

**2011**

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

**ROAD TRANSPORT (GENERAL)  
AMENDMENT BILL 2011**

**EXPLANATORY STATEMENT**

**Presented by  
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# Road Transport (General) Amendment Bill 2011

## Outline

This Bill amends the *Road Transport (General) Act 1999*, the *Road Transport (Offences) Regulation 2005* and the *Road Transport (Safety and Traffic Management) Act 1999*.

The Bill contains amendments to the *Road Transport (General) Act 1999*. New section 58B is inserted to give police and authorised officers the power to direct a person to remove an item that obscures all or part of the person's face. This power is not a general prohibition on wearing items that cover all or part of the face. A direction can be made under the new section only for either or both of two purposes:

- to establish the directed person's identity, in connection with a function under the road transport legislation;
- for conducting alcohol or drug testing under the *Road Transport (Alcohol and Drugs) Act 1977*.

This power is not enacted in response to any difficulties experienced with members of a religious or cultural group in the ACT. Neither ACT Policing nor the Office of Regulatory Services have encountered problems when dealing with members of communities who choose to wear items that identify them as belonging to a particular religious or cultural group. However, from time to time, some drivers and other road users whose identity is being checked under the road transport legislation have refused, for reasons not relating to religious or cultural observance, to remove facially obscuring items such as masks, balaclavas, 'hoodies', scarves, sunglasses and helmets of various types. On occasions, it has been necessary to arrest a driver or rider and take the person into custody for an identity check, because there is currently no express power under the road transport legislation to direct the person to remove an item in order to compare the person's face with the photograph on the person's driver or rider licence.

The Bill also contains amendments to the concepts of 'repeat offender' and 'first offender' in Division 4.2 of the *Road Transport (General) Act 1999*. These concepts are updated to align with amendments made in 2010 to the repeat offender provisions in the *Road Transport (Alcohol and Drugs) Act 1977*. The revised concepts of 'repeat offender' and 'first offender' will affect provisions that prescribe automatic disqualification periods for certain serious road safety offences. The amendments do not increase the penalties that apply to repeat offenders.

Minor amendments in the Bill clarify the application of the automatic disqualification provisions to persons who are found guilty of relevant disqualifying offences.

The Schedule includes amendments to the *Road Transport (General) Regulation 2005* that are consequential on the amendments in this Bill. It also makes unrelated amendments that are consequential on amendments made earlier this year. The Schedule also amends the *Road Transport (Safety and Traffic Management) Act 1999* to include amendments to the concept of 'repeat offender' and 'first offender' in Division 2.3. The amendments will align those concepts with the 2010 amendments

to the *Road Transport (Alcohol and Drugs) Act 1977*. The revised concepts of ‘repeat offender’ and ‘first offender’ will apply to existing provisions that enable a court to order the impoundment of a vehicle where a person is convicted of certain ‘hooning’ related offences (races and speed trials etc; menacing driving; burnouts and other prohibited conduct). This part also includes an unrelated technical amendment to omit a provision that has been identified as unnecessary.

The **human rights implications** of the amendments in this Bill are discussed in the clause notes for each amendment.

There are no **financial implications** for this Bill.

## Notes on clauses

### **Clause 1      Name of Act**

This clause is a formal provision that sets out the name of the legislation when enacted.

### **Clause 2      Commencement**

This clause provides for the commencement of the Bill, which will occur the day after notification.

### **Clause 3      Legislation amended**

This clause is a formal provision that lists the legislation amended by the Bill.

### **Clause 4      Offences against this Act—application of Criminal code etc Section 5A, note 1**

This clause amends section 5A, which is a standard provision that explains how the *Criminal Code 2002* and other legislation relating to the criminal law apply to offence provisions in an Act. It inserts a reference in note 1 to new section 58B; that section will be inserted by clause 5.

### **Clause 5      New section 58B**

This clause inserts new section 58B, which deals with directions to remove things that cover a person's face.

As explained in the Outline, this is not a prohibition on wearing items that obscure the face. It is a power to direct the removal of items that wholly or partly obscure a person's face, for two specific purposes:

- to establish the directed person's identity, in connection with a function under the road transport legislation;
- for conducting alcohol or drug testing under the *Road Transport (Alcohol and Drugs) Act 1977*.

This power to direct the removal of an item may limit the right to freedom of religion in sections 14 and 27 of the *Human Rights Act 2004* (the HRA) and the right of minorities to practice their culture (also in section 27 of the HRA). However, as explained in the followed paragraphs, it is considered that section 58B is a reasonable limitation of that right for section 28 of the HRA.

It is noted that the text of the International Covenant on Civil and Political Rights, to which many nations in the Western world are parties, specifically recognises that the expression of the right to freedom of religion may be subject to limitations prescribed by law that are necessary to protect safety, public order, health, morals or the

fundamental rights and freedoms of others.<sup>1</sup> For this reason, much of the case law internationally on whether laws that limit the right to freedom of religion are justifiable has involved a consideration of issues relating to public safety and public order.<sup>2</sup> Similar issues arise in relation to section 28 (2) of the HRA, which states that in determining whether a limit of human rights is reasonable, all relevant factors must be considered, including the importance of the purpose of the limitation and the relationship between the limitation and its purpose.

Public safety is the ultimate purpose of the limitation in this instance. The power to direct a person to remove an item that obscures the person's face is essential to enable police and authorised persons to establish the identity of a person in connection with a function under the road transport legislation, and for conducting alcohol or drug testing. Confirming the identity of participants in the various aspects of the regulatory scheme is essential, not least to ensure that those participants hold the required licence for the activity in which they are engaged. Police observation of a person during alcohol and drug testing is also essential to ensure that they can confirm the integrity of the sampling/testing process. The power is intrinsically linked to the effective enforcement of the road transport legislation. That legislation is directed at establishing a safe and orderly scheme for regulating traffic and transport in the ACT. A substantial volume of the legislation is devoted to road safety issues such as driver competency (including driver training and the road rules), driver impairment, vehicle management (including heavy vehicle loading and restraints) and vehicle standards.

In terms of the nature and extent of the limitation, and any less restrictive means reasonably available to achieve the limitation seeks to achieve—sections 28 (2) (c) and (e) of the HRA—new sections 58B (2) and (3) have been drafted to allow for reasonable accommodation of genuine religious and cultural concerns. Section 58B (3) provides that a directed person may request permission to remove the item in front of a police officer or authorised person of the same sex and/or to remove the item in a place or manner that affords that person reasonable privacy.

It is the directed person's choice whether or not to make a request under section 58B (3). For example, if a woman wearing a *niqab* does not object to removing it in front of the officer or authorised person making the request (usually this will be at the roadside), she is free to comply with the direction then and there. Alternatively, she may request the attendance of a female officer and/or ask to be taken to a police station for that purpose. These provisions are structured to accommodate differences between individuals in their cultural and religious practices and/or observances.

Section 58B (4) requires the police officer or authorised person to take reasonable steps to comply with a request made under section 58B (3). It addresses the possibility that despite the reasonable efforts of the police officer or authorised person, he or she cannot comply with a request. While it is not anticipated that there would be difficulties in complying with these requests in ordinary circumstances, there may be emergency situations (e.g. a major road accident or another emergency

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<sup>1</sup> Article 18 (3) ICCPR. For a similar approach, see the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, article 9 (2).

<sup>2</sup> For a recent survey of case law on this issue, see *Freedom of Religion and Religious Symbols in the Public Sphere*, Laura Barnett, Legal and Legislative Affairs Division, Parliamentary Information and Research Service, Canadian Library of Parliament Publication No. 2011-60-E 25 July 2011.

situation) where it is impracticable or impossible to comply. To avoid disputes as to whether the police officer or authorised person took ‘reasonable steps’ and/or in fact complied with a request, section 58B (5) provides that a failure to comply with a request does not become a ground for challenging actions that were taken or not taken under section 58B.

Section 58B (6) is an offence provision, for failing to comply with a direction under section 58B (1). New section 58B (7) provides that strict liability applies to the element in paragraph 58B (6) (b). This is the element of failing to comply with the direction. It is noted that strict liability offences are used frequently in offences forming part of a regulatory scheme relating to public safety, particularly as part of ‘licensing’ schemes where participants are licensed to engage in activities that carry risks to public health and safety. Under the *Criminal Code 2002*, the defence of mistake of fact is available for strict liability offences. Whether a particular defendant has grounds to assert that defence, of course, will depend on the facts of each case. There are other defences in the *Criminal Code 2002* (e.g. extraordinary emergency, duress) that may theoretically be available, but again this would depend on the facts of each case.

New section 58B (8) provides a specific defence in relation to the non-removal of face coverings that are required for medical reasons. A person’s ongoing medical treatment is accepted as legitimate reason for not removing an item that covers all or part of the person’s face.<sup>3</sup>

The defendant has a legal onus in relation to this defence. This onus is placed on the defendant rather than the prosecution as the defendant’s medical records are a private matter to which the prosecution will not usually have access.

Strict liability offences may be seen in some contexts as engaging the right in criminal proceeding under section 22 of the HRA, in particular the right in section 22 (1) (the right to be presumed innocent). However, in this particular offence strict liability attaches to only one element, the maximum penalty for the offence is not substantial, and there is an additional specific defence provided. It is considered that the engagement with the right under section 22 (1) of the HRA is not extensive and is in keeping with a regulatory scheme of this nature.

In conclusion, it is considered that while new section 58B engages human rights (most significantly the rights relating to freedom of religion and rights of minorities), it is believed that any engagement of human rights is demonstrably justified, having regard to the public interest in ensuring that the identity of road users can be established so that the road transport legislation can operate as intended to promote the safety of all road users.

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<sup>3</sup> It is assumed that the driver is nevertheless medically fit to drive. It should be noted that if the item, or the medical condition that necessitates its use, impairs the person’s ability to drive safely, the person may be guilty of an offence under the *Road Transport (Driver Licensing) Regulation 2000*, section 77 – medical condition or treatment affecting driving ability.

## Clause 6      New section 61AA

This clause inserts new section 61AA into Division 4.2 of the *Road Transport (General) Act 1999*. This section contains new definitions of the concept of ‘first offender’ and ‘repeat offender’.

At present, the concept of ‘first offender’ and ‘repeat offender’ are used in several provisions in Division 4.2, as well as in section 4F of the *Road Transport (Alcohol and Drugs) Act 1999* and several provisions of the *Road Transport (Safety and Traffic Management) Act 1999*. New section 61AA will align these concepts with the concepts of ‘first offender’ and ‘repeat offender’ in section 4F of the *Road Transport (Alcohol and Drugs) Act 1977* (the new A&D Act definition).

Last year, the *Road Transport (Alcohol and Drugs) Act 1977* was amended to displace explicitly the common law principles of statutory interpretation that apply to repeat offender provisions. For the reasons set out in the Explanatory Statement<sup>4</sup> for those amendments, including better public access to information about the penalties for re-offending and sometimes lengthy periods between the commission of an offence and the finalisation of proceedings for that offence, the common law approach to interpreting ‘repeat offender’ provisions is not considered appropriate in this particular context.

New section 61AA incorporates the new A&D Act definitions of ‘repeat offender’ and ‘first offender’, and applies them in the context of existing sections 62 and 63.

The purpose of sections 62 and 63 is to impose automatic disqualification periods on persons, including repeat offenders, who commit serious road safety offences under the *Crimes Act 1900* and the *Road Transport (Safety and Traffic Management) Act 1999*. After the person has completed the period of licence disqualification, the person may apply for a probationary licence – the person is not eligible to regain a full driver licence immediately. The automatic licence disqualification therefore has a dual purpose – it removes the person from the road for a period, then obliges the person to undergo a probationary driving period of 12 months during which safer driver behaviours must be sustained.

The relevant offences are:

- culpable driving;
- races, attempts on speed records, speed trials etc;
- negligent driving that occasions death or grievous bodily harm;
- burnouts and other prohibited conduct;
- furious, reckless or dangerous driving; and
- menacing driving.

The effect of new section 61AA (2) is that if a person has already been convicted or found guilty of a relevant disqualifying offence when he or she is convicted or found

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<sup>4</sup> See pages 9 and 10 of the Explanatory Statement for the Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2010, available on the ACT Legislation Register at [www.legislation.gov.au](http://www.legislation.gov.au)

guilty of a second or subsequent disqualifying offence, that person is regarded as a 'repeat offender' for that second or subsequent offence. It does not matter whether or not the conviction or finding of guilt for the first offence happened before or after he or she committed the second or subsequent offence. A person may also be a repeat offender for a relevant disqualifying offence if he or she is convicted or found guilty of the second or subsequent offence concurrently with the conviction or finding of guilt for the first offence.

There is a 5-year transitional provision in new section 61AA (3). It applies to a person who is convicted or found guilty of a disqualifying offence that was committed before section 6 of the amending Act commences. The person will be a repeat offender during the transitional period only if the person:

- was convicted or found guilty of a relevant offence in the 5 year period before being convicted or found guilty of the disqualifying offence; or
- is convicted or found guilty of one or more relevant offences concurrently with being convicted or found guilty of the disqualifying offence, and one or more of the relevant offences were committed before the disqualifying offence.

This transitional provision preserves the current 5 year time frame for taking previous convictions into account during the transition from the current scheme to the new scheme.

In terms of human rights impacts, the amendments do not appear to engage any specific human rights or alter any pre-existing common law rights. In particular, the amendments do not apply to provisions that impose terms of imprisonment or fines. Their effect is limited to ensuring that offenders who commit more than one disqualifying offence are not able to avoid being regarded as a 'repeat offender' simply because they committed the second or subsequent disqualifying offence before the trial of their first offence was completed.

## **Clause 7      Automatic disqualification for culpable driving** **Section 62 (1)**

This clause makes a technical amendment to insert the words 'or finds a person guilty' in section 62. This amendment gives full effect to the policy behind section 62 and removes uncertainty as to under which of several possible provisions an order for licence disqualification for offenders who are found guilty, but not convicted, may be made to ensure consistency of outcomes.

The provisions that are relevant are sections 62 and 64 of the *Road Transport (General) Act 1999* and section 18 (2) of the *Crimes (Sentencing) Act 2005*. At present, there is a power in section 64 of the *Road Transport (General) Act 1999* for a court to impose a period of licence disqualification if it convicts or finds a person guilty of an offence against the road transport legislation. Further, section 18 (2) of the *Crimes (Sentencing) Act 2005* provides that where a court makes a non-conviction order for an offence, the court may make any ancillary order that it could have made if it had convicted the offender of the offence. Section 18 (5) then explains that a licence disqualification is an 'ancillary order'. The application of section 18 (2) in the context of section 62 is unclear, as section 62 imposes an 'automatic disqualification

period’ for culpable driving offences, although ‘automatic’ is itself misleading in that the court has some choice as to the period of disqualification that can be ordered.

The amendment will resolve any uncertainty about the relationship between section 62 and section 18 (2) of the *Crimes (Sentencing) Act 2005*, and will bring section 62 into line with other provisions in the *Road Transport (General) Act 1999* that permit or require licence sanctions to be imposed, either on conviction or where there is a finding of guilt<sup>5</sup>.

**Clause 8      Section 62 (5)**

This clause is consequential on the inclusion of new section 61AA. It omits definitions of ‘repeat offender’ and ‘first offender’ as they are no longer required in section 62.

**Clause 9      Automatic disqualification for certain other driving offences  
Section 63 (2)**

This amendment is similar to the amendment in clause 7 and is made for the same reasons. It inserts the words ‘or finds a person guilty’ in section 63 (2).

**Clause 10     Section 63 (5)**

This clause is consequential on the inclusion of new section 61AA. It omits definitions of ‘repeat offender’ and ‘first offender’ as they are no longer required in section 63.

**Clause 11     Dictionary, new definitions**

This clause is consequential on the inclusion of new section 61AA. It includes definitions of ‘repeat offender’ and ‘first offender’ in the Dictionary.

**Schedule     Other amendments**

**Part 1.1     Road Transport (General) Offences Regulation 2005**

**1.1      Schedule 1, part 1.7, new item 7A**

This item amends the table in part 1.7 to include a reference to the new offence in section 58B.

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<sup>5</sup> These provisions are sections 64, 65, 66, 67A of the *Road Transport (General) Act 1999*.

## **Part 1.2 Road Transport (Safety and Traffic Management) Act 1999**

### **1.2 New section 10AA**

This item inserts new section 10AA in Division 2.3, which contains revised definitions of ‘first offender’ and ‘repeat offender’. This section will replace the existing definition of these concepts, to align with changes made to the *Road Transport (Alcohol and Drugs) Act 1977* in 2010.

This amendment is similar to the amendment in clause 6 and is made for the same reason – that is, to ensure consistency across the road transport legislation in the definition of ‘repeat offender’ and ‘first offender’ in provisions dealing with certain serious road safety offences. As explained in the clause notes for clause 6, it is not believed that these amendments will engage human rights as they do not affect provisions that impose penalties involving imprisonment. It should be noted that the decision to order impoundment of a vehicle is made by a court and can be reviewed.

The effect of new section 10AA (2) is that where a person has already been convicted or found guilty of a relevant impounding offence when he or she is convicted or found guilty of a second or subsequent impounding offence, that person is regarded as a ‘repeat offender’ for that second or subsequent offence. It does not matter whether or not the conviction or finding of guilt for the first impounding offence happened before or after he or she committed the second or subsequent offence. A person may also be a repeat offender for a relevant impounding offence if he or she is convicted or found guilty of the second or subsequent offence concurrently with the conviction or finding of guilt for the first offence.

### **1.3 Impounding or forfeiture of vehicles on conviction etc for certain offences Section 10B (10)**

This item is a consequential amendment to omit section 10B (10), which contains definitions that will not be required when new section 10AA is inserted.

### **1.4 Evidentiary certificates etc Section 25 (7)**

The opportunity is taken to omit an unnecessary provision in section 25 (7) that was identified during the implementation of the recent *Road Transport (Safety and Traffic Management) Amendment Act 2011*. This provision is not relevant to evidentiary certificates for traffic cameras. Sections 36 and 37 of the *Road Transport (General) Act 1999* already make provision for the liability of responsible persons for vehicles.

### **1.5 Dictionary, new definitions**

This item is a consequential amendment to insert new definitions of ‘first offender’ and ‘repeat offender’ in the Dictionary.