



**Coffs Harbour**  
Shop 6  
13-15 Park Ave  
Coffs Harbour NSW 2450  
T: 02 6580 2111  
www.mnclegal.org.au

**Port Macquarie**  
Suite 7, Level 1  
68 Clarence Street  
(PO Box 2875)  
Port Macquarie NSW 2444  
T: 02 6580 2111  
info@mnclegal.org.au

26 September 2024

Portfolio Committee No. 1 - Premier and Finance  
Legislative Council,  
Parliament of New South Wales

Dear Chair and Members the Committee

## **Inquiry Into The Impact Of The Regulatory Framework For Cannabis In New South Wales**

### **Response To Questions On Notice**

I gave evidence to the Inquiry on behalf of Mid North Coast Legal Centre on 20 August 2024.  
Answers to question on notice are below.

#### **Questions 1**

#### ***Evidence used in the prosecution of offence under section 112 of the Road Transport Act for driving under the influence***

**The CHAIR:** Yes, it is. That's been my experience. That's really interesting. So police do have the capacity—what sort of evidence do they tender when they're making the case around section 112? Is there a field sobriety test? Is there a standard set of questions? What do they tender as well as—your evidence was there is a blood test as well.

**PATRICK HOURIGAN:** To be fair, I've never defended one of those. I've looked into it in the past but I don't have any fresh—I'm probably not in a position to give informed evidence on that.

**The Hon. JACQUI MUNRO:** I know that you have just said that you don't necessarily have the experience with this. But, for example, if a police officer is wearing a body cam, is that the kind of evidence that might be tendered as demonstrating impairment not just it's in your system?

**PATRICK HOURIGAN:** Absolutely.

**The CHAIR:** Could you take that on notice? It would really help if the legal centre could provide some examples—some of it might be confidential—of the evidence that is provided around section 112. With those blood tests, is there a test that identifies a level of cannabis in the blood?

**PATRICK HOURIGAN:** For the drive under the influence offences, we would generally refer those to Legal Aid. So Legal Aid represents people who are charged with a serious traffic offence where there is a prospect of jail.

We don't have experience with those ones regularly because, if there is a prospect of jail, then we would usually refer to Legal Aid and they would take those on. I'm not aware of anyone in our service running one of those matters to a hearing. I know I've done a plead guilty for a client charged with that, but I'm not aware of anyone in our service who has run those matters to hearing. We can have a look at the cases and how they're decided and see if there are any public decisions or appeals that might refer to the evidence, but internally we don't have any records that I'm aware of that would assist.

The evidence used in a prosecutions of an offence of driving under the influence under section 112 of the *Road Transport Act* has been referred to in a number of cases. I did not find any cases which dealt with a defendant being charged with this offence because of an impairment by cannabis only, however the evidence used in such a case is likely to be similar to that used prosecutions for other drive under the influence offences.

In *DPP v Ridley* [2015] NSWSC 1478 and *Director of Public Prosecutions (NSW) v Kirby* [2017] NSWSC 1754 the prosecution relied solely on lay witnesses.

Lay witnesses may give evidence of matters including:

1. Admissions made by the defendant.
2. The defendant's consumption of a drug or alcohol.
3. The defendant's behaviour – for example if they were unstable on their feet or slurring their words.
4. The manner of driving or the occurrence of an accident.

Expert witnesses are not required but may be relied on by the prosecution. For example, in the Local Court case *Police v Keith Stewart Mouat* [2014] NSWLC 27 both the defence and the prosecution led evidence from an expert witness. The experts gave evidence of the effect of the drugs on the defendant based on the levels of the drugs in defendants blood and observations of lay witnesses.

## Question 2

### ***Clients with a prescription for cannabis being repeatedly charged under section 111 of the Road Transport Act for driving with an illicit substance in their system***

**The CHAIR:** Do any of your clients come before the courts repeating their evidence that they are on a medicinal cannabis prescription and they need it for x, y, z, and basically go through the process twice?

**PATRICK HOURIGAN:** I stopped appearing in court regularly about three years ago and I think there has been a proliferation of people with actual prescriptions before the court. I could take that on notice and perhaps take it to the solicitors who appear more regularly in the court. Certainly I know in our case study that was a client who had a prescription for cannabis. That person had been taking cannabis before they had a prescription. They'd had, I think, four offences within a 10-year period and the magistrate was sympathetic to the fact that they did have that prescription and a chronic medical condition. Ultimately, they had other considerations to take into account, set by Parliament, and the automatic disqualification for a second offence is 12 months. So that person was ultimately disqualified from driving for 12 months, despite there being no indication that their driving was impaired and having a prescription to take cannabis and taking it in accordance with that prescription.

I have spoken with a colleague who currently runs one of our duty traffic outreaches and regularly represents clients charged for having cannabis in their system. He reported that the increase in clients charged with this offence while having a prescription for cannabis is recent. If they have had previously been charged with the same offence, they did not have a prescription at the time.

Due to the increase in the prescribing of cannabis and the high rates of prosecutions of this offence we expect to start seeing clients charged with the offence multiple times while having a prescription for cannabis soon.

## Question 3

### ***Does being 'under the influence' for the purpose of a prosecution under section 112 Road Transport Act require that prosecution prove that the person's driving was affected?***

**The Hon. STEPHEN LAWRENCE:** In terms of the drive under the influence offence, you were talking about problems of proof—it's harder to prove et cetera; you might need evidence of observation of a person or something of that nature. The other respect in which I suppose it's different to the drive illicit offence is that you need to prove that the person was under the influence of the substance. Are you aware of any case law around the meaning of that, in terms of how affected you need to be in order to commit that offence?

**PATRICK HOURIGAN:** Off the top of my head, no. I haven't looked at this for quite a while. It's not an offence we see very often before the courts as well. You could count on two hands over five years how many of those matters I saw before Taree, as opposed to the

"drive with illicit in their system" offences or drink driving matters, where there were hundreds. It is rarely charged, so off the top of my head, no.

**The CHAIR:** So when you're charged with drink driving, you're not charged with that offence, 112? It's a separate offence?

**PATRICK HOURIGAN:** It is 110, yes.

**The CHAIR:** It is 110. Okay, interesting.

**The Hon. STEPHEN LAWRENCE:** Are you aware of the broad proposition that it's not the case that any influence is sufficient to prove that you're guilty of that offence? It's got to be influence to a degree that interferes with your driving capacity, basically.

**PATRICK HOURIGAN:** Off the top of my head, I'm not sure.

**The Hon. STEPHEN LAWRENCE:** That's fine.

**PATRICK HOURIGAN:** I can take it on notice and do a little bit of looking into it.

**The Hon. STEPHEN LAWRENCE:** Sure.

To prove the offence of drive under the influence it does not need to be shown that the defendant's ability to drive was affected.

In *Director of Public Prosecutions (NSW) v Kirby* R A Hulme J stated

*The Director was correct to submit that an offence under s 112(1)(a) of the Road Transport Act requires that the prosecution prove that the defendant drove a motor vehicle, and that, at the time of driving, the defendant was under the influence of alcohol or any other drug. It is not an element of the offence that the consumption of alcohol affected the defendant's driving.*

Please contact us by email at [info@mnclegal.org.au](mailto:info@mnclegal.org.au) if we can be of any further assistance to the Inquiry.

Yours sincerely

Patrick Hourigan  
**Assistant Principal Solicitor**  
**Mid North Coast Legal Centre**