



Faculty of Business, Law and Arts

**Law Reform Commission of NSW  
Review of Serious Road Crime  
Preliminary Submission**

**The Submitter**

I am Dean of Law at Southern Cross University. Prior to that I was a Magistrate for 22 years. I am also the lead of Drive Change<sup>1</sup>, an organization formed to lobby for change to the drug driving laws for prescribed medicinal cannabis patients (PMCP).

**Scope of Review**

I note that the Terms of Reference<sup>2</sup> refer to serious road crime pursuant to the *Crimes Act 1900 (NSW)*, and whether they remain “fit for purpose”. Further, the Terms of Reference at point five enable the Commission to consider “any other matter the Commission considers relevant”.

In calling for submissions, the Commission in its Background Note<sup>3</sup> describes serious offences under the *Crimes Act* and also lists some offences under the *Road Transport Act 2013 (NSW)*. Included in this is s111, which is the offence of driving with the presence of a prescribed illicit drug in a person’s oral fluid.

**Summary of Submission – s 111**

In my respectful submission:

1. This offence is not fit for purpose with respect to PMCP who are lawfully taking medication in accordance with a prescription – Terms of Reference 1.
2. The penalties are not appropriate for PMCP – Terms of Reference 2, 3 and 5.

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<sup>1</sup> <https://www.drivechangemc.org.au/>

<sup>2</sup> [Serious road crime-ToR.PDF \(nsw.gov.au\)](#)

<sup>3</sup> [Background note: What are "serious road crime" offences? \(nsw.gov.au\)](#)

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## Background

- At least 600,000 Australians are using medicinal cannabis with more than 300,000 prescriptions issued since 2020 covering 2.7% of the population<sup>4</sup>.
- There is no evidence that there has been a single road death or trauma caused by a person driving with prescribed medicinal cannabis in their saliva or blood in Australia or anywhere in the world.
- There is no evidence of an increase in road deaths or trauma in Tasmania, where there is a defence for medicinal cannabis use – s6A(2) *Road Safety (Alcohol and Drugs) Act 1970, TAS*
- Australia is the only country with a widespread random mobile drug testing program for detection of THC.<sup>5</sup> Other jurisdictions, including UK, Norway, Germany, Ireland, and New Zealand apply exemptions for patients, without any apparent problems<sup>6</sup>.
- The consensus of research is that cannabis is unlikely to impair driving after four or five hours yet it can be detected for days<sup>7</sup>.
- Other prescription drugs have a much greater impairment severity<sup>8</sup>. There is no other prescription medicine apart from THC where it is unlawful to drive with a detectable level – for example opioids, barbiturates, anti-anxiety and sedating antidepressant medications are not subject to detection offences.
- This provision was introduced to catch impaired drivers creating an increased risk on our roads, years before medicinal cannabis was legalized. The second reading speeches are all, universally, about impairment. The bill which introduced the amendment was the *Road Transport Legislation Amendment (Drug Testing) Bill of 2006*. It was moved in the Legislative Assembly by The Hon. Eric Roozendaal, the Minister for Roads who said on 18 October 2006 (my emphasis):

The bill allows police to randomly test drivers for the presence of three illicit drugs in oral fluid. These are speed, ecstasy and THC, the active ingredient in cannabis. These drugs are illegal, they are the most commonly used drugs in the community and they all *affect the skills and sound judgment* required for safe driving.

- Clearly, in 2006 cannabis was exclusively illicit, the technology was not nearly as advanced and road safety was the purpose. Certainly, it was not the aim of parliament that if you are a PMCP taking your dose daily in accordance with medical direction that you cannot ever lawfully drive.
- There is an existing defence for morphine in NSW – s111(5):  
It is a defence to a prosecution for an offence against subsection (3) if the defendant proves to the court's satisfaction that, at the time the defendant engaged in the conduct that is alleged to have contravened the subsection, the presence in the defendant's blood or urine of morphine was caused by the consumption of a substance for medicinal purposes.

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<sup>4</sup> <https://www.sydney.edu.au/news-opinion/news/2022/12/16/medical-cannabis-treating-population.html#:~:text=And%20there%20have%20been%20295%2C515.medical%20cannabis%20is%20substantially%20higher.>

<sup>5</sup> <https://www1.racgp.org.au/ajgp/2021/june/medical-cannabis-and-driving>

<sup>6</sup> <https://www.parliament.nsw.gov.au/lcdocs/submissions/78665/070%20Lambert%20Initiative%20for%20Cannabinoid%20Therapeutics.pdf>

<sup>7</sup> <https://www1.racgp.org.au/ajgp/2021/june/medical-cannabis-and-driving>

<sup>8</sup> <https://pubmed.ncbi.nlm.nih.gov/34107448/>

- Thousands of lawful medicinal cannabis users will be caught by these provisions every year, be criminalized and lose their license<sup>9</sup>.

### **Not Fit For Purpose**

The purpose of the current s111 are outlined in the Second Reading speeches. By virtue of changes in prescription laws, THC can no longer be accurately described as an illicit drug. The net of offending conduct has been extended unintentionally to include those lawfully using a governmentally and medically approved medicine. The law should change so that there is a defence for those detected with THC in their system if they can prove:

1. They were not driving “under the influence”, and
2. They were using exclusively in accordance with a lawfully obtained script in Australia.

The onus would be on the defendant on the balance of probabilities. This is the model in Tasmania. This is the model in NSW for morphine.

In accordance with standard prosecutorial rules, most cases would be withdrawn once representations were made by the defendant on the basis that there are no reasonable prospects of successfully prosecuting.

**Recommendation One: There be a defence akin to the current provisions in NSW for morphine, or identical to the Tasmanian provisions.**

### **Sentence**

The Commission in its table of offences which may be considered, failed to include disqualification periods in the ‘Maximum penalty’ column. In my respectful submission, that is unfortunate. As was pointed out by Howie J (for the full court) at 116 in the guideline judgment for High Range Drink Driving<sup>10</sup>:

License disqualification is such a significant matter and can have such a devastating effect upon a person’s ability to derive income and to function appropriately within the community that it is a matter which, in my view, must be taken into account by a court when determining what the consequences should be, both penal and otherwise, for a particular offence committed by a particular offender.

For many lawful medicinal cannabis patients fronting court, the loss of license is the real fear, especially for those from non-metropolitan areas<sup>11</sup>.

**Recommendation Two:**

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<sup>9</sup> [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2847/Report%20No.%2081%20-%20Road%20Transport%20Amendment%20\(Medicinal%20Cannabis-Exemptions%20from%20Offences\)%20Bill%202021.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2847/Report%20No.%2081%20-%20Road%20Transport%20Amendment%20(Medicinal%20Cannabis-Exemptions%20from%20Offences)%20Bill%202021.pdf) at 2.18 to 2.21 inclusive.

<sup>10</sup> *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303*

<sup>11</sup> [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2847/Report%20No.%2081%20-%20Road%20Transport%20Amendment%20\(Medicinal%20Cannabis-Exemptions%20from%20Offences\)%20Bill%202021.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2847/Report%20No.%2081%20-%20Road%20Transport%20Amendment%20(Medicinal%20Cannabis-Exemptions%20from%20Offences)%20Bill%202021.pdf) at pages 11 to 16.

**If the submission above relating to a defence is not adopted, in the alternative, there should be no disqualification period for those who have a prescription, and are using in accordance with that prescription.**

I thank the Commission for considering this submission.

A handwritten signature in black ink, appearing to read 'David Heilpern', with a long horizontal flourish extending to the right.

David Heilpern.

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Southern Cross University