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

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Standing Committee on Law and Justice

Inquiry into the Road Transport Amendment (Medicinal Cannabis – Exemptions from Offences) Bill 2021

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Contents

Introduction

On 17 November 2021, Ms Cate Faehrmann MLC, as a private Member, introduced the *Road Transport Amendment (Medicinal Cannabis – Exemptions from Offences) Bill 2021* (the Medicinal Cannabis Bill) to the Legislative Council of the NSW Parliament. The Medicinal Cannabis Bill proposes to amend the *Road Transport Act 2013* (NSW) (the Act) by excluding users of medicinal cannabis from the application of the offence relating to driving with the presence of delta-9-tetrahydrocannbinol (THC) in a person's oral fluid, blood or urine, if THC is the only illicit drug present; where the THC was obtained and administered in accordance with the *Poisons and Therapeutic Goods Act 1966* (NSW) or similar legislation in another State or Territory.

THC impairs the skills required for driving and the Medicinal Cannabis Bill is likely to increase the road safety risk to all road users in this State. Between 2016 and 2020 in NSW, there were 253 fatal crashes involving drivers or riders with the presence of THC, representing 16 per cent of all fatal crashes. The proposed exemption for medicinal cannabis users could create opportunities for illicit drug drivers to escape prosecution and negatively impact on existing successful road safety strategies and compliance operations involving roadside mobile drug testing (MDT). Additionally, the exemption may have detrimental effects on road safety messaging and deterrence.

Medicinal cannabis is not comparable to other drugs, in part due to its widespread use and availability for non-medicinal purposes. There is no reliable way to distinguish or prove whether the source of THC is illicit or prescribed. For these reasons, the NSW Government remains opposed to any change in the treatment of medicinal cannabis under its drug-driving laws.

Legal and enforcement framework

Legalisation of medicinal cannabis use

The cannabis plant contains a variety of cannabinoids including THC, which is a psychoactive cannabinoid and responsible for the characteristic effects of recreational cannabis use. Cannabidiol (CBD) is a non-psychoactive cannabinoid with therapeutic effects and often used in medicinal cannabis products. Cannabis can be administered by smoking, vaporizing, within food, or as an extract. Cannabis can affect the cognitive and motor skills necessary for safe driving such as attention, judgement, memory, vision and coordination.[1]

In NSW, THC has historically been listed under Schedule 8 (Controlled Drug) of the *Poisons and Therapeutic Goods Regulation 2008*, meaning it could be used for therapeutic purposes when prescribed by a medical practitioner. However, before 2016, Australian law generally considered cannabis an illegal narcotic.

In February 2016, federal laws were amended to make certain medicinal cannabis products available for specific patient groups under strict medical supervision. Since then, NSW laws have been adjusted to allow further prescription and use of a broad range of medicinal cannabis products. All other uses of cannabis outside the medical framework remain illegal.

The number of patients in NSW who are prescribed Schedule 8 medicinal cannabis remains relatively small. However, data collection has changed over time and is now only collected by the NSW Ministry of Health (the Ministry) where authorisation is required in limited circumstances, including use by a drug dependent person or children. The Ministry does not have oversight for Schedule 4 cannabis medicines. Data from the NSW Health Chief Pharmacist Unit show in the period August 2016 to February 2022:

- The Ministry received 6,566 applications to prescribe a Schedule 8 cannabis medicine. In the 12-month period up to February 2022, the Ministry received an average of 41 applications a month.
- A total of 6,067 applications resulted in an authority and/or exemption being granted. These applications involved 4,502 individual patients.[2]

The Australian Government Therapeutic Goods Administration (TGA) is the primary authority for approving applications for both Schedule 4 and Schedule 8 cannabis medicines. Prescribing data can be found at: https://www.tga.gov.au/medicinal-cannabis-special-access-scheme-category-b-data

[1] Cannabis-and-Driving-Fact-Sheet-Patients-FINAL.pdf (nsw.gov.au)
[2] Summary Report: NSW Applications to Prescribe a Schedule 8 Cannabis Medicine for the Treatment of Individual Patients for period up to February 2022, NSW Health 2022

Medicinal cannabis products

Only two medicinal cannabis products are approved medicines - one for refractory epilepsy and the other for severe uncontrolled spasticity in multiple sclerosis, although medical practitioners can apply for approval to prescribe unapproved medicinal cannabis products through the Special Access Scheme or the Authorised Prescriber Scheme. The Therapeutic Goods Administration (TGA) states that medicinal cannabis should not be considered a first line therapy and because of the limited evidence to support medicinal cannabis for many conditions, it should only be used when approved treatments have not been successful.[3] Medicinal cannabis products in Australia can be THC-dominant, CBD-dominant or contain a specific mix of THC and CBD.[4] Furthermore, medicinal cannabis comes in different cannabinoid formulations with the amount of THC will vary between products.

While the NSW Government has recognised the potential for cannabis and/or cannabis-based medicines to alleviate symptoms or potentially treat some debilitating or terminal illnesses in specific patient groups, patients prescribed a product that contains THC are advised not to drive while using the product because it impairs the skills required for driving.

Drug-driving presence offences and enforcement

To reduce the risk of a fatal crash due to drug driving, road safety drug driving policy focuses on deterring people from driving if they have recently taken illicit drugs and may pose a risk when driving, as well as detecting drivers that show visible signs of drug impairment. In NSW, a two-tiered approach to drug driving combines:

- presence offences, for driving with certain illicit drugs present in a driver's system, largely detected through mobile drug tests; and
- driving under the influence (DUI) offences which are detected via behavioural impairment or through blood and urine testing in prescribed medical facilities.

Presence offences are designed to deter the use of four key illicit drugs that feature in the NSW road toll, both before and during driving.

In NSW, section 111(1) of the Act provides that, 'a person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug' drive, attempt to drive or supervise a learner'. For this offence, the Act defines 'prescribed illicit drug', in section 4, as THC, methamphetamines, ecstasy, and cocaine. Driving with the presence of morphine in blood or urine is also an offence, for which there is a medical defence in section 111 (5), which is discussed below.[5] Consistent with other Australian jurisdictions, drug driving laws criminalise the presence of these drugs, including THC, in a driver's bodily fluids, without needing to provide specific evidence of impairment.

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[3] Guidance for the use of medicinal cannabis in Australia: Patient information | Therapeutic Goods Administration (TGA)
[4] Arkell, McCartney, & McGregor (2021) 'Medical cannabis and driving', *AJGP*, 50(6), 357–362.
[5] *Road Transport Act 2013* (NSW), s 111(3).

Detection of presence offences is typically via roadside mobile drug testing (MDT). The Act allows police to require a driver to submit to one or more oral fluid tests to detect for prescribed illicit drugs. If a driver fails an oral fluid test, an oral fluid sample can be collected and submitted for confirmatory laboratory analysis.[6] Charges are based on the results of confirmatory analysis of this oral fluid sample. Oral fluid can be easily, quickly and cost effectively collected at the roadside and is non-invasive when compared to blood and urine collection and analysis.[7] Presence of an illicit drug in oral fluid is reflective of recent drug use. Drug detection can also occur through mandatory blood tests, which are administered to drivers following a fatal crash.[8]

Driving under the influence (DUI) offences are separate offences under section 112 of the Act and can apply to both illegal or prescription drugs or alcohol if a driver is operating or attempting to operate a vehicle while under the influence of a 'drug' (the definition of which also includes alcohol). Drugs can be detected through blood and urine tests which can only be administered where a police officer has a reasonable suspicion that a driver is under the influence of a drug or drugs, and the driver has failed a sobriety assessment. Blood and urine tests must be completed by authorised sample takers, in a hospital. The penalties for a DUI offence are higher than for a presence offence.

Mobile Drug Testing

The deterrence approach to drug-driving in Australian jurisdictions uses high visibility, high volume roadside testing to create an environment 'that is at odds with an individual's belief that they are unlikely to be apprehended'.[9] In NSW, the 'Stop it ... Or cop it' campaign reminds drivers that MDT can occur anytime, anywhere and the next police car a person sees could stop them for MDT.[10]

The MDT program is modelled on the random breath testing (RBT) program which was commenced in 1982. RBT has been highly successful as a deterrence to drink driving and therefore as a means of reducing the significant negative impacts of drink-driving on community safety.

Since the 1980s, trauma from fatal crashes involving alcohol has dropped from about 40 per cent of all fatalities to the 2018-20 level of 18 per cent. In real numbers, 389 people were killed in alcohol related crashes alone in NSW in 1980, compared to 51 in 2020.

According to the report of the National Drug Driving Working Group in 2018, MDT programs across the states and territories are not only efficient and effective but have placed Australia 'at the international forefront of combating drug-driving'.[11]

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[6] *Road Transport Act 2013* (NSW), cl 6 of sch 3.
[7] Australia's second generational approach to roadside drug testing (roadsafety.gov.au)
[8] *Road Transport Act 2013* (NSW), cl 11 of sch 3.
[9] Australia's second generational approach to roadside drug testing (roadsafety.gov.au)
[10] https://roadsafety.transport.nsw.gov.au/stayingsafe/alcoholdrugs/drugdriving/index.html
[11] Australia's second generational approach to roadside drug testing (roadsafety.gov.au).

Evaluation of the Victorian random drug testing program conducted by Monash University Accident Research Centre (MUARC) found that the increase in roadside drug tests was effective and highly cost beneficial and was estimated to have saved a significant number of fatal and serious injury crashes per year.[12]

The Medicinal Cannabis and Safe Driving Working Group in Victoria (the Victoria Working Group) was established to consider research, evidence and policy issues related to medicinal cannabis and safe driving in Victoria following the introduction of a medicinal cannabis bill in that state in 2019.

It similarly highlights that mass, random screening is critical in achieving a level of general deterrence across the community which 'directly correlates to a reduction in drug-related road deaths and injuries.' [13] In the broader community, the MDT program in NSW has strong support. Consultations for the 2026 Road Safety Action Plan indicated that 83 per cent of the public considered drug testing important for road safety.[14]

[12] Evaluation-of-the-RDT-Program-and-RBT-in-Victoria-MUARC-Report-355_Updates.pdf (monash.edu)
[13] Report of the Medicinal Cannabis and Safe Driving Working Group: Assisting medicinal cannabis patients to drive safety, p. 7.
[14] Development of the 2026 Road Safety Action Plan: Community and Stakeholder Engagement Summary

Road safety consequences of THC use

THC and crash risk

The four prescribed illicit drugs which MDT detects were found to be a factor in 23 per cent of fatal crashes in NSW between 2016 and 2020, where THC was a factor in 16 per cent.[15] Of the fatal crashes involving illicit drugs, between 50 and 70 per cent involved drivers who tested positive to THC. In numerical terms, this means that, of the 264 fatal crashes in NSW in 2020, THC was a factor in nearly 60 deaths.[16] Importantly, in 2020-21, over 50 per cent of positive MDT samples contained THC (8,200 of 14,900 samples).[17]

The impact of THC use on driving ability and road safety risks is well established. Consistent with the trauma outcomes in NSW, evidence shows that THC can affect cognitive and motor skills necessary for safe driving such as attention, judgement, memory, vision and coordination and can increase the crash risk of drivers by an estimated 40 per cent[18]. Accordingly, NSW Health advises that 'patients should not drive while using a product that contains THC.'[19]

Similarly, the Victoria Working Group commissioned MUARC to conduct a literature review and found 'global consensus that the use of THC results in a range of impairments specific to driving'.[20] Such impairments include slowed reaction time; extensive and frequent lane deviations; cognitive processing errors[21]; inappropriate speed changes and following distances; reduced capacity to divide attention; and reduced vigilance.[22] THC is also known to have negative impacts on coordination and visual function.[23] Evidence cited in the MUARC report finds that THC can increase crash risk by around 50 per cent.[24]

Laboratory tests and research studies show that the effects of THC on individuals vary more than with alcohol.[25] This is because of differences in forms of ingestion, different dosages, presence of other drugs, individual biology, different rates of absorption and an increased tolerance to THC. For these reasons, as the National Drug Driving Working Group highlighted, it is not possible to be certain of the effect of any doses of medicinal cannabis on an individual, as there is a 'significant number of variables to take into consideration at any specific time.'[26]

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[15] Centre for Road Safety, crash reporting database, statistics for where a motor vehicle controller (driver or motorcycle rider) has the presence of an illicit drug including THC
[16] Road Traffic Crashes, NSW, 2020.
[17] Centre for Road Safety, analysis of samples from the MDT Program
[18] Cannabis-and-Driving-Fact-Sheet-Patients-FINAL.pdf (nsw.gov.au) indicates an increased crash risk of '40% (95% confidence interval that the true increase in risk is between 11-76%)
[19] Prescribed Cannabis Medicines and fitness to drive (nsw.gov.au).
[20] Report of the Medicinal Cannabis and Safe Driving Working Group, p.50.
[21] MUARC, Road Safety Aspects of Medical Cannabis, Rapid Review – Evidence on the crash risk associated with THC (Cannabis) and implications for users of medicinal cannabis, 26 February 2021, p.2..
[22] Report of the Medicinal Cannabis and Safe Driving Working Group, p. 5.
[23] Medicinal Cannabis and Driving: Issues paper, p. 6.
[24] Report of the Medicinal Cannabis and Safe Driving Working Group, p. 4.
[25] Guidance for the use of medicinal cannabis in Australia: Overview | Therapeutic Goods Administration (TGA); For health care professionals: Cannabis and cannabinoids - Canada.ca
[26] Australia's second generational approach to roadside drug testing (roadsafety.gov.au).

Medicinal cannabis, driving impairment and crash risk

While there is strong evidence regarding THC use and road safety risk, there is less research specifically on the impairment caused by medicinal cannabis products that contain THC on drivers.[27]

The Australian Government's *healthdirect* website lists 'medicinal cannabis that contains THC' as an example of a medicine that might impair driving, along with other prescription and over the counter medicines.[28] The NSW Ministry of Health advises, 'Patients using cannabis should be warned not to drive or to perform hazardous tasks, such as operating heavy machinery, because impairment of mental alertness and physical coordination resulting from the use of cannabis or cannabinoids may decrease their ability to perform such tasks'.[29]

There is no practical way of determining the way in which any user of cannabis, medicinal or otherwise, will metabolise the drug. In the absence of more direct research, THC must be presumed to be as impairing and potentially dangerous to prescribed users as those using it for recreational purposes.[30]

The Victoria Working Group considered the little available evidence specifically regarding the effect of medicinal cannabis on a person's ability to drive safely. The Victorian Institute of Forensic Medicine, in its evidence, reported that THC formulations (both THC only and CBD/THC together) in medicinal cannabis can impair driving, and that the impairment effects are 'significant' within two hours of consumption.[31] The report pointed to findings from the few studies performed, which have demonstrated 'clear impairment in safe driving as evidenced by increased weaving', which is a well-regarded measure of safe driving.[32] Drivers in an experimental setting taking a dose commensurate with a therapeutic level THC dose demonstrated impaired driving performance.[33]

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[27] Report of the Medicinal Cannabis and Safe Driving Working Group, p.9.
[28] Medicines and driving (healthdirect.gov.au).
[29] For patients - Cannabis medicines (nsw.gov.au)
[30] Blunted highs: Pharmacodynamic and behavioral models of cannabis tolerance - ScienceDirect
[31] MUARC, Road Safety Aspects of Medical Cannabis, Rapid Review – Evidence on the crash risk associated with THC (Cannabis) and implications for users of medicinal cannabis, 26 February 2021, p.5.
[32] Report of the Medicinal Cannabis and Safe Driving Working Group, p. 5.
[33] Report of the Medicinal Cannabis and Safe Driving Working Group, p. 5.

Roadside Detection by MDT

CBD is a non-psychoactive constituent in cannabis and is responsible for the therapeutic qualities including anti-nausea and pain relief in medicinal cannabis. CBD-only medicines would not be detected by roadside drug testing and patients taking CBD-only medicines can lawfully drive, as long as they are not impaired.

Research indicates that THC levels spike quickly after consumption, followed by a fast decline typically within a 2-8 hour period.[34] However, depending on the method of administration, THC levels may take significantly longer to dissipate.[35] Importantly, the 'quick metabolism of THC in saliva means that saliva detection [via MDT] is indicative of recent consumption that is likely to be associated with a level of impairment'.[36]

For drivers consuming products containing high levels of THC, the likelihood of testing positive to a roadside drug test is greater than for patients taking products containing lower levels. The Victoria Working Group states that driving immediately after taking medicinal cannabis with THC, taking a product containing higher levels of THC or also consuming recreational cannabis could mean that the driver 'may have accumulated sufficient THC in their saliva to trigger a positive roadside drug test.'[37]

[34] Guidance for the use of medicinal cannabis in Australia: Overview | Therapeutic Goods Administration (TGA)
[35] Guidance for the use of medicinal cannabis in Australia: Overview | Therapeutic Goods Administration (TGA)
[36] Report of the Medicinal Cannabis and Safe Driving Working Group, p. 7.
[37] Report of the Medicinal Cannabis and Safe Driving Working Group, p. 8

The Medicinal Cannabis Bill: Legal Considerations

Legislation Review Committee

The NSW Legislation Review Committee examined the Medicinal Cannabis Bill and noted that it is not clear on the issue of who bears the onus in proving THC was obtained and administered in accordance with the relevant law. It is likely that the intention is for the exception to act as a defence, which means the onus of proving the THC was used in accordance with law rests on the defendant rather than the prosecution. However, the exclusion provision in the Medicinal Cannabis Bill states that offences 'do not apply' under certain circumstances, and it could be that that this provision would therefore work as an exemption, rather than a defence. The difficulties with this approach are outlined in the section below 'testing and resourcing concerns.'

The Committee recommended greater clarity in drafting 'so that all parties are aware of their rights and obligations'.[38]

Misuse and supplementation – testing and resourcing concerns

The Medicinal Cannabis Bill proposes that the presence offence would not apply if THC in the person's system was 'obtained and administered' in accordance with relevant law. There would be significant challenges with operationalising this exemption - including obtaining evidence that THC detected in the system of a driver that uses medicinal cannabis was 'obtained' through prescription, and 'administered' as prescribed by a doctor. There is no reliable way to distinguish whether the source of THC is illicit or prescribed as THC is the same substance in both illicit cannabis and medicinal cannabis products. Moreover, medicinal cannabis products can contain from 5 to 20mg of THC: there is no standard dose.[39]

Additionally, drug concentration is not a consideration in oral fluid samples. Oral fluid testing is the primary way that offences of driving with the presence of an illicit drug, including THC, are detected in NSW. To reliably determine the concentration of THC, a blood sample would have to be taken from any driver who uses medicinal cannabis and be reviewed by an expert. Even with the concentration level, current analytical techniques are unable to determine the source of the drug or whether the THC was prescribed.

However, the Medicinal Cannabis Bill does not include powers for blood and urine sampling, which cannot be undertaken by members of the NSW Police Force, or roadside.[40] A person seeking to rely on any exemption would need to be taken to a hospital or other prescribed place for samples to be taken by an authorised sample taker.

Taking blood and urine samples, in order to help assess whether a person has properly obtained and administered THC, would be an invasive and time consuming procedure for a driver and resource intensive for the NSW Police Force which is responsible for undertaking roadside operations, prosecutions or expert pharmacology reviews, NSW Health in conducting

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[38] Parliament of NSW, Legislation Review Committee*, Legislation Review Digest*, No.38/57 – 23 November 2021, p.38.
[39] Victorian Institute of Forensic Medicine, Medicinal Cannabis and Driving, Report of the Medicinal Cannabis and Safe Driving Working Group, Appendix F, p.4.
[40] *Road Transport Act 2013* (NSW), sch 3.

forensic analysis and/or blood sampling as well as the NSW Courts in listing and hearing an increased numbers of contested and complex matters.

These changes would also undo the benefits of speedy, inexpensive and non-invasive MDT at the roadside and could impact the ability to deliver the NSW Government's committed 200,000 mobile drug tests per year, which serve to deter drug driving, and would undermine the deterrent effect of the program.

The Victoria Working Group noted that a special scheme applying to medicinal cannabis patients could weaken the mass-screening, general deterrence drug-driving regime in Victoria. Due to similarities in our deterrence model and drug testing programs, the same risk would apply to NSW.[41] Such a scheme could make it difficult to communicate why medicinal cannabis patients could drive, but not recreational users of cannabis (including recreation users who consume cannabis products for medicinal purposes).[42]

If a medical exemption operated at the roadside without any actual verification that the driver had taken the medicine as prescribed, there is a risk that drivers may have supplemented their medicinal cannabis prescription with non-prescribed use. This would, again, make it extremely difficult for law enforcement to determine whether the THC was 'obtained and administered' in accordance with relevant law, and would also increase crash risk.[43] This approach also assumes that taking THC as prescribed means that the patient is not impaired, which is not necessarily the case.

The National Drug Strategy Household Survey 2019 found that only 3.9 per cent of those who reported using cannabis for medical purposes obtained it by prescription.[44] In other words, many cannabis products ostensibly used for medicinal purposes are not prescribed by medical practitioners, nor are they approved by the TGA.

Savings, transitional and other provisions – retrospectivity concerns

The Medicinal Cannabis Bill includes a savings and transitional provision that means the new exemption provision would apply to 'the presence of [THC] … before the commencement of that subsection'. The intent and scope of this is unclear, but as it is worded it would operate retrospectively to nullify any 'presence' offence committed by a person who had THC present that could be attributed to medicinal cannabis use since the offence was created. The implications of this have not been scoped in terms of previous convictions, penalties, licence disqualification or potential claims against the Government and could have a significant and unintended impacts.

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[41] Report of the Medicinal Cannabis and Safe Driving Working Group, p. 21.
[42] Medicinal cannabis and driving: Issues Paper, p. 12.
[43] Perkins, Brophy, McGregor et al (2021), 'Medicinal cannabis and driving: the intersection of health and road safety policy', *Int J Drug Policy*, 97:103307.
[44] National Drug Strategy Household Survey 2019 (aihw.gov.au), p.48.

Additional concerns

Medicinal cannabis is unlike other prescription drugs

All drivers have a responsibility to ensure they are fit to drive when taking prescribed medicines, and prescribed drugs include warnings about possible side effects including drowsiness and recommendations not to drive or operate machinery which is supplemented by advice from doctors and pharmacists.

Some advocates for a medicinal cannabis exemption from drug-driving offences equate medicinal cannabis products with other prescription drugs which may cause impairment. However, the Victoria Working Group heard compelling arguments for treating medicinal cannabis as unique among prescription drugs. These include:

- THC, which has been reported to be used recreationally by 12 per cent of Victorians, is detected in autopsies of road deaths to a greater extent than other prescription drugs; and
- THC is used recreationally by a larger number of Victorians in comparison to other recreational drugs and other prescription drugs used recreationally, which likely explains its higher rate of involvement in road crashes.[45]

The figures cited for Victoria are similar for NSW: 11.4 per cent of people in NSW aged over 18 used cannabis illegally between 2001 and 2019 and it is the most widely used recreational drug in the State.[46] As Perkins, et al. wrote, 'the widespread availability of illicit cannabis creates a somewhat different risk profile compared with other prescription medications.'[47]

An exemption would be inconsistent with other jurisdictions

NSW's zero tolerance approach to driving with an illicit drug present is largely consistent across Australia. This is in line with the view of the National Drug Driving Working Group, which works towards a national best practice model of roadside drug testing and deterrence, and which examined the issue of medications and drug driving in 2018. It recommended no alteration to current legislative arrangements.[48]

There are currently similar Private Members Bills that have been introduced to provide an exemption for medicinal cannabis users in South Australia and Victoria. The Victorian Bill was introduced into the Legislative Council in 2019. Following its introduction, the Victoria Working Group was established to consider approaches to managing medicinal cannabis and safe driving. The working group considered a range of options but did not make any recommendations. The Bill has not progressed to the lower house. The South Australian Bill was introduced into the Legislative Council in February 2021 and has not progressed.

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[45] Report of the Medicinal Cannabis and Safe Driving Working Group, p.11.
[46] Alcohol, tobacco & other drugs in Australia, Illicit drug use - Australian Institute of Health and Welfare (aihw.gov.au)
[47] Perkins, Brophy, McGregor et al (2021), 'Medicinal cannabis and driving: the intersection of health and road safety policy', *Int J Drug Policy*, 97:103307.
[48] Australia's second generational approach to roadside drug testing (roadsafety.gov.au)

The ACT decriminalised recreational cannabis in January 2020 to allow adults to possess a small amount of cannabis for personal use. The ACT has not amended its road transport law to allow a legislative dispensation or a defence for the use of medicinal cannabis. Accordingly, it is still an offence to drive with THC present.

There are a number of other countries that provide a medical defence for testing positive to THC to protect medicinal cannabis patients, and argued that the state's driving laws should be similarly changed. While some international jurisdictions, including the United Kingdom, New Zealand, Norway, Germany and Ireland, have allowed tightly controlled prescription-only access pathways for medicinal cannabis, and exemptions from prosecution for driving with some levels of THC in the blood, there are important qualifications.[49]

Firstly, the countries that have a defence for medicinal cannabis require blood analysis to confirm that the driver is not impaired and was using the drug as directed, and impairment levels are not universally accepted in the scientific literature.[50] Additionally, none of these jurisdictions has large scale roadside drug screening and testing programs which make comparisons difficult. Australia is the only country with a widespread random MDT program for detection of THC.[51]

The medical defence for the presence of morphine

Morphine can be present in a driver's blood or urine from a range of sources. It can be present as a by-product of illicit heroin use or from prescribed or illegally used pharmaceuticals. It is also present in cases where medical practitioners administer emergency morphine. For example, a driver injured and hospitalised following a crash may be administered morphine following the crash, prior to having a sample taken and tested for drugs.

Morphine is not one of the drugs tested for under the roadside MDT program and since at least 2018, there have been no offences for driving (or supervising a novice driver) with morphine present in blood or urine.

A medical defence for THC is not comparable in scale, from both a roadside enforcement and trauma perspective, to a defence for morphine presence. Each year, thousands of people are found to have THC in their system, and THC continues to feature significantly in fatal crashes on NSW roads. Even if only a small proportion chose to use the proposed defence at Court, it would have a significant impact on police, health and court resources, in addition to the outlined safety risks.

[49] Report of the Medicinal Cannabis and Safe Driving Working Group, p.12.
[50] Report of the Medicinal Cannabis and Safe Driving Working Group, p.19.
[51] Arkell, McCartney, & McGregor (2021) 'Medical cannabis and driving', *AJGP*, 50(6), 357–362

Possible insurance implications

If the Bill was passed, there may be consequential impacts to the Compulsory Third-Party (CTP) insurance scheme. This includes consideration of insurer liability determination for a person involved in a motor accident who tested positive to THC however had a medical exemption.

Under the current CTP Insurance Scheme, all at-fault drivers are entitled to 26 weeks of statutory benefits. There is no limit to reasonable and necessary treatment and care that can be received during the first 26 weeks. If the at-fault driver is an earner, they can also receive weekly income support for up to 26 weeks if they are unable to work during that time. However, under section 3.37 of the *Motor Accident Injuries Act 2017* (2017 Act), if a person is in a motor vehicle accident and they committed a serious driving offence related to that accident they are ineligible for statutory benefits. A serious driving offence is defined at section 3.37(5) of the 2017 Act and includes an offence that is a major offence under the *Road Transport Act 2013* which includes (but not limited to) an offence against section 111.

Accordingly, if the Bill is passed, this may enable previously ineligible at-fault drivers (due to their serious driving offence) to access up to 26 weeks of statutory benefits.

Conclusion

The NSW Government remains opposed to any change in the treatment of medicinal cannabis containing THC under its drug-driving laws. The evidence of crash risk and increased fatalities where THC was a factor, remains regardless of whether the drug was used under prescription or illicitly.

There is compelling evidence regarding the impairing effects of THC and elevated crash risk associated with its usage and some evidence that impairment is associated with medicinal cannabis products. Moreover, the inability to distinguish between illicit use and medicinal use at the point of testing would make the operation of any exemption extremely challenging and resource-intensive.

High-visibility enforcement programs are designed to reduce the significant negative impacts of drug-driving on community safety. As indicated, Australia's pioneering approach to drug-driving is world leading, effective and efficient. The NSW Government intends to maintain the current mass screening MDT program that underpins general deterrence to drug-driving. The Medicinal Cannabis Bill, with its selective exemption, would complicate and potentially jeopardise the effective operation of that program and the messages it sends.