

Submission
No 58

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

Organisation: NSW Council for Civil Liberties

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NSWCCL SUBMISSION

**NSW LEGISLATIVE
COUNCIL'S STANDING
COMMITTEE ON LAW AND
JUSTICE**

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27 April 2022

NSWCCL

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The New South Wales Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the NSW Legislative Council's Standing Committee on Law and Justice, in regard to the Inquiry on the *Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021 (Bill)*.

NSWCCL supports the passage of the Bill which addresses discriminatory, inequitable and out of date presence-based drug driving practices targeting medical cannabis patients. NSWCCL agrees that those patients in Australia who are legally prescribed medicinal cannabis should be exempted from prosecution for driving with Delta-9-tetrahydrocannabinol (**THC**) in their system, unless there is clear evidence of impairment.

Introduction

1. THC is a prescribed illicit drug under s4 of the *Road Transport Act 2013 (NSW) (Act)*. Driving with an illicit drug present in blood, oral fluid or urine is an offence under s111 of the Act, a virtually zero tolerance drug driving legal framework.
2. The Bill amends the Act by creating an exemption to the offence under s111. That is, an offence under s111 is not made out where the person driving delivers a positive sample for THC, but the THC was obtained and administered in accordance with the *Therapeutic Goods Act 1989* or an identical state law. The defence can only be made if THC is the only substance present in the sample.
3. The current NSW roadside drug testing regime tests people for four specific substances: cannabis, cocaine, amphetamines and MDMA. However, police do not test for impairment, only the presence of these drugs.

The Bill does not amend the Act so as to exempt those that are affected or impaired by the drug while driving. That is, those that are affected would not be able to use the defence.¹

4. S111(5) of the Act already provides a medical defence for those found driving with morphine present in their system if it was consumed for medicinal purposes. It is considered that morphine is more dangerous than medical cannabis "both on and off the road".²
5. As of 31 March 2021, over 100,000 approvals for medicinal cannabis products had been granted by the Australian Therapeutic Goods Administration (**TGA**).³
6. Drug tests which check for the presence of THC do not assess the level of impairment that a driver may be experiencing.⁴ In fact, evidence suggests that a person could have THC in their body and

¹ S112 of the Act deals with driving under the influence of alcohol or drugs; Also Gregoire, P (4 Sept 2020) Charged with Drug Driving? Have a Cannabis Prescription? Speak to Former Magistrate David Heilpern, *Sydney Criminal Lawyers* <https://www.sydneycriminallawyers.com.au/blog/charged-with-drug-driving-have-a-cannabis-prescription-speak-to-former-magistrate-david-heilpern/>

² Cate Faehrmann, Second Reading Speech *Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021* NSW Legislative Council Hansard – 17 November 2021 <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-87320/HANSARD-1820781676-87320>

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 Commonwealth of Australia (March 2020) The Senate, Community Affairs References Committee, *Current barriers to patient access to medicinal cannabis in Australia* p88 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Medicinalcannabis/Report

still be competent to drive.⁵ Research led by Dr Danielle McCartney, found cannabis users had a “window of impairment” of between three and 10 hours caused by THC.

7. Dr McCartney says that is “becoming increasingly clear that our drug-driving laws are not only out of date but hugely unreasonable now that we have tens of thousands of Australians using legal, prescribed medical cannabis”.⁶ NSWCCCL believes that the treatment of medical cannabis users is inequitable.

Patient harms

8. The current roadside testing regime results in patient harms including criminal sanctions. A finding of guilt may result in a fine of up to \$2200 for a first offence and \$3300 for a second or subsequent offence as well as a licence disqualification of up to 6 months.
9. The possibility of loss of licence deters patients from using medicinal cannabis products containing THC, as they do not want to face prosecution or be prevented from driving.⁷ Many, at a vulnerable time of their lives, may not be able to manage or access public or other forms of transport, excluding access to medical or other community services and associated therapeutic benefit.⁸ Facing charges and court proceedings are costly and stressful.
10. Patients may risk more than a fine or a suspended licence. “If they are involved in an accident, their insurance will be voided. If another person is injured, they could face criminal charges of driving while impaired”.⁹
11. To avoid the risk of prosecution, patients may choose to leave prescriptions unfilled if they must work and have to drive every day or simply do not wish to lose their independence.
12. Patients in rural, remote and regional locations are particularly disadvantaged, as they are more likely to rely on their car for transport.¹⁰ They are likely to suffer particular hardship by a loss of licence which often leads to loss of work, difficulties maintaining family and other connections and difficulties discharging caring duties for children and other members of the family. This hardship may also be a disincentive to seek the medical help they need.
13. There are harms associated with not being able to access the medication. Dr Perkins says, “I’ve had patients who have come to me on high doses of opioids and Valium, and they gradually use cannabis to wean off their other medications. It would put an end to that type of medication for many people. And that’s just not satisfactory”.¹¹

Medical cannabis and prescription medication

14. Prescription medications with potentially impairing effects are not subject to presence-based testing and there is little evidence to justify the differential treatment of medicinal cannabis patients.¹²

⁵ Danielle McCartney clinical research associate at Sydney University’s Lambert Initiative for Cannabinoid Therapeutics, McCartney D, Arkell TR, Irwin C, McGregor IS. (July 2021) Determining the magnitude and duration of acute Δ 9-tetrahydrocannabinol (Δ 9-THC)-induced driving and cognitive impairment: A systematic and meta-analytic review, Neuroscience & Biobehavioral Reviews journal Neurosci Biobehav Rev. 126:175-193 <https://pubmed.ncbi.nlm.nih.gov/33497784/>; Knight B (29 Sept 2019) Driving under the influence of medical cannabis is illegal, but patients are still taking the risk, ABC News <https://www.abc.net.au/news/2019-09-29/medicinal-cannabis-thc-and-driving-laws-in-australia/11517648>

⁶ McCartney, ibid

⁷ Senate Report op.cit

⁸ Perkins op.cit.

⁹ ABC op.cit

¹⁰ Senate Report op.cit.

¹¹ Perkins op. cit.

¹² Perkins ibid

Impairment, not presence of a legally prescribed drug, should be the measure in terms of road safety outcomes.

A new study found road safety risks with THC were similar or lower than many other potentially impairing prescription medications, such as opioids, benzodiazepines and antidepressants.¹³

15. Further, the level of impairment faced by a patient taking medicinal cannabis does not directly correlate with the level of THC in their system.¹⁴ With cannabis, as opposed to alcohol, people actually feel impaired. “When they do drive, there are quite reliable effects like a lower speed and a bigger distance between them and the car in front. Then, when you look at the crash risk associated with cannabis, it's moderately increased but it's a very, very small statistical effect compared to alcohol and even compared to some prescription medications that are commonly prescribed like benzodiazepines and sedating antidepressants like mirtazapine”¹⁵.
16. A 2015 report by the Victorian Law Reform Commission noted the right of patients ‘not to be discriminated against because of their treatment’ when managing risks such as driving.¹⁶ A human right to health is protected internationally under Article 12, International Covenant on Economic, Social and Cultural Rights and should not be disregarded in terms of health outcomes and managing the risks of driving.

Purpose of the Act is road safety

17. The Act relies on an arbitrary and unqualified acceptance of the status quo of cannabis prohibition. There is no road safety outcome in subjecting medical cannabis users to presence-based testing. The current drug testing framework rather than improving road safety and minimising injury serves to criminalise patients for legal use and the mere presence of a drug in their system. It is “actually being used as a backdoor means of charging people for illicit drug use”.¹⁷

Cost

18. NSWCCCL agrees with the assessment by Cate Faehrmann MLC of the unjustified cost to the taxpayer of presence-based testing on medical cannabis users. She notes in her second reading speech the costs associated with the government 2020 target of 200,000 roadside drug tests (\$40 per unit), increased police personnel, pressure on the criminal justice system and the social injustice caused to victims. “Those road safety dollars and police time could be spent far more effectively on policing mobile phone use and speed, and on improving roads, and road safety campaigns.”¹⁸

Other jurisdictions

19. A medical defence is already available for medicinal cannabis patients in Tasmania.¹⁹
20. The United Kingdom, New Zealand, Norway, Germany, and Ireland are jurisdictions that have tightly controlled comparable prescription-only access pathways for medicinal cannabis. In all of these jurisdictions a ‘medical defence’ had been implemented to enable legitimate medicinal cannabis patients to drive by ensuring they would not be found guilty of a drug driving offence due to the presence of THC in their system, if they were not impaired and were using the drug as directed.²⁰

¹³ Booker, C (June 11, 2021) ‘It’s discriminating’: Study finds no justification for medicinal cannabis driving ban <https://www.theage.com.au/national/victoria/it-s-discriminating-study-finds-no-justification-for-medicinal-cannabis-driving-ban-20210610-p57zsc.html>

¹⁴ Professor Iain McGregor, Academic Director of the Lambert Initiative- Senate Report op.cit.

¹⁵ McGregor Senate Report ibid

¹⁶ Victorian Law Reform Commission (2015) Medicinal Cannabis: Issues Paper at p.140 <https://www.lawreform.vic.gov.au/project/medicinal-cannabis/>

¹⁷ Gregoire op.cit

¹⁸ Faehrmann op.cit

¹⁹ VLRC op.cit

²⁰ VLRC ibid

21. In Canada it is only an offence to drive while impaired or intoxicated – there is no guidance about how much cannabis can be consumed before it is unsafe to drive or how long a driver should wait to drive after consuming cannabis.²¹

Reversal of onus of proof

22. NSWCCCL agrees with the Legislation Review Committee call for greater clarity concerning the onus of proving the elements of the defence. If the exemption is “to act as a defence, then the onus of proving the THC was used in accordance with law rests on the defendant on the balance of probabilities. The Crown will bear the onus of proving that the THC was not used in accordance with law by proving it was not used for medicinal purposes or was not obtained or administered in accordance with the Therapeutic Goods Act 1989. Given a person may experience high financial penalties and lengthy licence disqualifications, it is important the legislation is drafted with sufficient clarity.

Inconsistency with Commonwealth Government Policy

23. The Senate Committee recommended that the Department of Health, in collaboration with the Australian Medical Association, the Royal Australian College of General Practitioners and other specialist colleges and health professional bodies, develop targeted education and public awareness campaigns to reduce the stigma around medicinal cannabis within the community.

24. The committee also recommended that the Australian Government, through COAG, encourage a review of state and territory criminal legislation in relation to current drug driving laws and their implications for patients with legal medicinal cannabis prescriptions.²²

This submission was prepared by Michelle Falstein on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Legislative Council's Standing Committee on Law and Justice.

Yours sincerely,

Michelle Falstein
Secretary
NSW Council for Civil Liberties

²¹ Senate Report op.cit.

²² Senate Report op.cit.