

Submission  
No 60

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

**Organisation:** Australian Lawyers Alliance

**Date Received:** 29 April 2022

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# **Inquiry into the Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021**

Submission to the New South Wales Legislative Council  
Standing Committee on Law and Justice

**29 April 2022**



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to have input into the NSW Legislative Council Standing Committee on Law and Justice ('the Committee') inquiry into the Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021 (NSW) ('the Bill').
2. The ALA contends that current 'drug driving' laws in NSW, outlined in the *Road Transport Act 2013* (NSW) ('the Act'), are not fair to drivers who can lose their license for taking prescribed, medicinal cannabis – which has been legally accessible across Australia since 2016 – even when there is no evidence of impaired driving.
3. Broadly, this is a welcome development that reduces differential treatment of certain drugs over others, and removes one form of discrimination against those who rely on cannabis for health purposes. Given that NSW 'drug driving' laws were developed before medicinal cannabis became legally accessible, the Bill seeks to update the law and to rectify an injustice for those who take medicinally-prescribed doses of the drug.
4. The ALA notes that Tasmania has already adopted this reform and there are proposed changes before the South Australian Parliament which the ALA has publicly supported.<sup>2</sup>
5. This submission will detail the ALA's support for the Bill, while also noting the need for clarification around how the proposed reform would work in practice. In summary, there is a need for clarity around the onus of proof and on whom the burden rests in establishing elements of the offence and the exemption.

## Addressing legislative inconsistency and injustice

6. Currently in NSW, an individual found driving with morphine present in their system can avoid prosecution by accessing a defence that the morphine was purchased with a prescription and consumed for medicinal purposes.<sup>3</sup>
7. However, under the Act as it stands, this medical defence is not available to an individual with medicinal cannabis in their system – an individual who has been prescribed medicinal

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<sup>2</sup> Australian Lawyers Alliance, 'Medicinal cannabis driving bill removes injustice' (Media Release, 3 February 2021) <<https://www.lawyersalliance.com.au/news/medicinal-cannabis-driving-bill-removes-injustice>>.

<sup>3</sup> *Road Transport Act 2013* (NSW) s 111(5).

cannabis by a medical professional, who has purchased it legally using that prescription and who has consumed the cannabis for medicinal purposes.

8. The ALA supports the intention behind the Bill to rectify this inconsistency by extending the medical defence to those with medicinal cannabis present in their system while driving.
9. Further, the Act is outdated and is fuelling a glaring injustice: Individuals in NSW can legally access cannabis for medicinal purposes once prescribed by “an Australian registered medical practitioner with appropriate qualifications and/or expertise for the medical condition requiring treatment”;<sup>4</sup> however, those same individuals face criminal prosecution if they test positive to having that medicinal cannabis present in their system while driving. It is the mere presence of cannabis which triggers the relevant provisions of the Act.<sup>5</sup> Thus, charges can be brought *even if there is no evidence* that their driving was impaired by the presence of medicinal cannabis in their system.
10. The ALA contends that passage of the Bill will ensure NSW law better reflects the present reality of legal medicinal cannabis access and use by individuals who also need to drive for any number of reasons, thereby helping to resolve this legislative injustice.

## Sufficient safeguards

11. The Bill strikes a sound balance by employing sufficient safeguards to ensure public safety while giving individuals access to a medical defence to charges of ‘drug driving’, including that:
  - cannabis can be the only prescribed illicit drug present in the person’s system and the medicinal cannabis was obtained and administered “in accordance with the *Poisons and Therapeutic Goods Act 1966* or a corresponding Act of another State or Territory”.<sup>6</sup>
  - the individual must have consumed medicinal cannabis as per the guidance of their medical practitioner, which would include instructions on how to assess

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<sup>4</sup> Centre for Medicinal Cannabis Research and Innovation, NSW Government, *Legal access pathways* (Web Page) <<https://www.medicinalcannabis.nsw.gov.au/patients/access>>.

<sup>5</sup> *Road Transport Act 2013* (NSW) s 111(1), entitled ‘Presence of prescribed illicit drug in person’s oral fluid, blood or urine’ (emphasis added).

<sup>6</sup> Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021 (NSW) cl 3.

one's impairment in order to avoid driving while actively impaired. Section 111(6)(a) of the Act defines "medicinal purposes" as "a drug prescribed by a medical practitioner taken in accordance with a medical practitioner's prescription";<sup>7</sup> and

- the medical defence is not intended to apply if there is evidence of impairment when driving.<sup>8</sup>

## Onus of proof: The need for clarification

12. The ALA notes the Legislation Review Committee's review of the Bill raised two concerns about potential confusion and issues with the implementation of the reform.

13. First, the Legislation Review Committee noted that if the defendant is required to prove that they have acquired and used the medicinal cannabis legally, then that may transplant the onus of proof in criminal proceedings from the prosecution (where it usually lies) to the defendant.<sup>9</sup> The Legislation Review Committee expressed concern that "a reversed onus may undermine the presumption of innocence".<sup>10</sup>

14. Secondly, the Legislation Review Committee acknowledged that the intention behind the Bill appears to be for this provision to act as a defence. The Legislation Review Committee noted that this also has implications regarding onus of proof, especially for the defendant.<sup>11</sup>

15. The ALA affirms that these are important issues which need to be clarified for the fair and just implementation of these legislative changes, should they pass NSW Parliament.

16. The ALA further contends that this clarity is essential given that the consequences for individuals accused of a 'drug driving' offence are significant – including but not limited to financial penalties, loss of licence (and potentially livelihood), and legal fees.

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<sup>7</sup> *Road Transport Act 2013* (NSW) s 111(6)(a).

<sup>8</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 17 November 2021, 10:48 (Cate Faehrmann).

<sup>9</sup> Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* (Digest No 38 of 57, 23 November 2021). 38-39.

<sup>10</sup> *Ibid* 39.

<sup>11</sup> *Ibid*.



17. The ALA notes for consideration by the Committee phrasing of comparable Tasmanian legislation:

**6A. Driving with prescribed illicit drug in blood**

(1) Subject to subsection (2), a person who drives a motor vehicle while a prescribed illicit drug is present in his or her blood or oral fluid is guilty of an offence.

(2) A person does not commit an offence against subsection (1) if the prescribed illicit drug was obtained and administered in accordance with the Poisons Act 1971.<sup>12</sup>

18. The ALA contends that this drafting is direct in its intention that an individual with, for example, cannabis consumed for medicinal purposes in their system unambiguously does not commit an offence under this provision and would thus avoid culpability from the outset.

## Conclusion

19. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the NSW Legislative Council Standing Committee on Law and Justice inquiry into the Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021 (NSW).

20. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

**Greg Barns SC**

**Spokesperson on Criminal Justice**

**Australian Lawyers Alliance**

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<sup>12</sup> *Road Safety (Alcohol and Drugs) Act 1970 (Tas) s 6A.*