

Exposure Draft

Road Transport (Drug Driving) Bill 2010



A guide to understanding the Bill



May 2010

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Table of Contents

Consultation Arrangements	1
Key Concepts in the Exposure Draft	2
Notes on Clauses - draft Bill	3
Notes on Clauses - draft Regulations	17

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May 2010

Consultation Arrangements

The Exposure Draft and this Consultation Guide are available on the Legislation Register at www.legislation.act.gov.au. The consultation period for the Exposure Draft closes on **24 June 2010**.

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Key Concepts in the Exposure Draft

oral fluid - oral fluid is the mixture of saliva and cells from a person's mouth that is used to test for the presence of some drugs.

controlled drug - in the Exposure Draft, this term has the same meaning as it does in the *Criminal Code 2002*. In summary, controlled drugs are the drugs listed in Schedule 1 of the *Criminal Code Regulation 2005*, and includes both 'controlled medicines' in Part 1.1 and 'prohibited substances' in Part 1.2. Most of the controlled drugs listed in Schedule 1 of the *Criminal Code Regulation 2005* have the capacity to alter a person's perceptions, mood, consciousness or motor control. Many of the controlled medicines are used medically in sedation, anaesthesia or as post-operative analgesics. The list of controlled drugs includes 'street' drugs such as heroin, amphetamines and cocaine as well as morphine, other opiates, cannabinoids and barbiturates. Under the proposed laws, it will be an offence to drive a motor vehicle on a public road if a controlled drug is present in the driver's oral fluid or blood. However, the list of controlled drugs also includes some that may be prescribed on an outpatient basis in very limited circumstances. The proposed legislation therefore includes a protection for drivers who use these controlled drugs in accordance with a legal prescription, provided always that the drug has not impaired the person's ability to drive safely.

medicine - in the Exposure Draft, 'medicine' means a medicine under the *Medicines, Poisons and Therapeutic Goods Act 2008*. There are two existing provisions that apply when a person drives a vehicle while impaired by a medicine. The first is section 24 of the *Road Transport (Alcohol and Drugs) Act 1977* - in essence, this is the offence of driving while impaired by an intoxicating drug. In this context, 'drug' is not limited to illicit drugs but encompasses all drugs including medications. The second offence that may be relevant is the offence under the *Road Transport (Driver Licensing) Regulation 2000* - driving a vehicle when a person's ability to drive safely is impaired by a medical condition or the treatment for a medical condition. Neither of the existing provisions expressly uses the term 'medicine', possibly contributing to a misconception that it is not currently an offence to drive while impaired by medication. The Exposure Draft consolidates the existing two offences and replaces the generic word 'drug' with the technical term 'medicine'.

oral fluid detectable controlled drug - the technology for roadside drug testing is still evolving. At present, oral fluid testing remains the preferred choice for random roadside drug testing in Australia. The oral fluid screening tests available for high volume screening can reliably detect three different controlled drugs, which are referred to in the Exposure Draft as 'oral fluid detectable controlled drugs'. These substances are: the active metabolite in recently consumed cannabis (delta-9-tetrahydrocannabinol), methylamphetamine and MDMA. The Exposure Draft does not propose to use oral fluid testing to test for other controlled drugs as the technology to support such testing is not yet available.

Notes on clauses - Draft Bill

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the Act will be known as the *Road Transport (Drug Driving) Act 2010*.

Clause 2 Commencement

This clause explains when the Act will commence. In summary, the Minister may commence the Act by notice within 12 months of enactment. If it has not commenced by then, it will commence automatically the first day after the 12 month period expires.

Clause 3 Dictionary

This clause explains that the dictionary is part of the Act.

Clause 4 Notes

This clause explains that the notes are not part of the Act and are explanatory only.

Clause 5 Offences against Act - application of Criminal Code etc

This clause explains that the *Criminal Code 2002* and the *Legislation Act 2001* apply in relation to offences against the Act. The notes to this clause explain that Chapter 2 of the *Criminal Code 2002* contains general principles of criminal responsibility that apply to the offences in this Act, while the *Legislation Act 2001* explains how to interpret penalties that are expressed in terms of penalty units.

Part 2 Important concepts

Clause 6 Meaning of *drug screening device*

This clause defines the concept *drug screening device*. The regulations will prescribe the devices for use in drug testing motorists in the ACT. In brief, a drug screening device is a disposable drug testing kit that is activated by a person's oral fluid when a person sucks or chews on the relevant part of the device, in accordance with the directions of the police officer supervising the screening test. A drug screening device tests drivers for the presence of 'oral-fluid detectable controlled drugs'.

Clause 7 Meaning of *oral fluid analysis instrument*

This clause defines the concept *oral fluid analysis instrument*. The regulations will prescribe the instruments for use in drug testing motorists in the ACT. In brief, an oral fluid analysis instrument is a portable machine that undertakes an almost immediate analysis of a sample of oral fluid to ascertain whether an oral fluid-detectable controlled drug is present in the sample.

Clause 8 Authorisation of operators

This clause explains that the chief police officer may authorise a police officer to carry out oral fluid analysis for this Act. It is expected that police officers will undergo instruction or training in the use of oral fluid analysis instruments before they are authorised as operators under the Act.

Clause 9 Register of authorised operators

This clause requires the chief police officer to keep a register of authorised operators. The purpose of the provision is to ensure that information about the police officers who are authorised to carry out oral fluid analyses is up to date and readily accessible. The system of notifiable instruments under the *Road Transport (Alcohol and Drugs) Act 1977* for authorised operators of breath analysis instruments has become unwieldy, with over 80 separate instruments of appointment of authorised operators currently notified on the Legislation Register. To avoid adding to the current plethora of notifiable instruments made under the road transport legislation, this Bill proposes the establishment a publicly accessible register of officers who are authorised to carry out an oral fluid analysis. The register may be in the form an electronic database.

Clause 10 Appointment of analysts

This clause allows the road transport authority to appoint a person as an analyst for the Act. In practice, it is anticipated that the instruments of appointment will refer to the holders of positions rather than to named individuals - this has been the usual practice in the ACT in recent years. It should be noted that under the *Road Transport (Alcohol and Drugs) Act 1977*, analysts from the ACT Government Analytical Laboratory are appointed to analyse samples taken under that Act for the presence of alcohol and other drugs. It is anticipated that the same analysts would also be appointed for the purposes of this Bill, as there will be occasions when a sample from an offender is required to be tested for alcohol under the *Road Transport (Alcohol and Drugs) Act 1977* and for controlled drugs or medicines (or both) under this Bill.

Clause 11 Approval of laboratories

This clause allows the road transport authority to approve a laboratory or other entity as laboratory for this Act. It is expected that the ACT Government Analytical Laboratory will be approved as a laboratory under this section - that laboratory is already approved as a laboratory for the purposes of the *Road Transport (Alcohol and Drugs) Act 1977* and tests samples of blood taken under that Act for the presence of alcohol or other drugs.

Part 3 Testing for presence of drugs

Division 3.1 Purpose - pt3

Clause 12 Purpose - pt 3

This clause explains the main purpose of part 3 of the Bill, which is to allow for drug tests to be conducted to determine whether a driver is committing either of the drug driving offences in Part 4.

Division 3.2 Power to require drug screening tests

This division deals with the situations in which the police may require a person to undergo a drug screening test, to determine whether an oral fluid detectable controlled drug is present in the person's oral fluid. This process is sometimes known as 'roadside drug testing' (RDT). The three controlled drugs that can be detected by oral fluid screening tests are delta-9-tetrahydrocannabinol, which is the active metabolite in recently consumed cannabis; methylamphetamine and MDMA (ecstasy). Drug screening kits used for RDT in most Australian jurisdictions do not currently test for other controlled drugs or medicines, but that situation is likely to change as drug detection technology evolves.

It is expected that drug screening tests will usually be conducted in a similar manner to random breath testing, with the person remaining in his or her vehicle during the test. The person will be asked to suck or chew on the oral fluid collection area of the testing device, and will be asked to wait for a short time while the oral fluid reacts with the device to produce a result.

Clause 13 Drug screening test - vehicle not involved in accident

This clause contains the power to permit the police to request a driver to undergo a random drug screening test. It applies where a person is driving a motor vehicle (which includes a motorbike) on a public street or in a public place, or where the police have reasonable grounds to believe that a person was driving motor vehicle on a public street or in a public place within the previous 4 hours.

Clause 14 Drug screening test - vehicle involved in accident

As the heading suggest, this clause gives the police the power to require the driver of a vehicle involved in an accident on a public street or in a public place to undergo a drug screening test. It also applies to a person who was in a vehicle at the time of an accident if the police do not know or are unsure who was driving the vehicle. The power cannot be used if more than 4 hours have elapsed since the accident.

Clause 15 Drug screening test - culpable driving

This clause provides that the police may require a person who is believed on reasonable grounds to have committed a culpable driving offence within the previous 4 hours to undergo a drug screening test. Culpable driving is an offence under section 29 of the *Crimes Act 1900*. There is no requirement that the culpable driving offence took place on a public street or in a public place.

Division 3.3 Analysis of blood and oral fluid samples

This division explains the process for conducting an oral fluid analysis after a drug screening test and sets out the circumstances in which a person may be requested to give a blood sample. It also contains provisions, based on existing provisions in the *Road Transport (Alcohol and Drugs) Act 1977*, for taking blood samples from people who are in hospital following traffic accidents.

Clause 16 Detention for giving sample of oral fluid

This clause explains what happens where a person's drug screening test gives a positive result or a person fails to undergo a drug screening test as directed by a police officer. It should be noted that under the *Legislation Act 2001*, the word 'fail' includes 'refuse', so clause 16 (1) (b) also applies where a person refuses to undergo a drug screening test. The person may be taken into custody and taken to a police station or another place so that an oral fluid analysis can be carried out. In Victoria, the police have used large vans or modified trailers to conduct their random drug testing operations. As drafted, clause 16 (3) gives ACT Policing the flexibility to conduct oral fluid analysis using machines at police stations, or in mobile units, or a combination of both, depending on the available resources and priorities.

Clause 17 Analysis of oral fluid by authorised operator

This clause explains how an oral fluid analysis is to be conducted. In summary, the person is taken into custody and person is directed to give a sample of oral fluid. It should be noted that the custody authorised by clause 17 (2) is of limited duration and cannot exceed 4 hours. Assuming no other drivers are being analysed at the time, the driver can produce an adequate sample and the machine is operating properly, then the procedure should take considerably less than an hour to complete.

Under clause 17 (3), part of the sample will be analysed 'on the spot' by an authorised operator using an oral fluid analysis instrument prescribed by the regulation. The instrument will provide an indication as to whether an oral fluid detectable controlled drug is present in the sample. If the result is positive, under clause 17 (4) the remaining sample is stored and sealed and sent for laboratory confirmation. It is anticipated that the regulations will prescribe the way in which samples that are to be sent for confirmatory testing must be labelled and handled in order to secure the integrity of the samples from both an evidentiary and scientific perspective.

Under clause 17 (5) the authorised operator is required to give the tested person a signed statement setting out the results of the analysis, including the details required by the regulations.

Clause 18 Analysis of oral fluid at approved laboratory

This clause requires an analyst at an approved laboratory to analyse a sample of oral fluid provided under clause 17 for the presence of an oral fluid detectable controlled drug in the sample. In so doing, the analyst must take care to protect and preserve part of the sample in case the person being tested (or the person's representative)

requests part of the sample for independent analysis within 6 months. If such a request is made, the analyst must make part of the sample available for analysis and give the person reasonable assistance to ensure it is protected and preserved until it is analysed.

Clause 19 Detention for taking of blood samples

As explained previously, drug testing technology is still evolving. Blood testing remains the only option for accurately detecting the majority of controlled drugs, including heroin, many amphetamine-related substances and cocaine. Blood testing may also be necessary for some users of drugs such as MDMA who are dehydrated and who cannot produce sufficient oral fluid for testing.

Clause 19 sets out the circumstances in which a person may be detained by the police for blood testing. In summary, these circumstances are:

- a person was asked to undergo a drug screening test but could not produce enough oral fluid
- although a person has passed a drug screening test, a police officer believes on reasonable grounds that the person may be affected by a non-oral fluid detectable controlled drug or a medicine;
- the person has not been asked to undergo a drug screening test (but could have been asked to do so) but a police officer believes on reasonable ground that the person may be affected by a non-oral fluid detectable controlled drug or a medicine.

In the situation outlined in the third dot point, the reason for allowing the police to by-pass the drug screening test stage is to cover those cases in which the police already know or reasonably believe (for example, from admissions made by the driver) that the controlled drug or medicine concerned is not an oral fluid detectable controlled drug.

Clause 19 (4) provides that a person required to give a sample under this clause may be taken to a 'sampling facility' where a 'sample taker' must take the sample as soon as practicable after the person arrives at the facility. The terms *sampling facility* and *sample taker* are defined in the *Dictionary*. The current practice under the *Road Transport (Alcohol and Drugs) Act 1977* is for drivers to be taken to a public hospital for a blood test by a doctor or a nurse - it is anticipated that practice would be followed under this Bill, although the Bill allows some flexibility if other options become available in the future.

It should be noted that under clause 19 (5), the sample cannot be taken if more than 4 hours have elapsed since the person became eligible for a drug screening test under part 3.

Clause 20 Taking of blood sample from detained person

This clause deals with procedures for taking blood. It explains that a person who is taken into custody for a blood test must allow a sample of the person's blood to be taken for analysis. It explains that the regulations can prescribe the procedures to be

followed by sample takers, and makes it clear that a person cannot be held in custody for a blood test under clause 19 if more than 4 hours have elapsed since the circumstances in clause 13, 14 or 15 applied to the person.

Clause 21 Taking of blood sample for person involved in accident

Unlike other provisions in Part 3 of the Bill, this clause is not limited in its application to persons who either were driving, or may have been driving, a motor vehicle. Instead, it applies where a patient in a hospital is a person who is involved in an accident that involved a vehicle (including a bicycle or animal-drawn vehicle), or a person riding or driving an animal or a pedestrian, where the accident occurred on a public street or in a public place, whether within or outside the ACT. It is based on existing provisions in *the Road Transport (Alcohol and Drugs) Act 1977*, and is similar to sections 20 and 21 of *the NSW Road Transport (Safety and Traffic Management) Act 1999* - although those provisions refer only to people riding horses, and do not mention driving cattle or sheep.

It imposes an obligation on sample takers in a hospital to take a sample of the patient's blood for analysis within 2 hours of the patient's arrival at the hospital.

Clause 21 (3) explains when the obligation to take a sample does not apply, and clause 21 (4) contains a defence, to the effect that the patient's conduct made it impossible for the sample taker to comply with the obligation.

The Explanatory Note invites readers of the Bill to comment on whether this provision is needed in this Bill. Readers may wish to consider the following specific issues: are there modifications or improvements that should be made? Is it essential to have a criminal sanction to underpin the duty on medical staff to take blood from patients if those patients are unconscious and therefore unable to consent? Should the scope of the provisions be restricted to drivers of motor vehicles, or should it continue to apply to pedestrians, and people riding bicycles and horses or driving sheep and cattle?

Clause 22 Analysis of blood sample for medicine or controlled drug

This clause deals with analysing blood samples taken under the Act. Among other matters, it allows the police officer requesting the analysis to indicate which drugs or medicines are of interest. It also allows the police office to request a quantitative analysis in relation to a stated medicine.

The structure of the two drug driving offences under the Act is relevant here. As the offence of driving while a controlled drug is present is a 'presence' offence, it is not necessary to establish the concentration of that controlled drug in a person's blood or oral fluid - unlike the offence of driving while exceeding the prescribed concentration of alcohol. The offence of driving while impaired by a medicine has a defence that a person took the medicine in accordance with a prescription or the directions for the medicine - accordingly, evidence as to how much of the medicine

was in the person's blood is likely to be relevant to establishing whether or not the person can rely on that defence.¹

Clauses 22 (5) to (7) require the analyst to protect and preserve part of the sample for 6 months in case the tested person (or the person's representative) requests it for an independent analysis. The analyst is required to make part of the sample available as soon as practicable and to provide reasonable assistance to ensure that the sample is protected and preserved until it is analysed.

Clause 23 Blood sample - other tests

This clause permits a sample of blood that is taken from a person under this Act for analysis to be analysed for the purposes of the *Road Transport (Alcohol and Drugs) Act 1977* as well, if the sample of blood could have been taken from the person under that Act too. The purpose of this clause is to avoid having to take more than one blood sample from the same person on a single occasion, in order to minimise the impact on the person's human rights.

Clause 24 Blood analysis - statement

This clause requires a police officer to give a tested person certain written information about the results of the blood analysis conducted under part 3, including the results of the analysis and the person's right to have part of the sample collected for independent analysis within 6 months from the date the blood sample was taken from the person.

Division 3.4 Requirements for drug screening tests etc

This division sets out certain safeguards that apply to drug screening tests and other procedures conducted under part 3.

Clause 25 Ensuring privacy

The effect of this clause is to require the police or sample takers involved in carrying out drug tests to take reasonable steps to protect the privacy of people being tested. Clause 25 is not an absolute guarantee of privacy, recognising that it may not be feasible to provide complete privacy at all times in a busy hospital or police station.

Clause 26 Disposal of devices used for drug screening tests

Drug screening devices do not have evidentiary value and are disposable. As they are activated by a biological material (oral fluid) the used devices need to be disposed of appropriately. Clause 26 requires the police officer supervising a drug screening test to ensure that the device is disposed of in the prescribed way. These regulations will be drafted with the assistance of the government agencies responsible for the management of biological waste materials.

Clause 27 Permitted use of blood or oral fluid samples

¹ The controlled drug offence also has a defence that applies where the person is using the drug in accordance with a lawful prescription. This situation is not considered likely to arise in practice as these drugs are rarely prescribed outside hospitals.

This clause makes it clear that a sample of blood or oral fluid provided under this Act cannot be used except for analysis under this Act (noting that includes analysis for the purposes of the *Road Transport (Alcohol and Drugs) Act 1977* as mentioned in clause 23) or de-identified research into drivers affected by drugs. A sample cannot be used under any other Act, for example the *Crimes (Forensic Procedures) Act 2000*.

Part 4 Offences

This part contains most of the offences under the Act, including the two drug driving offences: the new offence of driving with controlled drug in blood or oral fluid (section 28) and the revised offence of driving while impaired by medicine (section 31).

Section 28 Driving with controlled drug in oral fluid or blood

It is very difficult to specify particular levels at which different controlled drugs have impairing effects on drivers. The age, weight, gender, overall health and prior habituation of a person to a drug are all factors that may affect the person's level of impairment, and interactions with other drugs or alcohol further complicate the picture. For this reason, all Australian states and Territories other than the ACT have introduced a 'presence' based offence for drug driving offences: a person commits an offence if they drive a motor vehicle while particular drugs are present in their blood, oral fluid or both. To align the ACT with other Australian jurisdictions, clause 28 proposes a new strict liability offence of driving if a controlled drug is present in a person's oral fluid or blood.

It is theoretically possible that a person may be lawfully prescribed a controlled drug that is a 'controlled medicine' in an outpatient context. In such cases, the person has a defence to a charge under section 28 (1) if the person can establish that he or she was taking the drug in accordance with a legal prescription and that his or her driving was not impaired by the drug.

The maximum penalty for this offence is 50 penalty units, 1 year licence disqualification or both. Unlike drink driving, where alcohol has generally predictable effects despite the various forms in which it is consumed, there are many different controlled drugs and the circumstances in which they are used may vary enormously. Accordingly, it is proposed not to attempt to tabulate the penalties for offenders at this stage. Consistent with the ACT's harm-minimisation policies for drug offenders it is not proposed to include imprisonment as a sentencing option for drug driving offences. However, it should be noted that if a drug-driver is also charged with an offence that does have imprisonment as a sentencing option (for example, culpable driving or drink driving) then there is nothing in this Bill to preclude the court from sentencing the driver to a period of imprisonment for that offence if it is warranted in the circumstances.

Clause 29 Refusing to give oral fluid for analysis

This clause provides that it is an offence to refuse to give an oral fluid sample for analysis. Under the legislation, the police cannot use physical force to obtain an oral fluid sample from a person but a person can be charged with refusing to provide a

sample when required to do so. The penalties for the offence are similar to the penalties for the offence in clause 28, but with a lower maximum fine.

Clause 30 Refusing to give blood sample for analysis

This clause provides that it is an offence to refuse to give a blood sample for analysis. Under the legislation, the police cannot use physical force to obtain a blood sample from a person but a person can be charged with refusing to provide a sample when required to do so. The penalties for the offence are similar to the penalties for the offence in clause 28, but with a lower maximum fine. Unlike the offence in clause 29, there is a defence available in subclause 30 (2), which applies if the defendant proves that he or she refused the blood tests on religious, conscientious or medical grounds.

To date, the Government has not been advised of any religious, conscientious or medical grounds for refusing an oral fluid test, which is why the Bill does not include an equivalent defence in clause 29.

Clause 31 Driving while impaired by medicine

This clause is derived from section 77 of the *Road Transport (Driver Licensing) Regulation 2000*, which dealt with the situation where a person's ability to drive safely was impaired by a medical condition or the treatment for a medical condition. It is also derived from section 24 of the *Road Transport (Alcohol and Drugs) Act 1977*, which is the offence of driving while under the influence of alcohol or a drug (in this case, drug included all medicines).

Clause 31 (1) provides that it is an offence to drive if a person has taken a medicine and the person's ability to drive safely is impaired by the effect of the medicine.

Clause 31 (2) provides a defence that applies if the person proves he or she took the medicine as directed and either had reasonable grounds to believe that he or she wasn't impaired (an example of reasonable grounds could be that the person had used the same medication before with no adverse effect) or could not reasonably have known that the person's ability to drive safely was impaired - an example could be where the medication had a rare side effect that affected the person's driving, such as causing the person to faint or become dizzy.

In summary, the offence requires drivers to take ordinary, commonsense precautions before driving after taking a medicine. These precautions could include, for example:

- taking the medicine strictly as directed;
- reading labels and consumer product information - what are the possible side effects?
- talking to the doctor and pharmacist - are there other medicines that don't affect driving that could be prescribed instead?
- being self-aware: asking 'am I fit to drive today?' before getting behind the wheel;
- if in doubt, making alternative transport arrangements.

Clause 32 Unauthorised use or analysis of blood or oral fluid

This clause makes it an offence to use or analyse blood or oral fluid in a way that is not authorised by the Act.

Part 5 Evidence

Division 5.1 Evidentiary Certificates

Clause 33 Application - pt 5

This clause explains that the provisions in part 5 apply to proceedings for offences against the Act. They are additional to the rules of evidence that apply in criminal proceedings and do not limit the evidence that can be presented apart from this part of the Act.

Clause 34 Use of evidentiary certificates

This clause explains how evidentiary certificates given under the Act may be used as evidence in criminal proceedings.

Clause 35 Evidentiary certificate - analysis of oral fluid samples

This clause sets out the matters that may be contained in an evidentiary certificate given by a police officer relating to an oral fluid analysis under part 3 of the Act. In summary, these matters include:

- the way the analysis was carried out, including directions given by the police officer and the steps taken to protect privacy;
- where and when the analysis occurred;
- the use of the oral fluid analysis instrument, and matters relating to the condition, maintenance and testing of the instrument;
- whether the police officer conducting the analysis was an authorised operator;
- whether part of the sample was sent to an approved laboratory for confirmatory analysis;
- the procedures that were followed; and
- the results of the analysis and its accuracy.

Clause 36 Evidentiary certificate - blood sample not taken

This clause applies where a sample taker declined to take a sample of blood from a person on the basis of a belief that complying with the requirement would be detrimental to a person's health. It details the matters to be contained in an evidentiary certificate signed by the sample taker.

Clause 37 Evidentiary certificate - analysis of blood sample by analyst

This clause details the matters that may be included in an evidentiary certificate prepared by the analyst for a blood sample taken under the Act. These matters include the processes that were followed and the results of the analysis.

Clause 38 Evidentiary certificate - oral fluid analysis statement

This clause allows a print-out from an oral fluid analysis instrument to be used as evidence about the matters it deals with - that is, the results of an oral fluid analysis conducted by an authorised operator using that instrument. Depending on the particular instrument that is used, a printout may indicate the make and model of the instrument, the date and time of the analysis, a operator code or name for the authorised operator and the results of the analysis.

Clause 39 NSW evidentiary certificates

This clause enables evidentiary certificates prepared under corresponding New South Wales legislation to be used in proceedings for offences under this Act, for example where a person who was driving a vehicle on an ACT road is taken to a sampling facility in NSW (such as Queanbeyan Hospital) for a drug test following an accident.

Clause 40 Oral evidence about div 5.1 certificate

This clause provides that a person who is charged with an offence under the Act (the defendant) may require that a witness who has given an evidentiary certificate to give evidence in person at the trial. The defendant must give written notice requesting the witness's attendance to the chief police office not less than 7 days before the hearing date, although the court may allow a shorter period for serving notice that the witness is required to give oral evidence.

Division 5.2 Other provisions about evidence

Clause 41 Evidence for insurance purposes

As the explanatory note for this clause describes, this provision is based on section 41A of the *Road Transport (Alcohol and Drugs) Act 1977*. When that provision was introduced, its stated purpose was to limit the use that could be made of evidence in relation to blood samples taken from unconscious persons - presumably, although this was not explained further in the Explanatory Statement for the Bill at the time, on the basis that the person from whom the blood was taken could not refuse consent to the blood test.

Clause 41 proposes that evidence from samples obtained under this Act can be admitted only in relation to drug driving offences under this Act, drink driving offences under the *Road Transport (Alcohol and Drugs) Act 1977* or culpable driving offences under section 29 of the *Crimes Act 1900*².

Clause 41 (2) explains that evidence about a person's commission of a relevant offence under this Act or a culpable driving offence is not admissible in proceedings in relation to an insurance contract as evidence that that a person's driving was affected by a controlled drug or medicine.

² Clause 15 of the Bill allows the police to require a person to undergo a drug screening test if the person is believed on reasonable grounds to have committed a culpable driving offence within 4 hours. Under section 29 (6) (b) of the *Crimes Act 1900*, a person shall be taken to drive a motor vehicle culpably if the person drives the vehicle while under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle.

Comments are sought on clause 41. As drafted, clause 41 would exclude evidence about a person's conviction or finding of guilt for any of the following offences from being used in proceedings relating to insurance contracts:

- an offence of driving with a controlled drug in a person's blood or oral fluid
- driving while impaired by a medicine
- culpable driving while impaired by a drug
- refusing an oral fluid analysis
- refusing a blood test
- any other offence under the Act prescribed by regulation.

Should this exclusion be limited to evidence obtained from the blood of unconscious people, like the original provision, or should it cover all drug-driving related offences under the Act and drug-related culpable driving offences under the *Crimes Act 1900* as well?

Clause 42 Effect of non-compliance - analysis of blood or oral fluid sample

This clause permits a court to continue to hear a charge for a drug driving offence under the Act even if the court is not satisfied that there has been full compliance with the requirements for taking and analysing a blood or oral fluid sample, but only if the court is satisfied that the drug tests, if properly carried out, would have shown the presence of a controlled drug. This clause is based on section 42 of the *Road Transport (Alcohol and Drugs) Act 1977*, although the drafting has been recast to remove double negatives. It should be noted that this provision (and clauses 43 to 44 inclusive) applies only to offences involving controlled drugs, where the primary issue before the court is whether or not a person drove a vehicle while a controlled drug was present in the person's blood or oral fluid.

Clause 43 Effect of non-compliance - refusal to give oral fluid for analysis

This clause permits a court to continue to hear a charge for an offence of refusing to give an oral fluid sample, even if the court is not satisfied that there was full compliance with the procedures required by the Act before the person refused to give the sample. In brief, the court may allow the charge to be heard if it is satisfied that despite the procedural non-compliance, if the test had gone ahead it would have shown the presence of a controlled drug in the person's oral fluid.

Clause 44 Effect of non-compliance - refusal to give blood for analysis

This clause permits a court to continue to hear a charge for an offence of refusing to give an blood sample, even if the court is not satisfied that there was full compliance with the procedures required by the Act before the person refused to give the sample. In brief, the court may allow the charge to be heard if it is satisfied that despite the procedural non-compliance, if the blood test had gone ahead it would have shown the presence of a controlled drug in the person's blood.

Part 6 Miscellaneous

Clause 45 Police may direct person not to drive

This clause applies where a person has been tested for drugs under part 3. If a police officer reasonably believes that the person may be affected by a controlled drug or a medicine (for example, because the person has failed a drug screening test or because of the person's driving or behaviour), the police officer may give the person a written direction not to drive for a period of up to 12 hours. A breach of a written direction is an offence. The purpose of the provision is to give drug-affected drivers time to recover from the effects of drugs or medicines before they drive again. The chief police officer can review the direction at the request of the person, and may revoke the direction if the chief police office is satisfied that the person is no longer impaired. In practice, it is expected that the chief police office would delegate this review power to senior staff in traffic operations.

Clause 46 Conducting alcohol-related tests and drug-related tests at the same time

The clause makes it clear that random breath testing operations and random drug testing operations can be carried out simultaneously. Police in other jurisdictions often run joint operations targeting drink and drug driving, sometimes in conjunction with heavy vehicle inspections, driver licensing or roadworthiness checks.

Clause 47 Right of arrested person to medical examination

This clause is based on section 47 of the *Road Transport (Alcohol and Drugs) Act 1977*. It gives a person who is arrested for a drug driving offence the right to have a medical examination by a nominated doctor or nurse practitioner.

Comments are sought as to whether this provision is necessary or practicable. Data from the police suggests that few people are arrested for drink or drug driving offences, as most matters are commenced by summons. Even fewer have requested an examination under the equivalent provision in the *Road Transport (Alcohol and Drugs) Act 1977*. It is not known whether arrested persons have experienced difficulties in arranging for their nominated health professional to attend them and conduct the examination.

Clause 48 Approved forms

This clause allows the chief executive of the department responsible for administering the Act to approve forms for the Act. This is a standard provision of a kind found in many Acts.

Clause 49 Regulation making power

This clause contains a power to make regulations for the Act. The regulation making power is fairly standard, and includes the power to create offences with penalties carrying a maximum penalty not exceeding 20 penalty units.

It is anticipated that the regulations will detail the processes to be followed when samples are taken for analysis under the Act, particularly the processes for ensuring

that the chain of evidence is not broken and that samples are protected from unlawful interference, contamination or inappropriate storage handling. The draft regulations attached to the Exposure Draft of the Bill are only an outline at this stage. It is anticipated that the drafting of the regulations will be finalised in consultation with key stakeholders such as the Canberra Hospital, ACT Policing and the ACT Government Analytical Laboratory during consultations on the Exposure Draft and in the implementation phase prior to commencement.

Clause 50 Legislation Amended - sch 1

This clause deals with consequential amendments, which will be set out in schedule 1. For the purposes of the Exposure Draft, the consequential amendments are only flagged- they have not been drafted in detail.

Part 1.1 will amend the definition of 'drug' in the offence of culpable driving in section 29 of the *Crimes Act 1900* to bring it into line with the concepts of 'controlled drug' and 'medicines' under the *Road Transport (Drug Driving) Act 2010*.

Part 1.2 will contain the amendments to the *Road Transport (Alcohol and Drugs) Act 1977* to remove references to drugs so that Act deals only with drink driving.

Part 1.3 will amend section 77 of the *Road Transport (Driver Licensing) Regulation 2000*, so it will deal only with impairment by a medical condition or a treatment for a medical condition (other than a medicine).

Dictionary

The dictionary contains definitions on important words and concepts used in the Act.

Notes on Clauses - Draft Regulations

Part 1 Preliminary

This part contains formal provisions that are found in most regulations.

Clause 1 Name of regulation

This clause provides for the name of the regulation.

Clause 2 Commencement

This clause provides that the regulation commences on the day after notification.

Clause 3 Notes

This clause explains that the notes are explanatory and do not form part of the regulation.

Clause 4 Dictionary

This clause explains that the Dictionary is part of the regulation.

Part 2 Important concepts

Clause 5 Drug screening device - Act, s 6, def *drug screening device*

This clause, when finalised, will name the device or devices that can be used for drug screening tests under the Act.

Clause 6 Oral fluid analysis instrument - Act s 7, def *oral fluid analysis instrument*

This clause, when finalised, will name the instrument or instruments that can be used for oral fluid analysis under the Act.

Part 3 Testing for presence of drugs - procedures

Clause 7 Record-keeping requirements for drug screening tests

This clause may contain record keeping requirements for drug screening tests. Although drug screening tests do not have evidentiary value in themselves, should the police be required to keep records relating both to positive and negative drugs screening tests and if so, what should those records contain?

Clause 8 Procedure for taking oral fluid sample - Act, s 17 (1)

This clause may contain provisions dealing with the procedures for taking a sample of oral fluid for analysis by an oral fluid instrument and any subsequent laboratory analysis.

Clause 9 Procedure for storing, sealing and transferring oral fluid samples - Act, section 17 (4)

This clause may contain provisions dealing with the procedures for storing, sealing and transferring oral fluid samples to an approved laboratory in such a way as to ensure that the integrity of the sample is not compromised.

Clause 10 Oral fluid analysis - requirements for statement under Act, s 17 (5)

This clause may set out the details that must be included in an oral fluid analysis statement given to a person by an authorised operator under section 17 (5) of the Act.

Clause 11 Procedure for taking blood samples - Act, s 20 (1) and s 21 (2)

This clause sets out the procedures to be followed when a blood sample is taken under the Act. It is based on the procedures set out the Road Transport (Alcohol and Drugs) Act 1977. Comments are invited on the proposed regulation - are there improvements in blood sampling practice or technology that should be considered? Does the procedure described provide adequate protection for sample takers from accidental injury? Is the one-way box the best way to protect the evidentiary integrity of samples or are there better devices available now?

Clause 12 Procedure for protecting and preserving blood samples - Act, s 22 (5)

This clause sets out the procedures to be followed in order to protect and preserve a blood sample as required by the Act.

Clause 13 Blood analysis statement - Act, s 24 (f)

This clause may set out the details that must be included in a blood analysis statement given to a person under section 24 of the Act.

Clause 14 Evidentiary certificate - sample taker

This clause provides that a sample taker may give an evidentiary certificate about taking a blood sample from person under the Act, and lists the matters that may be included in the certificate. As the procedures for taking blood samples may vary with time and technology this provision has been placed in the Regulation instead of the Act so that it can be amended quickly to reflect new blood sampling practices.

Clause 15 Procedure for disposal of drug screening devices

This clause may set out the procedures to be followed for the safe disposal of drug screening devices. Comments are invited on the matters that should be included.

Part 5 Miscellaneous

Clause 16 Drugs that are not controlled drugs - Act, dict, def *controlled drug*, par (b)

The definition of controlled drug in the Act anticipates the possibility that one or more of the controlled medicines that are controlled drugs under the *Criminal Code Regulation 2005* could be excluded from the definition of 'controlled drug' for drug driving purposes, if there is general agreement from clinical toxicologists and

forensic traffic medicine experts that the controlled medicine does not impair driving.

Clause 17 Sampling facility - Act, dict, def *sampling facility*, par (b)

This clause will list the facilities where blood samples may be taken under the Act.

Dictionary

The dictionary defines important words and concepts used in the regulation.