



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into the Road Safety and Crimes Legislation Amendment Bills 2022

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Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
Canberra ACT 2601

By email: LACommitteeJCS@parliament.act.gov.au

Dear Committee,

RE: Inquiry into *Road Safety Legislation Amendment Bill 2022* and *Crimes Legislation Amendment Bill 2022*

Thank you for the opportunity to contribute to the inquiry into the above bills.

Legal Aid ACT ('the Commission') provides services to the ACT community's most vulnerable and disadvantaged individuals as they navigate the criminal justice system. We assist many clients who have been charged with driving offences with different degrees of seriousness.

The Commission acknowledges public concern around dangerous driving and other risky driving behaviours which cause harm within our Territory. This submission builds upon the recent *Inquiry into Dangerous Driving* to which Legal Aid made a submission supporting the introduction of a clearer framework for dangerous driving offences. In that submission we also noted the existing capability of ACT Courts to use discretion and apply harsher penalties to such behaviours where appropriate.

To that end we have identified some areas where caution is recommended in relation to a number of the changes contained in the two amending bills. Particularly, concern arises surrounding the imposition upon vulnerable drivers' right to privacy, and the limitation of judicial discretion in sentencing of dangerous driving offences.

Road Safety Legislation Amendment Bill 2022

Fitness to Drive Regulations

Additional subsections under s28 *Road Transport (Driver Licensing) Act 1999* will allow for the creation of regulations:

- requiring the reporting of information by health practitioners relating to a person's fitness to drive a motor vehicle; and
- allowing for sharing of fitness to drive information to interstate entities.

Such regulation would need to balance the restriction of a person's right to privacy against the promotion of public safety through application of Fitness to Drive Standards.

The Commission recognises the need to ensure that the standards are applied using up-to-date medical information to allow for well-informed decisions about a person's ability to drive. We do note that existing regulations allow for provision of such information through, for example, requiring a licence holder to undergo a medical examination by a doctor, or provide other evidence of compliance with medical standards.¹

This regulation will expand the scope of information available in a medical review process by allowing the RTA to require medical practitioners (in addition to licence holders) to produce, for example, referral or specialist reports. These reports, and other private medical information about a person's fitness to drive, may then (under the potential new regulations) also be shared with interstate entities who correspond with the RTA, without the consent of the person to whom the information relates.

While the Commission supports in principle the pursuit of ensuring ACT drivers are medically fit to drive, the exact trade-off between this and the competing interest of privacy cannot be assessed until the regulations themselves are presented. We note that this breach of privacy is likely to disproportionately affect already vulnerable members of the community, such as people with a disability, or elderly people, who are more often subject to Fitness to Drive reviews. In engaging with this 'balancing act' there is the potential for the impact upon privacy of vulnerable Canberrans to be lessened by placing conditions on regulation-making power.

It should be noted that in her capacity as the Chief Coroner, her Honour Chief Magistrate Walker recommended legislative amendment to require reporting by medical practitioners of illnesses, disabilities or deficiencies specifically for patients driving heavy vehicles.² The proposed amendment goes beyond this recommendation to allow regulation requiring reporting for all license classes, even if it is noted in the explanatory memorandum that the regulation "may limit reporting to holders of certain types or kinds of licences as deemed a greater risk to road safety."³ Limitation of the regulation-making power to heavy vehicle licences would appear to achieve the purpose of the amendment, while reducing impact upon the privacy of disabled and older Canberrans, who are not often the holders of a heavy vehicle licence.

¹ *Road Transport (Driver Licensing) Regulation 2000* s78.

² *Inquest into the death of Blake Andrew Corney* [2021] ACTCD 6 [82].

³ Explanatory Statement, Road Safety Legislation Amendment Bill 2022 (ACT) 9.

Introduction of two-tiered sentencing to punish aggravated or repeat offenders

The amendments to the *Road Transport (Safety and Traffic Management) Act 1999* introduce an aggravated form of the existing s5A offence, which relates to races, attempts on speed records, and similar activities.

An offence which is aggravated, or a repeat offence, is subject to an increased maximum penalty, which acts as a “yardstick” representing “the legislature’s assessment of the seriousness of the offence.”⁴

The amendments also introduce a statutory alternative verdict to allow for the lesser offence to be found proven where the trier of fact is satisfied beyond reasonable doubt of an offence under s5A, but not of the presence of an aggravating circumstance. The aggravated offence and statutory alternative verdict are structured in a way consistent with the existing s7A.

The Commission notes that many of the circumstances which are elements to the new aggravated offence are already matters the Court must consider in sentencing under s33 of the *Crimes (Sentencing) Act*, including:

- the nature and circumstances of the offence,
- any other offences required or allowed to be taken into account,
- if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—the course of conduct,
- where the victim of the offence is a vulnerable person, the knowledge or constructive knowledge of the offender as to that vulnerability, and the loss or harm to that vulnerable person,
- whether the offender was affected by alcohol or a controlled drug when the offence was committed.⁵

Additionally, the Act sets out at s5C an offence of ‘failing to stop motor vehicle for police.’ Under that offence the penalty for a first offender is a comparable one hundred penalty units and/or 12 months’ imprisonment.

In combination, these sentencing considerations and existing offence demonstrate the capability of ACT Courts to handle more serious instances of s5A offences, a sentiment which was also communicated by the Commission in its previous submission to the *Inquiry into Dangerous Driving*. In that submission it was pointed out that courts have been unafraid of applying harsher penalties where appropriate, as was the case in *Monfries*.⁶

Further, the creation of a two-tiered offence in this manner is against Government policy, for example as set out in the JACS *Guide for Framing Offences*.⁷ As that *Guide* notes, such an offence structure risks prioritising factors such as past offences above, or to the exclusion of, other relevant sentencing

⁴ *Elias v The Queen* (2013) 248 CLR 483 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁵ *Crimes (Sentencing) Act 2005* s33.

⁶ Legal Aid ACT, Submission to Inquiry into Dangerous Driving (September 2022)

<https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/2092807/011-Legal-Aid-ACT.pdf>; *Monfries v R* [2014] ACTCA 46 [134] (Ross J).

⁷ ACT Government, Justice and Community Safety Directorate, ‘Guide for Framing Offences’ (2010, Version 2)

<<https://www.justice.act.gov.au/publications/guide-for-framing-offences>>.

considerations. The ACT Court of Appeal similarly warned in 2016 that “the antecedent criminal history of an offender cannot be given such weight as to lead to a penalty that is disproportionate to the offence for which he or she is actually to be sentenced.”⁸

The Commission appreciates that the increased maximum penalty for the aggravated form of the s5A offence indicates the legislature’s assessment of the seriousness of such offences while retaining the existing judicial discretion. We support its consistency with the existing s7A.

‘Relevant Offences’ for Alcohol and Drug charges

Currently, where a s7A offence which is aggravated by the presence of alcohol or drugs, it is not a ‘relevant offence’ when defining a repeat offender under s4F of the *Road Transport (Alcohol and Drugs) Act*. This often results in prosecution insisting on applying both the aggravated s7A charge, and a drug/alcohol driving charge. The proposed s5A will be subject to the same issue.

The Commission suggests that it may be opportune to make amendments defining s5A and s7A driving offences aggravated by presence of a prescribed drug or alcohol as ‘relevant offences’ at s4F *Road Transport (Alcohol and Drugs) Act*. This could be done in a manner similar to the inclusion of culpable driving as a ‘relevant offence’ at s4F(3)(c).

Such an inclusion will allow for any potential future intoxicated driving offences to be properly handled as repeat offences without necessarily needing to apply and prove both charges to one instance of a defendant’s conduct.

New category of ‘dangerous driving’ offences

A previous concern of the Commission was the lack of clarity surrounding what constituted a ‘dangerous driving offence’ in the ACT, given the placement of such offences among various acts. To that end, we appreciate the replacement in s5AB *Road Transport (Safety and Traffic Management) Act* of ‘failing to stop’ offences with the new category of ‘dangerous driving’ repeat offences.

However, the Commission generally opposes the emphasis of the amendments upon determination of penalties based on whether a person is a repeat offender. While antecedent offences may form part of a Court’s considerations in sentencing, it should not be elevated above all other considerations, or lead to a penalty disproportionate to the present offence for which a person is being prosecuted.⁹ Expansion of the range of offences which will constitute a ‘repeat offence’ under the Act appears to compromise the existing and demonstrably functional discretion of the courts in sentencing, by prioritising previous offences over other sentencing considerations.

Such restriction has, in the past, required the Court to subject defendants to extended periods of bail to avoid application of an unjust penalty. For example, early in 2023 the Magistrate’s Court will determine the sentence for a decision which was handed down in May 2021, because application of the Territory’s mandatory sentencing provisions would have, at that time, “produce[d] a

⁸ *Millard v The Queen* [2016] ACTCA 14 at [39] (Refshauge, Penfold and North JJ).

⁹ *Elias v The Queen* (n 5).

disproportionate and counter-productive outcome”.¹⁰ Though that matter relates to automatic disqualification of a licence upon conviction, it demonstrates the consequences of limiting sentencing discretion of Courts. Where Parliament “chooses to deny the court such a discretion,” and instead imposes a specific punishment or consideration, “the court must obey... in this respect,”¹¹ even where the result would be “somewhat draconian.”¹²

Broader definition of ‘impounding offence’

Like the new category of dangerous driving offences, the Commission supports the clarity and consistency of the expanded ‘impounding offence’ category but has concerns about the restriction upon discretion of the Court, and the potential for unjust sentencing outcomes. In this case, such concerns are mitigated by s10B(3), which allows the Court to make orders shortening or commuting a period of impounding to avoid injustice or excessive hardship.

Immediate suspension for refusal to provide an oral fluid sample

An offence against the *Road Transport (Alcohol and Drugs) Act 1977* s22A (refusing to provide an oral fluid sample) will, under the amendments, be included as an immediate suspension offence. The Commission suggests that immediate suspensions should be treated with caution, particularly as s22A is a strict liability offence. However, in this case we acknowledge the consistency of this amendment with the existing immediate suspensions for offences such as refusing to provide a breath sample or blood test.

The difficulty with oral fluid analysis (OFA) offences, as has frequently been cited by the Magistrates Court in sentencing, is that the offence is created by the mere presence of prohibited drug.¹³ There is no capacity under the current form of testing imposed by police to identify the level to which a driver’s capacity is affected.

Immediate suspension, disqualification, and impounding for high-range speeding

The amendments expand the existing licence suspension and disqualification powers, as well as vehicle seizure/impounding powers, to apply to an offence against s20 *Road Transport (Road Rules) Regulation 2017* (obeying speed limit) in circumstances where the person, in committing the offence, exceeded the applicable speed limit by more than 45km/h.

These measures to address high-range speeding are supported by the Commission, as such offences represent a significant source of danger on ACT roads not previously addressed by the immediate suspension/impounding schemes. We know, for example, that dangerous driving offences are overrepresented among repeat high-speed offenders; those who have committed multiple speeding offences exceeding the speed limit by at least 30km/h are also more like to have committed other types of driving offences.¹⁴

¹⁰ *Robens v Sproule* [2021] ACTMC 8 [1].

¹¹ *Magaming v R* (2013) 252 CLR 381 27, quoting *Palling v Corfield* (1970) 123 CLR 52 58 (Barwick CJ).

¹² *Watson v Stiles* [2021] ACTMC 2 [44] (Chief Magistrate Walker).

¹³ See eg, *Watson v Stiles* [2021] ACTMC 2 [2] (Chief Magistrate Walker).

¹⁴ Barry Watson et al (2015). Profiling high-range speeding offenders: Investigating criminal history, personal characteristics, traffic offences, and crash history. *Accident Analysis & Prevention*, 74, 87-96.

However, the Commission notes some inconsistencies in the way that this offence will be regulated with regards to seizure and impounding of vehicles, due to the framing of the amendment. Currently, vehicles which may be subject to a surrender notice, or the power of police to seize and impound vehicles, are set out respectively by subsections 10BA(1) and 10C(1)(a) of the Act. Subsequent limitations on these powers often refer specifically to those subsections. This means that they would apply to the inclusion of s7A offences, by way of subsections 10BA(1)(d) and 10C(1)(a)(iv), but not to the high-range speeding offence which is instead inserted at subsections 10BA(1A), and 10C(1)(aa).

The relevant limitations are listed in the table below:

Section/s	Relevant limitation not applicable to new ss 10BA(1A) or 10C(1)(aa)
10BA(3), 10C(2)	Time limit following offence for seizure or provision of surrender notice
10D	Requirement to notify registered operator of seized vehicle within 7 days, with certain information stated in the notice
10E	Requirements for the chief police officer to keep a motor vehicle seized, and where the seizure may end (due to matter dealt with by court, infringement notice served, end of 28 day period where no prosecution commenced, end of 3 month period where person not convicted of relevant offence in past 5 years).
10G	Persons may apply to the chief police officer for release of a seized/surrendered motor vehicle, where period for seizure under s10E has ended, or person is entitled to possession of the vehicle and did not know that the vehicle would be used for commission of the offence
10H	Persons may apply to Magistrate's Court for release of seized/surrendered vehicles
10J	Proceedings not to lie for seizure/surrender of a vehicle for an offence, only because a prosecution is not started for the offence.

The Commission submits that these types of requirements are important safeguards, both against unfair, indefinite and unnotified seizure of vehicles by the Territory, and against legal consequences to the Territory for seizure of a vehicle. While it is appropriate to include high range speeding as dangerous driving for which police may seize and impound vehicles, that inclusion should come with the protections of the existing scheme for surrender and seizure.

This change can be achieved by including the high range speeding offence under subsections 10BA(1) and 10C(1)(a), rather than including it separately to the existing list of applicable offences. Alternatively, each of the sections in the table above could be amended to include the new subsections 10BA(1A) and 10C(1)(aa).

Where the legislature explicitly intends to exclude these limitations from such surrender/seizures, the Commission respectfully opposes such an intention and suggests that, if progressed, the intent of the amendments should be clearly articulated.

Crimes Legislation Amendment Bill 2022

Entry to a Motor Vehicle

Amendments to the *Criminal Code* introduce a new offence, 'unauthorised entry of a motor vehicle.' This offence appears to handle similar conduct that which is addressed by s318 *Criminal Code* (dishonestly taking, driving, riding in motor vehicle without consent), and s82 *Road Transport (General) Act* (motor vehicle/trailer not to be used without owner's consent).

The new offence is likely intended to provide an alternative charge with a lower burden upon prosecutors than these existing offences, as it does not include an element of dishonesty, or of having made 'use' of the vehicle. The behaviour captured by the amendment is equivalent to the current offence of trespass.

The Commission has previously opposed the introduction of this offence, which risks criminalising well-intentioned conduct. Further, the offence places an evidentiary burden upon defendants to raise the defence of reasonable excuse, in the face of readily established factual elements.

The Commission continues to oppose the introduction of this offence on those grounds.

However, where the offence is to be introduced, the Commission recommends that the maximum penalty be lowered to five penalty units. As we have previously submitted, this is line with equivalent trespass offences. It would also be more consistent with the similar NSW offence '*unauthorised entry of a vehicle or boat*,' which carries a maximum of four penalty units (\$440).¹⁵

¹⁵ *Summary Offences Act 1988* (NSW) s6A.

Conclusion

The Commission appreciates the collaborative approach to addressing dangerous driving behaviours in the Territory, including both the previous *Inquiry into Dangerous Driving*, and the present inquiry.

In response to the *Road Safety Legislation Amendment Bill 2022*, the Commission recommends that:


- (1) The regulation-making powers for Fitness to Drive ought to be subject to additional restrictions, such as applying only to specific licence classes, to avoid unfairly imposing upon the right to privacy of already vulnerable individuals.
- (2) Where greater penalties are made applicable to aggravated and repeat offences, such as under s5A, care should be taken to avoid limiting judicial sentencing discretion.
- (3) Consideration should be given as to whether offences against the new s5A and existing s7A, where aggravated by a circumstance of drug/alcohol, should be included as a 'relevant offence' for purposes of repeat offenders in the *Road Safety (Alcohol and Drugs) Act*.
- (4) The category of 'dangerous driving' offences should not be grouped together as repeat offences, preferring instead to allow for judicial discretion using existing sentencing considerations.
- (5) The new subsections 10BA(1A) and 10C(1)(aa) should be included in the limitations and requirements applicable to the existing surrender/impounding scheme.

In response to the *Crimes Legislation Amendment Bill 2022, Part 7A.3 – Other Offences*, the Commission recommends that:

- (6) The new offence of 'entry to a motor vehicle' is not introduced.
- (7) Where the new offence of 'entry to a motor vehicle' is to be introduced, that its maximum penalty be decreased in line with the equivalent NSW offence.

Yours sincerely



 Derek Schild
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