

2014

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2014

EXPLANATORY STATEMENT

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ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2014

Overview of the Bill

The Road Transport Legislation Amendment Bill 2014 (the Bill):

- (a) introduces an aggravated version of the offence of furious, reckless or dangerous driving in section 7 of the *Road Transport (Safety and Traffic Management) Act 1999* (the Act); and
- (b) implements a consequential amendment arising from the passage of the Road Transport (Alcohol and Drugs) Amendment Bill 2013 to allow a police officer to issue an Immediate Suspension Notice when they charge a person with refusing to undertake a drug or alcohol screening test.

Aggravated version of the offence of furious, reckless or dangerous driving

The potential for conduct constituting furious, reckless or dangerous driving to have catastrophic consequences is high. Currently such dangerous conduct is only subject to significant sanction if the conduct results in grievous bodily harm or death (which would allow a more serious charge such as culpable driving to be used). This focus on outcomes, rather than the conduct itself, can result in dangerous conduct not being appropriately punished when – by luck alone – serious death or injury has not occurred.

The Bill addresses this by the introduction of aggravating factors for the offence of furious, reckless or dangerous driving in section 7 of the Act and higher maximum penalties applying when those aggravating factors are present.

The aggravating factors for the offence, introduced by this Bill, are:

- a) the person without reasonable excuse, failed to comply with a request or signal given by a police officer to stop the vehicle;
- b) the person was driving while intoxicated by alcohol and/or drugs;
- c) the person was driving at a speed that exceeded the speed limit by more than 30%;
- d) the person was driving in a way that put at risk the safety of a vulnerable road user;
- e) the person was driving with a person younger than 17 years old in the vehicle; or
- f) the person is a repeat offender.

The first three aggravating factors represent a greater risk to the general community than dangerous driving offences where those elements are not present. Dangerous driving while evading police represents a greater risk due to the common practice of such drivers to travel at high or unsafe speeds, whilst also driving erratically and disobeying traffic signals and lights. The increased risk posed by drivers driving whilst intoxicated has been clearly established, and is reflected in the varying penalties applied to drivers convicted of alcohol or drug driving offences depending on the level of intoxication of the driver. A similar risk is posed by those who drive at high speed, with penalties also determined by the degree that the speed limit has been exceeded by the driver. Repeat offending is an aggravating factor to discourage offenders from repeating their dangerous conduct.

The aggravating factor of driving with a person younger than 17 years old in the vehicle at the time when the offence was committed reflects that, unlike adult passengers, a child cannot consent to involvement in reckless driving. Furthermore, children are highly vulnerable to injury and the associated long-term consequences. They are also potentially impressionable and may be liable to come to regard the offending driving behaviour as normal, acceptable or even enjoyable, and perpetuate this in their own driving behaviour.

The aggravating factor of driving in a way that put at risk the safety of a vulnerable road user reflects the increased risk posed by dangerous driving behaviours to vulnerable road users. These road users (such as pedestrians, cyclists, riders of animals and motorcyclists) are particularly “vulnerable” in their interactions with other motor vehicles as they do not benefit from the level of crash protection which is provided by other vehicles. This vulnerability increases the likelihood that furious, reckless or dangerous driving will have catastrophic consequences.

The Bill provides that the maximum penalty for the offence of furious, reckless or dangerous driving where an aggravating factor is present is 200 penalty units, imprisonment for two years or both. The maximum penalty for the offence without an aggravating factor remains at 100 penalty units, imprisonment for one year or both. This doubling of the maximum penalty where an aggravating factor is present is consistent with the approach adopted in a number of other jurisdictions. The proposed penalty is not considered excessive or disproportionate. The ratio of 2 years imprisonment and/or 200 penalty units is also consistent with the ratio for maximum penalty units to imprisonment terms in the ACT Government’s Guide for Framing Offences.

The Bill also provides that where a person is convicted of furious, reckless or dangerous driving where an aggravating factor is present, their licence is automatically disqualified for at least 12 months.

It is possible that this amendment may engage human rights, particularly the right to liberty. Any limitation on these rights is reasonable and proportionate, noting the public interest benefits from addressing the risks to community safety associated with reckless, furious and dangerous driving where circumstances of aggravation are present, and the need to protect the human rights of other road users and the broader community. Section 28 of the *Human Rights Act 2004* provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28 (2) of the Human Rights Act provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

The nature of the right being limited

The Human Rights and Discrimination Commissioner has previously noted that aggravated offences may engage the right to liberty. The right to personal liberty requires that persons not be subject to arrest and detention except as provided for by law, and provided that neither the arrest nor the detention is arbitrary. The UN Human Rights Committee has made clear that an arrest or detention may be permissible under domestic law, but may nevertheless be arbitrary. The Committee has stated that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

The importance of the purpose of the limitation

The purpose of the limitation (improving road safety, and protecting the community from the increased dangers posed by furious, reckless or dangerous driving where the circumstances of aggravation are present) is considered to be of high importance.

The nature and extent of the limitation

The limitation is not extensive. It applies to drivers who have committed the existing offence of furious, reckless or dangerous driving in circumstances where aggravating factors are present. The maximum penalty for a person found guilty of the offence where one or more of the circumstances are present is double the maximum penalty that may be imposed by a court where those circumstances of aggravation are not present.

The relationship between the limitation and its purpose

The Bill seeks to target high-risk driving behaviour that has the potential to have catastrophic consequences. The introduction of an aggravated version of the offence is appropriate, and would:

- (a) potentially provide a greater deterrent to this type of behaviour for prospective or previously convicted offenders; and
- (b) provide a more appropriate recognition of the seriousness with which the community regards the offence and the consequences which should attach to conviction (particularly noting that all other jurisdictions already have aggravated factors for this offence that result in a potentially higher penalty for the offence).

It is not considered that the Bill necessarily limits the human rights of offenders, but establishes a higher penalty range once the offence of furious, reckless or dangerous driving has been established in the normal manner. The Crown must in the first place prove beyond reasonable doubt that the elements of the basic offence exist. Then the Crown must prove beyond reasonable doubt that there exist those facts which establish that the offence is “aggravated” in the way described in proposed section 7A. The amendments to the offence of furious, reckless or dangerous driving does not alter or impact on the presumption of innocence, but merely imposes higher penalties once an offence has been established.

The amendment does not impose a minimum penalty for the offence, but merely increases the maximum penalty that may be imposed. The court retains its discretion to impose a sentence it considers appropriate in the circumstances.

Less restrictive means reasonably available to achieve the purpose

It is not considered that there are any less restrictive means available to achieve the purpose of the amendment.

For these reasons it is considered that the any limitation arising from these amendments is reasonable and proportionate.

Power to issue an Immediate Suspension Notice for the offence of refusing to undertake an alcohol or drug screening test

The Bill also contains a consequential amendment related to the passage of the Road Transport (Alcohol and Drugs) Amendment Bill 2013. Among the changes made by that Bill is the creation of an offence of refusing to undertake an alcohol or drug screening test. The amendment included by clause 5 of this Bill gives a police officer the power to issue an Immediate Suspension Notice (ISN) to a driver who refuses to undertake an alcohol or drug screening test. An ISN suspends the driver's ability to drive for a maximum of 90 days, or until the matter is considered by a court.

Giving the police the power to issue an ISN to drivers who refuse a screening test will ensure that those drivers are not advantaged over drivers who undertake a screening test that discloses the presence of excessive alcohol or a prescribed drug in their system, and are issued with an ISN by the police officer. The power to issue an ISN in this situation is consistent with the existing powers of a police officer to issue an ISN where a driver refuses to undertake a blood or oral fluid analysis.

The clause amends the definition of 'immediate suspension offence' in section 61A of the *Road Transport (General) Act 1999* to include the new offence of refusing to undertake a screening test in section 22C of the *Road Transport (Alcohol and Drugs) Act 1977*. The human rights implications of the changes giving rise to this consequential amendment have been considered in the explanatory statement for the Road Transport (Alcohol and Drugs) Amendment Bill 2013. In relation to this specific amendment, it is considered that any engagement of a driver's human rights is a reasonable limitation that can be demonstrably justified in a free and democratic society, as provided for by section 28 of the *Human Rights Act 2004*.

The nature of the right being limited

The power of a police officer to issue an immediate suspension notice may engage rights in criminal proceedings (particularly the presumption of innocence) and the right to a fair trial.

The importance of the purpose of the limitation

The purpose of the amendment (promotion of road safety through prevention of drink or drug driving) is considered to be of high importance, given the known risks of death and injury associated with drink and drug impaired driving.

The nature and extent of the limitation

Any limitation to a person's right to a fair trial arising from this amendment is limited.

Any limitation to a person's right to a presumption of innocence is also limited. In the Supreme Court of British Columbia decision of *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639, the Court considered whether the power of a police officer to issue an immediate roadside prohibition that provides for an automatic 90-day licence suspension when a driver registers a "fail" (over 0.08 blood-alcohol) on a roadside screening device. In that case, the Court found that the power to issue the roadside prohibition did not constitute an offence, and so the right in the Canadian Charter of Rights and Freedoms that any person charged with an offence has the right to be presumed innocent was not engaged. Section 22 of the *Human Rights Act 2004* also is limited to a people

“charged with a criminal offence”. The power to issue a suspension notice is an administrative sanction, in that it does not depend upon on judicial determination of guilt. That determination is reserved for the hearing of the substantive charge, and the determination of the sentence to be applied if the accused is found guilty.

It should be noted that the any period of suspension under an immediate licence suspension is ‘discounted’ from the term of disqualification imposed upon conviction.

Further, a driver issued with an Immediate Suspension Notice may apply to the Magistrates Court for a stay of the notice.

The relationship between the limitation and its purpose

Immediate licence suspension addresses a road safety risk by removing a driver from the road immediately (rather than having the person continue to drive until the matter is dealt with by the court) and delivers an immediate consequence of drink or drug driving, or in this case, refusing to undertake an alcohol or drug screening test, to the offender.

The amendment ensures that a person is not advantaged by refusing to undertake an alcohol or drug screening test, as compared to those drivers who undertake a screening test that discloses the presence of excessive alcohol or a prescribed drug in their system, and are issued with an ISN by the police officer. The power to issue an ISN in this situation is consistent with the existing powers of a police officer to issue an ISN where a driver refuses to undertake a blood or oral fluid analysis.

Less restrictive means reasonably available to achieve the purpose

It is not considered that there are any less restrictive means available to achieve the purpose of the amendment.

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

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This clause specifies the name of the Bill, once enacted, as the *Road Transport Legislation Amendment Act 2014*.

Clause 2 Commencement

This clause provides that the amendments made by the Act, other than the amendment made by clause 5, will commence on the day after its notification day.

As the amendment made by clause 5 is consequential on amendments to be made by the Road Transport (Alcohol and Drugs) Amendment Bill 2013, clause 5 will commence on the later of the commencement of the substantive clauses of that Bill or the day after this Act's notification day.

Clause 3 Legislation amended

This clause states that the Act will amend the *Road Transport (Alcohol and Drugs) Act 1977*, *Road Transport (General) Act 1999*, the *Road Transport (Safety and Traffic Management) Act 1999* and the *Road Transport (Offences) Regulation 2005*.

Part 2 Road Transport (Alcohol and Drugs) Act 1977

Clause 4 Permitted use of samples Section 18B, new paragraph (d)

This clause provides that a sample of oral fluid, blood or any other body sample given or taken under the *Road Transport (Alcohol and Drugs) Act 1977* may be used in a proceeding for an the aggravated offence of furious, reckless or dangerous driving. This clause is related to new sections 7B (2) and (3), inserted by clause 10, which establish how evidence may be given of the aggravating factors of a person driving with the prescribed concentration of alcohol in their breath or blood, or driving with a prescribed drug in their oral fluid or blood.

Part 3 Road Transport (General) Act 1999

Clause 5 Definitions—div 4.2 Section 61A, definition of *immediate suspension offence* (or *suspension offence*), new paragraph (ba)

This clause amends the definition of *immediate suspension offence* to include the offence contained in section 22C (Refusing to undergo screening test) as established by the Road Transport (Alcohol & Drugs) Amendment Bill 2013.

Clause 6 **Automatic disqualification for certain other driving offences**
Section 63 (1) (d)

This clause amends the reference to an offence against the *Road Transport (Safety and Traffic Management) Act 1999*, section 7 (1) (furious, reckless or dangerous driving) in section 63 (1) (d) to clarify that it also includes an aggravated offence under that section.

This amendment ensures that a person who has been convicted of or found guilty of an aggravated offence of furious, reckless or dangerous driving is subject to the automatic driver licence disqualification provisions in section 63.

Clause 7 **New section 63 (2A)**

This clause provides that a person who has been convicted of or found guilty of an aggravated offence of furious, reckless or dangerous driving is automatically disqualified, under the automatic drivers licence disqualification provisions in section 63, from holding or obtaining a driver licence for 12 months, or if the court orders a longer period, the longer period.

This period of disqualification is the same period of disqualification imposed on repeat offenders, and reflects the risk posed to other road users by drivers who drive furiously, recklessly or dangerously whilst an aggravating factor is present.

Part 4 **Road Transport (Offences) Regulation 2005**

Clause 8 **Short descriptions, penalties and demerit points**
Schedule 1, part 1.12, new item 9A

This is a consequential amendment arising from the creation of the new aggravated offence of furious, reckless or dangerous driving, and amends the short description of the offence to reflect the new aggravated offence.

Part 5 **Road Transport (Safety and Traffic Management) Act 1999**

Clause 9 **Furious, reckless or dangerous driving**
Section 7 (1), penalty

This clause amends the maximum penalty for the offence of furious, reckless or dangerous driving to reflect the creation of the new aggravated offence. A person convicted or found guilty of the aggravated offence is subject to a maximum penalty of 200 penalty units, imprisonment for 2 years, or both.

There has been no change to the penalty for the offence of furious, reckless or dangerous driving where there are no circumstances of aggravation present.

This doubling of the maximum penalty where an aggravating factor is present is consistent with the approach adopted in a number of other jurisdictions. This reflects the increased risk

from a driver driving furiously, recklessly or dangerously whilst there is an aggravating factor present – the risk is higher than if the offence was committed without the aggravating factor present, and so the penalty should reflect this increased risk.

The maximum penalty remains significantly lower than the lowest possible maximum penalty for the more serious offence of culpable driving, which is 10 years imprisonment, and so is in proportion to its respective seriousness within the continuum of offences in the road transport legislation. The ratio of 2 years imprisonment and/or 200 penalty units is also consistent with the ratio for maximum penalty units to imprisonment terms in the ACT Government’s Guide for Framing Offences.

Clause 10 New sections 7A and 7B

This clause creates an aggravated offence of furious, reckless or dangerous driving.

New section 7A lists the aggravating factors for the offence. The aggravating factors, and the rationale for their selection as aggravating factors, are explained in detail above in the outline of the Bill.

New section 7A (1) (a) (i) provides that an aggravating factor is if the person, without reasonable excuse, failed to comply with a request or signal given by a police officer to stop the vehicle. This wording reflects the power in section 109 of the *Road Transport (Safety and Traffic Management) Regulation 2000* of a police officer to request or signal the driver of a vehicle to stop the vehicle. It is an offence to fail to comply with such a request or signal without reasonable excuse under that section. Furious, reckless or dangerous driving while evading police represents a greater risk due to the common practice of such drivers to travel at high or unsafe speeds, whilst also driving erratically and disobeying traffic signals and lights.

New section 7A (1) (a) (ii) specifies that the person driving with the prescribed concentration of alcohol in their blood or breath is a circumstance of aggravation. This definition reflects the existing drink driving offence in section 19 (Prescribed concentration of alcohol in blood or breath) of the *Road Transport (Alcohol and Drugs) Act 1977*. Prescribed concentration of alcohol is defined in new section 7A (5) by reference to section 4C of the *Road Transport (Alcohol and Drugs) Act 1977*, which provides that the prescribed concentration is for a special driver—more than 0g of alcohol in 100mL of blood or 210L of breath; or for any other person—0.05g. The increased risk posed by drivers driving whilst intoxicated has been clearly established, and is reflected in the varying penalties applied to drivers convicted of alcohol or drug driving offences depending on the level of intoxication of the driver.

New section 7A (1) (a) (iii) provides that it is an aggravating factor if the person was driving with a prescribed drug in their oral fluid or blood. This reflects the existing offence in section 20 (Prescribed drug in oral fluid or blood—driver or driver trainer) of the *Road Transport (Alcohol and Drugs) Act 1977*. Prescribed drug is defined in new section 7A (5) by reference to the dictionary of the *Road Transport (Alcohol and Drugs) Act 1977*.

New section 7A (1) (a) (iv) provides that it is an aggravating factor if the person was driving while under the influence of intoxicating liquor or of a drug to such an extent as to be incapable of having proper control of the vehicle. This reflects section 24 (Driving under the

influence of intoxicating liquor or a drug) in the *Road Transport (Alcohol and Drugs) Act 1977*.

New section 7A (1) (a) (v) provides that it is a circumstance of aggravation if the person was driving at a speed that exceeds the speed limit by more than 30%. While other jurisdictions which have adopted similar aggravating factors related to excessive speeding have specified exceeding the speed limit by 45km/h as the relevant factor, this is an inflexible measure that does not reflect the actual risk posed by the speeding driver. For instance, a driver driving recklessly through a 50km/h residential zone at 70km/h potentially poses more of risk to the community than a driver driving 145km/h on a 100km/h freeway. The 30% threshold would cut in at above 65km/h in a 50km/h zone, above 78km/h in a 60km/h zone and above 104km/h in an 80km/h zone.

New section 7A (1) (a) (vi) provides that it is a circumstance of aggravation if the person was driving in a way that put at risk the safety of a vulnerable road user. This aggravating factor reflects the increased risk posed by dangerous driving behaviours to vulnerable road users. These road users (such as pedestrians, cyclists, riders of animals and motorcyclists) are particularly “vulnerable” in their interactions with other motor vehicles as they do not benefit from the level of crash protection which is provided by other vehicles. This vulnerability increases the likelihood that furious, reckless or dangerous driving in such a way that puts their safety at risk will have catastrophic consequences. New section 7A (4) defines vulnerable road user as a road user other than the driver of, or passenger in, an enclosed motor vehicle. Examples of a vulnerable road user provided in the Bill are pedestrians, cyclists, motorcyclists, riders of animals, users of motorised scooters and users of segways. A road user is defined by reference to the definition of road user in the Australian Road Rules, which defines it as ‘a driver, rider, passenger or pedestrian’.

New section 7A (1) (a) (vii) provides that it is a circumstance of aggravation if the person drives with a person younger than 17 years in the vehicle. This aggravating factor of having a child or children younger than 17 years in the vehicle at the time when the offence was committed reflects that, unlike adult passengers, a child cannot consent to involvement in reckless driving. Furthermore, children are highly vulnerable to injury and associated long-term consequences, and are also potentially impressionable to the offending behaviour. Exposure to this type of driving behaviour may influence their own driving behaviour.

New section 7A (1) (b) provides that the driver being a repeat offender is an aggravating factor. New section 7A (4) defines a repeat offender as a person who has been convicted or found guilty of an offence against section 7 (reckless, furious or dangerous driving) or the more serious offence in section 29 of the *Crimes Act 1900* (Culpable driving). This is a circumstance of aggravation as the driver has failed to learn from their actions and continued to drive in a manner less than the standard expected by the community, and their sentence should reflect the seriousness with which the community regards the offence and the consequences which should attach to conviction.

New sections 7A (2) and (3) specifies how evidence of the concentration of alcohol in a person’s blood or breath, or the presence of a prescribed drug in a person’s oral fluid or blood, may be given. This evidence would be used to prove the aggravating factors in subsections (1) (a) (ii) and (iii). The evidential provisions refer to analyses carried out in accordance with the *Road Transport (Alcohol and Drugs) Act 1977*.

New section 7B provides that where a trier of fact is not satisfied beyond reasonable doubt that a person charged with the aggravated offence has committed the aggravated offence, but they are satisfied that person has committed the offence of reckless, furious or dangerous driving, that the person can be found guilty of the offence of reckless, furious or dangerous driving.

Clause 11 **Dictionary, new definition of *aggravated offence***

This clause amends the dictionary in the Act to include the new terms *aggravated offence* as defined in new section 7A, and *road user* as defined in rule 14 of the Australian Road Rules.