Submission No 68

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

Organisation: Mills Oakley

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MILLS OAKLEY

SUBMISSION TO INQUIRY INTO THE ROAD TRANSPORT AMENDMENT (MEDICINAL CANNABIS-EXEMPTIONS FROM OFFENCES) BILL 2021

1. Mills Oakley welcomes the opportunity to make a submission to this inquiry (**Inquiry**) into the Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021 (the **Bill**).
2. Our submission, which addresses the Terms of Reference, is set out below.

Background to the Inquiry

3. In order to place our submission in the appropriate context, this Background section provides information about the issues with the current legislation in NSW.
4. The *Road Transport Act 2013* (NSW) (**Act**) outlines various traffic-related offences which relate to, but are not limited to, driver licences, registration and unsafe driving behaviour, including drug driving.
5. Relevant to this inquiry, sub-section 111(1) of the Act makes it an offence for a person to drive a motor vehicle with certain drugs (other than alcohol) present in their oral fluid, blood or urine. It provides:

    111 Presence of certain drugs (other than alcohol) in oral fluid, blood or urine

    (1) Presence of prescribed illicit drug in person's oral fluid, blood or urine

    A person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug--

    (a) drive a motor vehicle, or

    (b) occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or

    (c) if the person is the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence)--occupy the seat in a motor vehicle next to a learner driver who is driving the vehicle.

    Maximum penalty--20 penalty units (in the case of a first offence) or 30 penalty units (in the case of a second or subsequent offence).

6. For the purposes of sub-section 111 of the Act, a 'prescribed illicit drug' is defined as follows:

> '***prescribed illicit drug*** *means any of the following—*
> *(a) delta-9-tetrahydrocannabinol (also known as THC),*
> *(b) methylamphetamine (also known as speed),*
> *(c) 3,4-methylenedioxymethylamphetamine (also known as ecstasy),*
> *(d) cocaine.'*

7. The inclusion of delta-9-tetrahydrocannabinol (**THC**) in the definition of a prescribed illicit drug under the current legislation is anomalous, as THC that is consumed for medicinal purposes is entirely lawful. In fact, the medicinal use of THC has been lawful since 2016, and yet the legislation has not – more than five years later – been amended to remove THC from the definition of a prescribed illicit substance.

8. This means that under the current legislation, if a person undergoes a random roadside drug test and THC is detected in that person's oral fluid, blood or urine, even though that THC may have been taken in accordance with a medical practitioner's prescription, the person faces a potential penalty of either 20 penalty units (first offence) or 30 penalty units (second or subsequent offence).[1] This is equivalent to a fine of either $2200 or $3300, depending on whether it is a first time or repeat offence. A driver committing such an offence may also be automatically disqualified for a period of six months under section 205 of the Act.

The Committee's Inquiry

9. The NSW Legislative Council's Standing Committee on Law and Justice is inquiring into and reporting on the potential to amend the current legislation which applies to THC and driving offences in New South Wales. The Terms of Reference for the Inquiry are set out below:

    (a) The Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021 be referred to the Standing Committee on Law and Justice for inquiry and report;

    (b) The bill be referred to the Committee at the conclusion of the mover's second reading speech;

    (c) The resumption of the second reading debate on the bill not proceed until the tabling of the Committee report; and

    (d) The Committee report by 23 June 2022.

10. We note that the Terms of Reference are not specific, and we therefore consider the Bill generally.

Discussion about the Bill

11. On 17 November 2021, Ms Cate Faehrmann MLC introduced the Bill in the Legislative Council. The Bill proposes to amend the Act by creating an exception to the offence in section 111 (outlined above), by inserting the proposed amendment after section 111(1) of the Act, as follows:

> *(1A) Subsection (1) does not apply if, at the time the person engaged in the conduct that is alleged to have contravened the subsection—*

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[1] One penalty unit is equivalent to $110.

(a) the only prescribed illicit drug present in the person's oral fluid, blood or urine is delta-9-tetrahydrocannabinol (also known as THC), and

(b) the delta-9-tetrahydrocannabinol was obtained and administered in accordance with the Poisons and Therapeutic Goods Act 1966 or a corresponding Act of another State or Territory.[2]

12. The aim of the Bill is to exclude users of medicinal cannabis from the application of offences relating to driving if THC is the only illicit substance present in a person's oral fluid, blood or urine, and was obtained or administered in accordance with the law,[3] being prescribed by a medical practitioner and is taken in accordance with the medical practitioner's instructions.[4]

13. The necessity of the Bill is highlighted by a recent incident on 31 March 2022, involving a 21-year-old woman who was arrested in Oran Park (south-west Sydney) after she tested positive on a random roadside test to medically prescribed cannabis, which she was utilising for pain management.[5] This incident demonstrates the anomaly between the legalisation of prescribed medicinal cannabis at a federal level (and under state health legislation) and the criminal offences imposed for prescribed THC under road transport legislation.

14. Ms Faehrmann in her second reading speech stated that the Bill would not only bring NSW in line with other states who have similar legislation or are currently considering similar legislation, but it would also reflect current research, which states that medically administered cannabis has minimal effect on driving.[6]

15. Additionally, Ms Faehrmann pointed out in her second reading speech that medicinal cannabis is becoming more common as a medical treatment for various indications, noting that:

    …the number of Australians accessing medicinal cannabis has exploded. Up to 12 October [2021], the TGA had approved over 180,000 applications for medicinal cannabis products. FreshLeaf Analytics, the leading supplier of data on the medicinal cannabis industry in Australia, has reported that the number of active medical patients has grown from 30,000 at the end of 2020 to 70,000 in September. That number is predicted to reach 75,000 by the year's end, with the exponential growth of the industry expected to continue into 2022 and beyond.

16. We agree with the above statements made by Ms Faehrmann, which are supported by data presented by the Therapeutic Goods Administration (**TGA**) on the Medicinal Cannabis Access Data Dashboard (**Dashboard**) on its website.[7] The TGA publishes de-identified data on the number of unapproved medicinal cannabis products accessed through the Special Access Scheme (**SAS**), and is divided into two categories, Category A and Category B data. These data not include products that are currently registered in the Australian Register of Therapeutic Goods (**ARTG**), being Sativex (nabiximols) and

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[2] Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021
[3] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest, No. 38/57, 23 November 2021.
[4] *Ibid.*
[5] https://www.heraldsun.com.au/motoring/on-the-road/big-problem-with-australian-road-rule-around-medical-cannabis/news-story/5cb3094993099067f52b9c4904e1d160?btr=81825a6d547894e9da91c68bf521489f
[6] *Ibid.*

Epidyolex (cannabidiol). To provide some qualification with respect to these data, it should be noted that the approval and notification numbers that are presented do not necessarily equate to the actual number of patients receiving unapproved medicinal cannabis under the SAS, as one patient may be associated with repeat applications for a single product or approvals for multiple products, and some patients may not dispense their prescription if the medicine is unaffordable. We also note that an SAS approval or notification does not mean that the patient has accessed or continues to access treatment, as this is a matter between the medical practitioner and the patient.

17. For SAS Category A, which is an application submitted for a patient who is seriously ill with a condition from which death is reasonably likely to occur within a matter of months, or from which premature death is reasonably likely to occur in the absence of early treatment,[8] the data published on the Dashboard for Schedule 4 and Schedule 8 medicinal cannabis indicates that there were:

    (a) 1,439 notifications made from 2017 to present;

    (b) 830 prescribers; and

    (c) 391 prescriber consulting locations in NSW.

18. For SAS Category B, which is an application pathway that can be accessed by health practitioners (usually medical or dental practitioners) if the patient does not fit the Category A definition and if the therapeutic good does not have an established history of use (Category C),[9] the data published on the Dashboard for Schedule 4 and Schedule 8 medicinal cannabis indicates that there are:

    (a) 4,098 prescribers;

    (b) 237,761 applications and approvals;

    (c) 29,750 applications in 2022; and

    (d) 47,010 prescriber consulting locations in NSW.

19. The data presented demonstrate the significant number of patients who are seeking access to medicinal cannabis. While we cannot comment on whether all of the SAS Category A notifications and Category B approvals translate to actual medicinal cannabis use, the number of notifications and approvals alone indicate the significant uptake of medicinal cannabis in the community.

20. Ms Faehrmann cites the report from the University of Sydney Lambert Initiative for Cannabinoid Therapeutics in support of the proposition that drug-driving laws are not an accurate reflection of the current status of the use of medicinal cannabis in the wider population, as tens of thousands are utilising legal, prescribed medicinal cannabis, and yet current laws punish these individuals who are seeking to improve their health.[10] Ms Faehrmann rightly noted that medicinal cannabis provides relief to individuals who are suffering from the severe side effects of chemotherapy, chronic pain, multiple sclerosis and other serious illnesses and pain.[11] It is simply unreasonable for the law, as it currently stands, to force individuals to choose between the therapeutic effects of medicinal

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[7] https://www.tga.gov.au/medicinal-cannabis-access-data-dashboard
[8] https://www.tga.gov.au/form/special-access-scheme
[9] *Ibid.*
[10] Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021, Second Reading Speech.
[11] *Ibid.*

cannabis and avoiding the risk of prosecution, when both scenarios have serious implications for the individual on the basis of their choice, being continuing pain and illness on the one hand and criminal sanctions on the other hand.

21. The report published by the University of Sydney Lambert Initiative for Cannabinoid Therapeutics (**Report**),[12] considered 80 publications which reviewed 1534 outcomes to characterise the acute effects of a single dose of delta-9-THC on driving performance and driving-related cognitive skills. The authors concluded that the effects of delta-9-THC were less pronounced in regular users compared to occasional cannabis users, likely due to the development of tolerance. The Report cited two Canadian guidelines which stated that an individual should wait a minimum of 4-6 hours before driving (Mothers Against Drunk Driving) and at least 6 hours following cannabis use before driving (Health Canada). These guidelines indicate that the concerning effects that may impact driving after cannabis use may be mitigated through time delays between use and driving. Nonetheless, the authors in the Report indicated that their analyses suggested that most driving-related cognitive skills recover within 3-5 hours of inhaling 10 and 20 mg of delta-9-THC, respectively, with almost all individuals recovering within 5-7 hours, respectively. The authors additionally recognised that their findings suggest that individuals should wait at least 5 hours following inhaled cannabis use before performing safety-sensitive tasks, although the recovery time required will depend on several factors (for example, dosage and oral delta-9-THC induced impairment may take longer to subside).

22. Accordingly, as an alternative to the drafting proposed in the Bill, we propose the following (with deleted text highlighted as red strikethrough text and added text highlighted in blue):

    (a) In the Definitions in section 4 of the Act, change the definition of a “prescribed illicit drug” to the following:

        prescribed illicit drug *means any of the following—*

        ~~(a) delta-9-tetrahydrocannabinol (also known as THC)~~

        (a~~b~~) methylamphetamine (also known as speed),

        (b~~c~~) 3,4-methylenedioxymethylamphetamine (also known as ecstasy),

        (c~~d~~) cocaine.

23. If our proposed drafting is not palatable to the legislature, then the Bill as drafted would still be appropriate, and would adequately cure the injustice that arises under the current legislation.

24. This proposed amendment means that THC would be excluded entirely from the definition of a prescribed illicit drug, and therefore the operation of subsection 111. Unlike the other drugs included in the definition of a ‘prescribed illicit drug’, THC has therapeutic value and its use is lawful when obtained and utilised under a medical practitioner’s prescription. THC, in this regard, should not be treated differently to any other legally prescribed drugs that may potentially cause impairment. It is not appropriate for THC to continue to be defined as a ‘prescribed illicit drug’ when other drugs like benzodiazepines, opioids, antidepressants and other sedating drugs, which may similarly cause impairment, are not treated in the same way. The polarisation of THC in this way is discriminatory, especially when there is increasing evidence of the medicinal and therapeutic benefits of THC.

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[12] McCartney, Danielle et al. “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 and biobehavioral reviews* vol. 126 (2021): 175-193.

25. We also note that when police do test for 'prescribed illicit drugs', they do so not on the basis of whether an individual is impaired from the consumption of the drug, but whether the prescribed illicit drug is merely present in the individual's oral fluid, saliva or blood sample. In considering the main purpose of the Act, which is road safety for all road users, the inclusion of THC in the definition of 'prescribed illicit drug' does not achieve the objective of the Act. This is because studies have demonstrated that road safety risks associated with THC are either similar to or lower than many other potentially impairing prescription medications, including opioids, benzodiazepines and antidepressants.[13] It is on this basis that we consider the removal of THC from the definition of a prescribed illicit drug to be essential, particularly given that medicinal cannabis was legalised in 2016, and the purported risks of impairment are nowhere near as significant as the legislature ostensibly asserts them to be. In this regard, an evidence-based approach is required to ensure that the legislation continues to reflect the current state of play and the available current research. The research to date indicates that the amount of THC in an individual's system is a poor indicator of their level of impairment,[14] and this information in turn indicates that the current position under the Act is not substantiated by the available evidence. In this regard, the legislation is not only out-dated, but it also unjustly exposes THC users to criminal sanctions without proper foundation.

26. Finally, we wish to emphasise that our submission to this Inquiry should not be interpreted to suggest that we are proponents of the decriminalisation of THC or cannabis, and particularly its use more broadly than for medicinal purposes. In this regard, it is important to note that our submission that THC ought to be removed from the definition of a 'prescribed illicit drug' under the Act does not mean that the unlawful use of THC (*i.e.* the use of THC outside of a medical prescription, such as for recreational purposes) will go unpunished, because the *Drug Misuse and Trafficking Act 1985* (NSW) (**DMT Act**) provides that a person who has a 'prohibited drug' in his or her possession is guilty of an offence.[15] Relevantly, a 'prohibited drug' is defined in section 3 of the DMT Act as any substance, other than a prohibited plant, specified in Schedule 1 to the DMT Act, and Schedule 1 specifies that the cannabis leaf, cannabis oil, cannabis resin and THC[16] are all prohibited drugs. Notably, however, consistent with our submission, paragraph 10(2)(c) of the DMT Act provides that the possession of a prohibited drug is not unlawful if it is possessed by a person for whom it has been lawfully prescribed or supplied.

Conclusion

27. It is clear from Ms Faehrmann's second reading speech and our analysis of the Bill that any laws which punish individuals who are using lawfully prescribed THC-containing medicinal cannabis products for a legitimate medicinal purpose are manifestly unjust and must be changed.

28. The Bill proposes changes to the legislation which should have been effected in 2016, when medicinal cannabis was legalised. We strongly support the Bill (albeit with some proposed amendments), as it addresses a gross anomaly between the legalised prescription of medicinal cannabis and driving offences associated with THC under

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[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] https://www.sydney.edu.au/news-opinion/news/2021/12/02/thc-blood-saliva-poor-measures-cannabis-impairment-lambert-study.html

[15] See sub-section 10(1) of the DMT Act.

[16] Referred to in Schedule 1 as "delta-9-tetrahydrocannabinol (dronabinol)".

state/territory laws. This Bill is significant and necessary due to the increasing, widespread use of medicinal cannabis in the community and the increasing number of applications submitted to the TGA to access medicinal cannabis. If this Bill is not passed, it will continue to discriminate against individuals who have been legitimately prescribed medicinal cannabis and will unjustly expose them to a material risk of criminal sanctions.

29. We would welcome the opportunity to appear before the Committee to provide further information and legal insight. Otherwise, if you have any questions or require further information, please do not hesitate to contact Dr Teresa Nicoletti

Yours sincerely

DR TERESA NICOLETTI
PARTNER

30 April 2022