to exercise their discretion rationally and within prescribed limits and to apply the law to the particular circumstances of individual cases.

18. It would be entirely proper for a police officer to discontinue an investigation or prosecution of an offence contrary to s 111(3) of the 2013 Act because there was evidence that the detectable presence of morphine in the suspect's system was due to that individual's having consumed the substance for a medical purpose. Such a decision could, in principle, also be made at the roadside after receiving information from a suspect as to the medical reason for why THC was found in his or her oral fluid.
19. The NSW Police Force, as a matter of policy, follows the principles set out in the Prosecution Guidelines of the Director of Public Prosecutions when considering whether to commence proceedings against a suspect.<sup>10</sup>
20. In summary, to prosecute a person, the NSW Police Force must be satisfied that there is a reasonable prospect of securing his or her conviction on the admissible evidence ('**the evidential test**') and that it is in the public interest to commence or to maintain proceedings against the suspect ('**the public interest test**').<sup>11</sup>
21. When applying the evidential test to the circumstances of an alleged offence of '*drug driving*' involving morphine consumption, a police officer would be required to consider not only whether there was evidence of each element of the offence but also the strength of that evidence, the potential operation of the defence under s 111(5) of the 2013 Act and the weight of any evidence provided by the suspect.<sup>12</sup>
22. Were the Bill to be enacted, police would be required to exercise the same discretion and apply the same evidential test when determining whether to continue to investigate or to charge an individual for an alleged offence of driving with the presence of cannabis in his or her system, or, if charged, continue the prosecution.
23. One method of ensuring a timely exercise of discretion by police to discontinue an investigation or to decline to commence or to maintain a prosecution against an individual would be for the NSW Police Force and NSW Health to develop a protocol or scheme to allow those prescribed with medicinal cannabis to demonstrate easily their lawful consumption of the drug at the point a roadside test is administered or, if necessary, at a later point in any investigation, including the point at which a decision to prosecute is to be made.

*Penalty Notices and offences under s 111 of the 2013 Act*

24. Section 195 of the 2013 Act empowers police to issue penalty notices for offences specified by regulation.
25. Under reg 133 of, and col 1 of sch 5 to, the Road Transport (General) Regulation 2021 (NSW) (the **2021 Regulation**), offences contrary to s 111(1) of the 2013 Act may be dealt with by way of

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<sup>10</sup> See <[https://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0006/775230/2021-0018951\\_Prosecution\\_Policy\\_-\\_The\\_Decision\\_to\\_Prosecute\\_23.03.21\\_Full\\_Release.pdf](https://www.police.nsw.gov.au/_data/assets/pdf_file/0006/775230/2021-0018951_Prosecution_Policy_-_The_Decision_to_Prosecute_23.03.21_Full_Release.pdf)>

<sup>11</sup> See Chpt 1 of the Director of Public Prosecution's *Prosecution Guidelines* (29 March 2021) <<https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines/chapter-1>>.

<sup>12</sup> *Ibid.*

a penalty notice if the suspect *‘has not been issued a penalty notice for an alcohol or other drug related driving offence, or convicted of the same or an equivalent offence, in the 5 years before the offence’*.

26. Penalty notices are, therefore, only available for alleged offences contrary to s 111(1) of the 2013 Act, namely driving or being otherwise in charge of a vehicle with THC, speed, ecstasy or cocaine in one’s system.
27. Curiously, offences relating to the presence of morphine contrary to s 111(3) of the 2013 Act are not offences for which a person may receive a penalty notice.<sup>13</sup>
28. As a consequence, an adult found by police to have morphine present in his or her system while driving or in charge of a vehicle will ordinarily be charged with an offence contrary to s 111(3) of the 2013 Act unless police are satisfied that the evidential test for prosecuting the individual has not been met or a decision to commence proceedings against the individual is not in the public interest.
29. Penalty notices for offences contrary to s 111(1) of the 2013 Act could not be issued until 20 May 2019.<sup>14</sup>
30. It would appear that the time when penalty notices are issued for illicit drug driving offences is different than that for drink driving offences because *‘while robust evidence of drink driving offences can be obtained at the roadside or station (breath analysis), oral fluid samples require laboratory confirmation for the presence of illicit drugs’*.<sup>15</sup>
31. Between 2017 and 2021 (inclusive) the following numbers of *‘exceed the prescribed content of illicit drugs offences’*<sup>16</sup> were recorded by NSW Police Force according to the Bureau of Crime Statistics and Research (BOCSAR):<sup>17</sup>

2017	2018	2019	2020	2021	Total
8,918	8,720	8,871	12,156	13,982	52,647

<sup>13</sup> For the avoidance of doubt, offences contrary to s 112 of the 2013 Act (driving whilst under the influence of alcohol or another drug) are also not listed in sch 5 to the 2021 Regulations and, as such, cannot result in the administration of a penalty notice to an individual under s 195 of the 2013 Act.

<sup>14</sup> See sch 2.3[2] to the *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) (the **2018 Act**), which added offences under s 111(1) of the 2013 Act to the list of penalty notice offences in col 1 of sch 5 to the Road Transport (General) Regulation 2013 (NSW) (the **2013 Regulation**). Schedule 2.3[2] to the 2018 came into force on 20 May 2019 by proclamation: see s 2 of the 2018 Act and (653) LW 23.11.2018. The 2013 Regulation was repealed 1 September 2021 and was superseded by the 2021 Regulation.

<sup>15</sup> Transport for NSW Centre for Road Safety, *NSW Drink and Drug Driving Reforms – Monitoring Report 4*, January 2022, 1 <<https://roadsafety.transport.nsw.gov.au/downloads/drink-drug-driving-reforms-monitoring4.pdf>>.

<sup>16</sup> Defined by BOCSAR as: *‘[o]ffences where the driver of a vehicle exceeds the prescribed content of illicit substances, or [d]rives while affected by an illicit substance’*. It should be noted that BOCSAR in its dataset for driving offences also includes *‘Exceed The Prescribed Content Of Alcohol’* and *‘Driving Under The Influence Of Alcohol Or Other Substance’*, with the latter defined as: *‘[o]ffences in which the driver of a vehicle (as defined at the beginning of this division) is under the influence of alcohol or other substance, their driving is impaired, and they actually do or potentially could cause an injury to themselves or another person. Includes riding (bicycle, horse, skateboard, etc.) under the influence of alcohol or drugs. excludes exceeding teh proscribed contents of alcohol or other substances and death caused by a driver under the infleunce of alcohol of otehr substncces [sic]’*. It can, therefore, reasonably be inferred that the category entitled *‘exceed the prescribed content of illicit drugs offences’* refers to offences contrary to s 111 of the 2013 Act alone. The Standing Committee may wish to confirm the exact definition of *‘exceed the prescribed content of illicit drugs offences’* with BOCSAR, particularly as that category may possibly include offences contrary to s 111A of the 2013 Act (namely, driving with the presence of both a prescribed illicit drug in one’s oral fluid, blood or urine and a prescribed concentration of alcohol in one’s breath or blood).

<sup>17</sup> BOCSAR’s data sets are available at <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Driving-offences.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Driving-offences.aspx)>.



32. BOCSAR's statistics do not provide information on the type of 'illicit drug' the 52,647 recorded offences between 2017 and 2021 pertain to; nor do the data confirm whether offences were proven, with the above-listed figures representing only 'the number of legal actions commenced by police'.

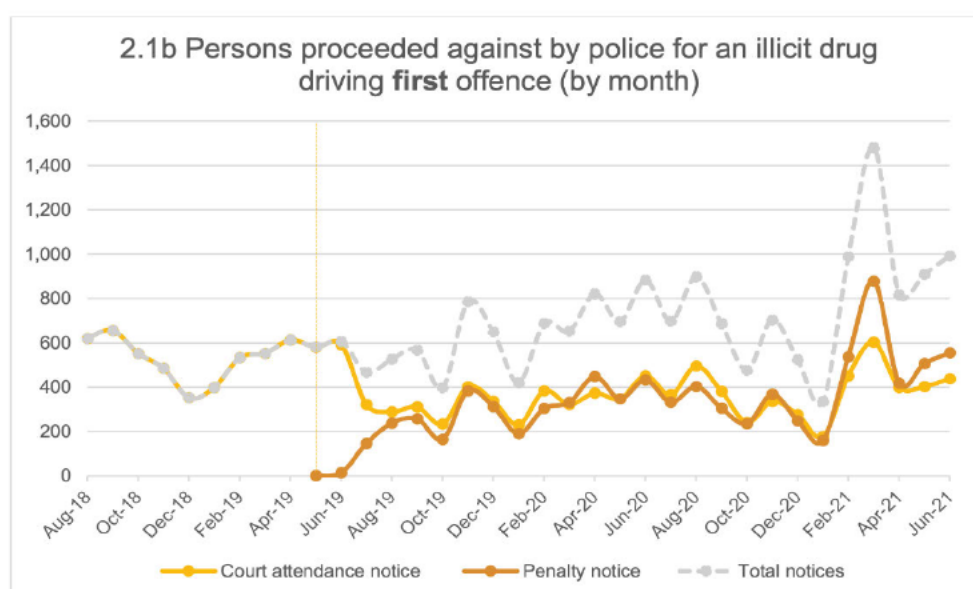
33. According to Revenue NSW, the following numbers of penalty notices for offences contrary to s 111 of the 2013 Act were issued in the period 2018/2019 to 2021/2022:<sup>18</sup>

2018/2019	2019/2020	2020/2021	2021/2022	Total
357	4,191	5,226	3,955	13,729

34. Revenue NSW does not record the substance found to be present in the suspect's system that led to the issuing of a penalty notice. However, as penalty notices have only been available since 20 May 2019 for offences contrary to s 111(1) of the 2013 Act, it necessarily follows that none of the penalty notices recorded by Revenue NSW related to the consumption of morphine and all must have been administered to suspects with THC, speed, ecstasy or cocaine in their systems. It is not known to the Association whether any penalty notices for s 111(3) morphine offences have been issued in error and paid without challenge.

35. Those who receive a penalty notice may choose to have the matter heard by a court rather than paying the fine. During the period May 2019 to June 2021, 3.7 per cent of drivers issued with a penalty notice for an offence contrary to s 111(1) of the 2013 Act elected to have the matter reviewed by the court.<sup>19</sup>

36. The proportion of court attendance notices (CANs) to penalties notices issued during the period May 2019 and June 2021 is clear from the below graph published by Transport for NSW's Centre for Road Safety:<sup>20</sup>



Source: NSW Bureau of Crime Statistics and Research – November 2021

<sup>18</sup> Revenue NSW's penalty notice data sets are available at < <https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics>>.

<sup>19</sup> Transport for NSW, Centre for Road Safety, *NSW Drink and Drug Driving Reforms – Monitoring Report 4*, January 2022, 2.2.

<sup>20</sup> *Ibid.*, 2.1b.

37. As Transport for NSW's Centre for Road Safety notes, the above graph demonstrates that '[a] few months after the introduction of penalty notices for illicit drug driving first offences, the number of [CANs] and penalty notices for this category of offence become similar, with the number of penalty notices exceeding court attendance notices in some months'. In March 2021, the highest number of penalty notices for offences contrary to s 111(1) of the 2013 Act was recorded for the period May 2019 to June 2021. A total of 1,481 notices (CANs and penalty notices) were issued that month, with 878 of those notices being penalty notices, as compared to 603 CANs.<sup>21</sup>
38. The Association has been unable to locate statistics on the number of charges relating to s 111 of the 2013 Act (including morphine-related 'drug driving') that have proceeded to court but have later been withdrawn or have been disproved. NSW Police Force's Police Prosecutions branch, the Local Court or BOCSAR may hold data on the number of charges withdrawn or not proven that concerned offences contrary to s 111(1) and (3) of the 2013 Act.

*The numbers of defendants sentenced for offences contrary to s 111(3) of the 2013 Act*

39. The Association is unaware of the number of occasions on which drivers have tested positive for morphine in their urine or blood.<sup>22</sup>
40. The Judicial Commission of New South Wales's Judicial Information Research System (JIRS) records that, between July 2018 and September 2021, **two defendants** were sentenced in the Local Court each for an offence contrary to s 111(3) of the 2013 Act (as amended by **the Road Transport Legislation Amendment (Road Safety) Act 2018** (NSW)).<sup>23</sup> Both offences were committed after 1 July 2018 and, consequently, both related to the consumption of morphine. One of the two defendants pleaded not guilty/entered no plea to the offence; it is unknown whether the medicinal-purpose defence under s 111(5) of the 2013 Act was invoked by the accused.
41. As noted above, prior to 1 July 2018, offences contrary to s 111(3) of the 2013 Act could be committed where a driver had morphine *or* cocaine in their blood or urine. As at May 2022, JIRS records that **four defendants** were sentenced in the Local Court between October 2017 to 23 September 2018 for offences under s 111(3) of the 2013 Act committed before 1 July 2018. It is not possible to determine whether the defendants in these matters were convicted of an offence as a consequence of having cocaine or morphine in their blood or urine.
42. JIRS records during the period 24 September 2018 to September 2021 that the Local Court sentenced **17,520 defendants** for offences under s 111(1) of the 2013 Act. The 'prescribed illicit drug' in question (THC, speed, ecstasy or cocaine) is not recorded by JIRS.<sup>24</sup>
43. The low number of defendants sentenced in the Local Court for offences relating to morphine consumption and driving may be due to the fact that roadside tests do not detect the substance. As is noted in the Centre for Accident Research & Road Safety's 2017 report on roadside drug

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<sup>21</sup> *Ibid.*

<sup>22</sup> Statistics are available on the number of mobile drug tests conducted to screen drivers for THC, speed, ecstasy and cocaine: see Transport for NSW, Centre for Road Safety, *NSW Drink and Drug Driving Reforms – Monitoring Report 4*, January 2022, 5.

<sup>23</sup> The accused's lone offence occurred on 24 July 2018; the sentence imposed by the presiding magistrate on 8 May 2019 was a fine of \$550.00, with the defendant's plea being recorded as 'not guilty'/'no plea'. It is unknown whether a defence under s 111(5) of the 2013 Act was advanced by the defendant.

<sup>24</sup> JIRS data on Local Court sentences for offences contrary to s 111 of the 2013 Act is available at <<https://jirs.judcom.nsw.gov.au/penstats/nswlc/nsw2013-18A.html>>.

testing, the investigation of offences contrary to s 111(3) of the 2013 Act '*relies on a blood or urine sample (collected for either suspected DUI [driving under the influence] or after a fatal crash*'.<sup>25</sup>

#### Statistical evidence and the medicinal-morphine defence under s 111(5) of the 2013 Act

44. From the amendments to the 2013 Act, 2013 Regulation and 2021 Regulation and the BOCSAR, JIRS and NSW Government Revenue data analysed by the Association, it is not possible to confirm the number of defendants who have relied upon the medical-purposes defence under s 111(5) of 2013 Act to a charge that they had morphine in their systems while driving or in charge of a vehicle.<sup>26</sup>

#### Criminal records and penalty notices

45. During the hearing on 16 June 2022, the Standing Committee posed a series of questions about the consequences for an individual of receiving a penalty notice.
46. The payment of a penalty notice does not result in a criminal conviction or an entry on a person's criminal record. It does, however, appear on a person's traffic record, which is accessible to the NSW Police Force.
47. If a person elects to challenge a penalty notice in court, this does not necessarily result in that individual's receiving a criminal conviction or a criminal record. For example, a court may decide not to record a conviction against a defendant, even if that person pleads guilty or is found guilty, by dealing with the matter pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).<sup>27</sup> The matter may also be dealt with pursuant to s 14 of the *Mental Health and Cognitive Impairments Forensic Provisions Act 2020* (NSW). Such disposals, while potentially appearing on a person's record, would not appear on a conviction history. The reduction of a penalty notice fine may also result in an entry on the person's traffic record, but not necessarily their criminal record.
48. Further, any conviction for a traffic offence has a different character for the purposes of calculating the crime-free period when determining whether a conviction is spent. For example, a conviction for a traffic offence is to be disregarded in calculating the relevant crime-free period when determining whether a conviction for a non-traffic offence is spent, and is of relevance only in calculating the crime-free period for an earlier traffic offence.<sup>28</sup>

#### Conclusion

49. The Association thanks the Standing Committee for the opportunity to comment on the Bill and to supplement its written submission of 4 May 2022 and the testimony of Mr Cowdery AO QC and Ms Khalilizadeh on 16 June 2022.

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<sup>25</sup> Centre for Accident Research & Road Safety, Davey, J, Armstrong, K, Freeman, J, Sheldrake, M, *Roadside Drug Testing Scoping Study – Final Report*, (June 2017), p 49 <<https://www.roadsafety.gov.au/sites/default/files/2019-11/roadside-drug-testing.pdf>>.

<sup>26</sup>

<sup>27</sup> It should be noted that, while s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) specifies that the court makes an order '*without proceeding to conviction*', s 5 of the *Criminal Records Act 1991* (NSW) treats such a circumstance as a '*conviction*' for the purposes of that Act only, with a dismissal ordinarily being deemed to be spent immediately in accordance with section 8(2) of that Act.

<sup>28</sup> Section 11(1) of the *Criminal Records Act 1991* (NSW).



50. Should members of the Committee have any questions about this submission, please contact Senior Policy Lawyer Mr Richard Easton at [reaston@nswbar.asn.au](mailto:reaston@nswbar.asn.au).

Yours sincerely

Gabrielle Bashir SC

President

*Enc.<sup>1</sup>*