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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

ROAD TRANSPORT (ALCOHOL AND DRUGS) AMENDMENT BILL 2013

EXPLANATORY STATEMENT

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Overview of the Bill

The Road Transport (Alcohol and Drugs) Amendment Bill 2013 (the Bill) makes a number of amendments to the roadside alcohol and drug testing scheme, as established in the *Road Transport (Alcohol and Drugs) Act 1977* (the Act), to improve the effectiveness of the schemes, and in turn improve road safety for all road users in the ACT.

The Bill implements four main changes that will improve ACT Policing's ability to enforce the road transport legislation relating to roadside alcohol and blood testing. The amendments and their purposes are described below.

The climate change impacts of these proposals have been considered and no impacts have been identified.

1 Restricting the ability of a driver to rely on the defence of honest and reasonable mistake of fact for an offence of driving under the influence of a prescribed drug when the driver claims he or she believed they were taking another prohibited substance.

A driver commits an offence under section 20 of the Act if they drive with a prescribed drug in their oral fluid or blood (as determined by the results of analysis of samples of the driver's oral fluid or blood). Prescribed drugs are: methylamphetamine (commonly known as ice, speed or crystal meth), cannabis, and ecstasy.

The offence in section 20 is a strict liability offence, which means that no criminal intent or fault element is required to be proven. As this offence is a strict liability offence, drivers are able to rely on section 36 of the *Criminal Code 2002*, which provides that a person is not criminally responsible for a strict liability offence if the person was under a mistaken but reasonable belief about the facts, and, had the facts existed as believed, the conduct would not have been an offence.

This amendment would prevent drivers from seeking to rely on this defence where they knowingly took a prohibited substance which they thought was not a prescribed drug which in fact turned out to be a prescribed drug. The defence in section 36 of the *Criminal Code 2002* would still be available to a driver in other circumstances (e.g. they had a mistaken but reasonable belief that they were not consuming an illicit drug at all, but rather a prescription drug or some other over-the-counter medication such as aspirin).

It is possible that this amendment may engage human rights, particularly the right to a fair trial and rights in criminal proceedings. Any limitation on these rights is reasonable and proportionate, noting the public interest benefits from addressing the risks to community safety associated with driving whilst alcohol or drug affected, and the need to protect the human rights of other road users and the broader community.

There is clear evidence that the use of illicit, non-prescribed, drugs can cause drivers to become impaired and reduce their ability to safely operate a motor vehicle. Drivers who operate a vehicle whilst knowingly under the influence of a prohibited substance potentially pose a greater safety risk than drivers who have consumed a legal drug. Illicit drug users

consume these drugs specifically for their mood/perception altering effects, which directly impacts on their driving skills. While certain over-the-counter or prescription drugs can also cause driver impairment, those drugs are required to display warnings to inform users of the risks associated with driving whilst under the influence of that drug. Illicit drugs, by their very nature, are not subject to the same requirements as legal drugs and so users are not made aware of the impact of the drug on their ability to operate a vehicle safely. In addition, the strength and potency of prohibited substances varies and is impossible for a user to determine prior to taking the drug (unlike legal medication, which is required to clearly display this information), making it more likely that a driver may consume a higher concentration than they expected. Finally, the chance of a person taking a different illicit drug to the one that they believed that they were taking is far higher than in the case of legal drugs because of the lack of regulation, packaging and warning labels.

2 Amend the requirement in section 47 of the Act for police to contact a doctor or authorised nurse practitioner nominated by a person arrested for an offence against that Act.

Section 47 of the Act places an obligation on a police officer who has arrested a person for an offence under the Act to advise that person that they have the right to request a medical examination by a doctor or nurse practitioner of their choice. Should the arrested person exercise that right, the police officer is obliged to contact a doctor or nurse practitioner and arrange the medical examination.

Section 47 was originally introduced to provide drivers arrested for an offence under the Act with access to their own blood test, or medical opinion, that they could use to defend a charge that they were driving with a prescribed concentration of alcohol in the person's blood or breath or were driving whilst under the influence of alcohol. In practice, although few drivers exercise this right, noting increased community and judicial confidence in the accuracy of police alcohol testing facilities, when drivers choose to exercise their right, it imposes an unreasonable administrative burden on police. This burden is compounded given that the majority of people arrested for an offence under this Act are arrested outside of standard business hours, at a time when most nominated medical or nurse practitioners are not readily contactable.

This amendment would not remove a person's right to seek an independent medical examination, but instead removes the requirement for police to locate and contact the nominated medical practitioner and arrange the examination. The obligation on police is to provide the arrested person with access to a phone to contact their preferred medical practitioner to arrange an examination in the same way that access to a phone is given to arrested people to enable them to seek legal representation. Alternatively the arrested person may ask the police officer to contact the police-contracted on-call Forensic Medical Officer to undertake the examination. In either case the cost of the examination would be borne by the arrested driver.

There is also no change to the obligation on the arresting police officer to advise the arrested person of their right to receive a medical examination.

There are no human right implications from this amendment.

Create a power for police officers to direct drivers to remain at the scene where they were originally pulled over by police for the purpose of an alcohol or drug screening test where a screening device is not immediately available or not in working order.

Currently police officers have no legislative power to require that a driver who they reasonably suspect of driving under the influence of drugs or alcohol must remain for a screening test if a screening device is not immediately available at the scene, or a device is not in working order. Delays can occur if the screening device malfunctions, or a driver is stopped for some other purpose but the police officer subsequently suspects the driver has driven under the influence of drugs or alcohol but they do not have a screening device in their vehicle.

Although there is no express legislative power to direct a driver to remain for such a test, there are a small number of judicial precedents which have held that a power to direct a driver to stop to allow a screening test to be conducted necessarily includes an obligation that the driver remain stationary for such reasonable time as may be necessary to allow the police officer to undertake the test. In the 2012 ACT Magistrates Court decision of *Hackett v Gault* (2011/9222) the defendant argued that a police officer had no power to compel a driver to remain whilst a replacement screening device was obtained. In that case the batteries failed on the screening device carried by the police officer who originally stopped the defendant's vehicle, and a replacement unit was obtained from the nearest station, causing the defendant to be delayed for approximately 10 minutes. Magistrate Campbell did not support the Defendant's argument, finding:

> *"the duty of a driver to stop when directed to by a police officer must include a duty or obligation to remain stationary for such reasonable time as may be necessary to enable the traffic officer to carry out the breath test. Otherwise one would have the absurd situation where, as an officer returns to his motor vehicle to collect his breath screening device, the driver could drive away and the officer would have no recourse. Implicit in the provision is that there has to be some power to detain or require the driver to remain at the roadside to enable the purpose of the section to be achieved....[S]ome delay must be taken to be an anticipated and acceptable imposition on the liberty of drivers bearing in mind the statutory object of the legislation. The scheme would otherwise be rendered unworkable.*
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> *The direction to the defendant ... to remain pending the arrival of a machine resulted in his detention for a short period (which from the outset was going to be of limited duration). This is not an unreasonable or disproportionate limitation on the defendant's right to liberty particularly when measured against the public interest in ensuring that people do not drive when affected by alcohol."*.

The amendment creates a legislative power to allow a police officer to temporarily detain a driver to undertake an alcohol or drug screening test, by directing them to remain at the place where the alcohol screening test is being carried out for the time (not exceeding 30 minutes) reasonably necessary for the test to be completed in accordance with the police officer's directions. 30 minutes has been identified as the preferred maximum period, as that would allow a drug screening device to be sourced from the Traffic Operations Centre in Belconnen (where all drug screening units are stored) and delivered to any part of metropolitan Canberra where the driver has been directed to remain.

It is possible that human rights may be engaged by this amendment, particularly the right to security of the person and freedom from arbitrary detention and the right to freedom of movement. The right to personal liberty requires that persons not be subject to arrest and detention except as provided for by law, and provided that the law itself and the manner of its execution are not arbitrary. Requiring the driver to remain at the location for a reasonable period would not be an arbitrary detention as the power would only be exercised where the police officer has a reasonable belief suspicion that the driver is committing a drink or drug driving offence.

The right to freedom of movement may be subject to restrictions as provided by law which are necessary to protect public order, public health or the rights and freedoms of others. Any engagement of the right to freedom of movement by this amendment would be justifiable, noting the benefits to other road users and the wider community from reducing the incidence of drivers under the influence of alcohol and/or drugs on ACT roads. The penalty is proportionate, and consistent with the penalties applying for refusing to follow a direction from a police officer found in other sections of the road transport legislation.

Creating an offence of refusing to undertake a screening test for alcohol or drugs.

Currently, if a driver refuses to undertake a roadside screening test for alcohol or drugs, the only option available to a police officer is to take the person into custody for a breath or oral fluid analysis. It is only when a driver refuses to undertake the analysis that they can be charged with the offence of refusing a breath or oral fluid analysis.

In practice, drivers are unlikely to agree to an analysis if they have already refused to undergo the initial screening. Some drivers readily admit that, for cultural or professional reasons, they would prefer to have a conviction for the offence of refusing a police request as opposed to having a conviction for a drink/drug driving offence. In other cases drivers are merely seeking to delay any test in the belief that they will no longer be over the limit when the test is conducted. Given that in almost all cases, and irrespective of the reason why the driver is refusing to undertake the screening test, the driver will refuse to provide the sample for analysis, the formal process of taking the person into custody and directing them to undertake the breath or oral fluid analysis uses up police time and resources that could be better targeted at other road safety and enforcement activities.

This amendment creates a new offence of refusing to undergo an alcohol or drug screening test screening. The offence would apply to the driver or a driver trainer of a motor vehicle on a road or road related area who has been required, in accordance with the Act, to undergo an alcohol or drug screening test. The offence would be committed if the person fails to undergo the screening test in accordance with the reasonable directions of the police officer who made the requirement.

It would be a defence to a prosecution for this offence if the defendant proves that the failure to undergo the test was based on medical grounds.

The maximum penalty for the offence is 30 penalty units. This is the same penalty as for the similar existing offences of refusing to provide a breath sample for analysis or refusing to provide oral fluid sample (sections 22 and 22A of the Act). These penalties are aligned with the penalty for a high-range drink driving offence to ensure that high-range drink drivers are not advantaged by refusing to undertake the test.

The offence is a strict liability offence. Strict liability offences may be seen as engaging or limiting the right in section 22 (1) of the *Human Rights Act 2004* – the presumption of innocence. While the inclusion of strict liability limits the range of defences that may be available for a person accused of this offence, a number of defences including mistake of fact remain open to the accused, depending on the particular facts of each case. The use of strict liability in this offence is consistent with the approach taken to similar offences in the Act. It is a reasonable limitation of rights on the basis that driving under the influence of alcohol and/or drugs has long been recognised as a major road safety risk, and remains a major focus of government road safety strategies. Any limitation of a driver's right arising from the new offence must be balanced by the benefits to all road users from ensuring that drivers affected by drugs and alcohol are detected and face appropriate sanctions.

CLAUSE NOTES

Clause 1 Name of Act

This Act is the *Road Transport (Alcohol and Drugs) Amendment Act 2013.*

Clause 2 Commencement

This clause states that the Act will commence on the day after its notification day.

Clause 3 Legislation amended

This clause states that the Act will amend the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 4 Offences against Act—application of Criminal Code etc
Section 4, note 1, dot point 4

This clause amends note 1 in section 4 of the principal Act, to update the list of sections to which the Criminal Code applies. This amendment is consequential on the amendments to section 22B (Failing to stay for a screening test) and the creation of new section 22C (Refusing to undergo screening test) made by clause 15 below.

Clauses 5 to 12 inclusive

These clauses provide that a person directed by a police officer to undergo an alcohol or drug screening test must remain at the place where the screening test is being carried out for the time (not exceeding 30 minutes) reasonably necessary for the test to be completed.

The amendment will allow a police officer to direct a driver to remain at that location whilst an alcohol or drug screening device is located. A driver cannot be detained for more 30 minutes, which is the maximum period of time that would allow a drug screening device to be sourced and delivered to any part of metropolitan Canberra where the driver has been directed to remain.

A person commits an offence under new section 22B if the person fails to comply with the direction of a police officer under these provisions. The offence is a low-level summary offence, with a maximum penalty of 20 penalty units. This is consistent with the penalty for offences of refusing a direction given by a police officer under other road transport legislation.

Clause 13 Prescribed drug in or blood—driver or driver trainer
New section 20 (2A)

This clause inserts a new section 20 (2A), which provides that a driver charged with driving whilst they have a prescribed drug in their oral fluid or blood (an offence against section 20) cannot rely on the defence of honest and reasonable mistake of fact when the driver claims he or she believed they were taking another controlled drug that was not also a prescribed drug. Prescribed drugs are ice, speed or crystal meth, cannabis and ecstasy.

The offence in section 20 is a strict liability offence, which means that no criminal intent or fault element is required to be proven. As this offence is a strict liability offence, drivers are able to rely on section 36 of the *Criminal Code 2002*, which provides that a person is not criminally responsible for a strict liability offence if the person was under a mistaken but reasonable belief about the facts, and, had the facts existed as believed, the conduct would not have been an offence.

This amendment would prevent drivers from seeking to rely on this defence where they knowingly took a controlled drug which they thought was not a prescribed drug (such as cocaine) which in fact turned out to be a prescribed drug. The defence in section 36 of the *Criminal Code 2002* would still be available to a driver in other circumstances (e.g. they had a mistaken but reasonable belief that they were not consuming a controlled drug at all, but rather a prescription drug or some other over-the-counter medication such as aspirin).

Clause 14 Section 20 (4), new definition of controlled drug

This clause inserts a new definition for section 20 of *controlled drug*. The definition cross-references to the definition of controlled drug in section 600 of the *Criminal Code 2002*. That section defines controlled drug as 'a substance prescribed by regulation as a controlled drug, but does not include a growing plant'. The *Criminal Code Regulation 2005* prescribes a substance in schedule 1 of that Regulation as a controlled drug.

Clause 15 Section 22B

This clause replaces existing section 22B with new sections 22B and 22C.

Existing section 22B provides that a person commits an offence if the person is required to undergo a drug screening test and fails to remain until the test is completed. New section 22B retains the offence for failing to stay for a drug screening test, but extends it to also include failing to stay for an alcohol screening test. It provides that a person commits an offence if a police officer requires them to undergo an alcohol or drug screening test under the Act and the person fails to remain at the place where the screening test is being carried out until the test is completed.

A person cannot be directed to remain at the location for more than 30 minutes, which is a reasonable period of time to allow a drug screening device to be sourced and delivered to where the driver has been directed to remain.

An offence against the new section 22B is a strict liability offence, with a maximum penalty of 20 penalty units. This is the same penalty that applies under the existing section 22B. This is also consistent with the penalty for offences of refusing a direction given by a police officer under other road transport legislation.

New section 22C creates a new offence of refusing to undergo an alcohol or drug screening test. It provides that a person commits an offence if a police officer requires the person to undergo an alcohol or drug screening test under the Act and the person fails to undergo the screening test in accordance with the reasonable directions of the police officer.

An offence against the new section 22C is a strict liability offence, with a maximum penalty of 30 penalty units. This penalty is the same as for the existing offences of refusing to

provide a breath sample for analysis or refusing to provide oral fluid sample (sections 22 and 22A of the Act), which is aligned with the penalty for a high-range drink driving offence to ensure that high-range drink drivers are not advantaged by refusing to undertake the test.

It is a defence to a prosecution for this offence if the defendant proves that the failure was based on medical grounds.

Clause 16 Driver etc intoxicated
Section 24A (2) and (3)

This clause omits existing sections 24A (2) and (3). These sections provide that a person arrested for an offence under section 24A (driving whilst under the influence of alcohol) is entitled to be examined by a doctor or authorised nurse practitioner if the person asks to be examined. If a request is made, the person making the arrest must provide reasonable facilities for the examination.

These sections are no longer necessary, given section 47 of the Act grants a right of all persons arrested under the Act (not just section 24A) to be examined by a doctor or medical practitioner at their request.

Clause 17 Section 27 heading

This is a consequential amendment to the heading of section 27, following the amendment to that section made by clause 18 below.

Clause 18 Section 27 (a)

This clause adds the new section 22C (Refusing to undergo screening test) to the list of offences for which the court may, if it considers that in all the circumstances and having regard to the antecedents of the person that it is appropriate to do so, sentence the person to a term of imprisonment to either 6 months (for a first offender) or 12 months (for a repeat offender). This term of imprisonment is in addition to any pecuniary penalty they court may impose.

The addition of new section 22C to the list of offences for which a court may order a term of imprisonment is consistent with the other offences for which a court can currently order a term of imprisonment. These include section 22 (Refusing to provide a breath sample), section 22A (Refusing to provide oral fluid sample) and section 23 (Refusing blood test etc).

The inclusion of new section 22C in the list of offences for which a court may order a term of imprisonment is necessary to prevent a driver who would otherwise be guilty of an offence under section 24 (Driving under the influence of intoxicating liquor or drug) of the Act, or another section of the Act that prescribes a term of imprisonment, from refusing to undergo the screening test to avoid a possible term of imprisonment.

Clause 19 Section 47

Section 47 currently places an obligation on a police officer who has arrested a person for an offence under the Act to advise that person that they have the right to request a medical examination by a doctor or nurse practitioner of their choice. Should the arrested person exercise that right, the police officer is obliged to contact a doctor or nurse practitioner and arrange the medical examination.

This clause replaces existing section 47 with a new section 47. New section 47 retains the obligation on the arresting police officer to advise the arrested person of their right to receive a medical examination. New section 47 removes the requirement for police to locate and contact the nominated medical practitioner and arrange the examination. The obligation on police would now be to provide the arrested person with access to a phone to contact their preferred medical practitioner to arrange an examination in the same way that access to a phone is given to arrested people to enable them to seek legal representation. Alternatively the arrested person may ask the police officer to contact the police-contracted on-call Forensic Medical Officer to undertake the examination. In either case the cost of the examination would be borne by the arrested driver.

Clause 20 Dictionary, definition of *disqualifying offence*, new paragraph (da)

This clause amends the definition of disqualifying offence to add the new offence in section 22C (Refusing to undergo screening test) to the list of offences for which the automatic driver licence disqualification provisions of the Act would apply. These provisions provide that if a court convicts an offender of a disqualifying offence, the person is automatically disqualified from holding or obtaining a driver licence for a certain period.

Making the new offence of refusing to undergo a screening test a disqualifying offence ensures that offenders convicted of this offence receive a similar sanction to drivers who are convicted of similar 'refuse to provide' offences (such as sections 22 (Refusing to provide breath sample), 22A (Refusing to provide oral fluid sample) and 23 (Refusing blood test etc) – all of which are disqualifying offences). Including the new offence in the definition of disqualifying offence ensures that the penalty for refusing to undergo a screening test is aligned with the penalty for a high-range drink driving offence to ensure that high-range drink drivers are not advantaged by refusing to undertake a screening test.