



MINISTER FOR INFRASTRUCTURE, PLANNING AND LOGISTICS

Parliament House
State Square
Darwin NT 0800
minister.lawler@nt.gov.au

GPO Box 3146
Darwin NT 0801
Telephone: 08 8936 5566
Facsimile: 08 8936 5609

Mr Tony Sievers MLA
Chair
Economic Policy Scrutiny Committee
GPO Box 3721
DARWIN NT 0801

Dear Mr ^{Tony} Sievers

Re: Inquiry into the Transport Legislation Amendment Bill 2019 (Serial 98)

Thank you for your letter of 18 September 2019, seeking clarification on a number of aspects of the Transport Legislation Amendment Bill 2019 (the Bill).

Please find attached a response to each of the questions raised by the Economic Policy Scrutiny Committee. For your information, the Office of Parliamentary Counsel was consulted in drafting the response.

I have no objection to the Committee publishing the response on its website.

Should the Committee need any further clarification, please don't hesitate to contact Mrs Paula Timson, Director Legislation and Reform of the Department of Infrastructure, Planning and Logistics on ph: 8924 7018 or email paula.timson@nt.gov.au.

Yours sincerely

EVA LAWLER

26 SEP 2019

ECONOMIC POLICY SCRUTINY COMMITTEE
Written Questions

Department of Infrastructure, Planning and Logistics

CI 14 – Section 19 amended (Interpretation) - proposed s 19(7)

1. Proposed s 19(7) provides that Part V of the *Traffic Act 1987* applies to a person, other than a driving instructor, who holds a licence and is occupying a front passenger seat in a vehicle being driven by a learner driver, as if the person is also a driver.
 - a. *What is the rationale for differentiating between driving instructors and others rather than applying the same provisions to both as has been done in s 112 of the Road Transport Act 2013 (NSW)?*

Department Response

There is a higher duty of care placed on a driving instructor and accordingly their prescribed breath alcohol level is zero.

Non-professional supervising drivers are subject to whatever the alcohol level applies to them having regard to their age and experience or the type of vehicle involved, i.e. zero if the vehicle is over 12 tonnes or is capable of seating more than 12 persons, or if the supervising driver is under 25 years old and has not held a full licence for three years, otherwise, 0.05 blood / alcohol level.

2. The provisions allowing for testing set out in Part V, Division 5, only apply to 'drivers'.
 - a. *Under what circumstances can an instructor be tested in circumstances where they are not the driver and not deemed to be the driver?*

Department Response

A "person" can be tested under section 29AAC of the *Traffic Act 1987* (Breath test and breath analysis) if the officer has reasonable cause to suspect that they have committed an offence against Division 2 which includes the driving instructor offence.

3. Although sections 26(1), 28(1) and 29AAA(1) deal with similar offences relating to a driving instructor sitting next to and instructing a learner while affected by alcohol and/or drugs, or having a prohibited drug in their body, the wording for s 26(1) differs from that used in sections 28(1) and 29AAA(1).
 - a. *Why is the term 'permit' used in s 26(1)?*

Department Response

The subsection 26(1)(b) offence is a similar offence to the new offence being created for other people supervising learner drivers. It seeks to make the instructor who has been drinking, liable for an offence whether he or she is driving, or instructing a pupil to drive.

The difference in language between subsection 26(1)(b) and subsections 28(1)(b) and 29AAA(1)(b) reflects the fact that the original driver instructor offence was contained in the *Traffic Act 1987* when it came into force on 20 June 1998, and sections 28 and 29AAA were rewritten or inserted into the Act in 2008. These differences reflect different drafting styles.

It is suggested that building consistency in language between sections 26(1), 28(1) and 29AAA(1) could be addressed in subsequent amendments to the *Traffic Act 1987*.

4. Proposed s 19(7) applies to any person who holds 'a' licence and who occupies the seat next to the learner driver. Consequently it applies to persons holding a learner or provisional licence as well those holding an open licence. Although under Traffic Regulations 11 and 12 the holders of learner or provisional licences cannot supervise a learner driver, and a learner driver cannot drive without the supervision of the holder of an open licence, a person with a learner or provisional licence may inadvertently sit in the passenger seat next to the learner driver and thereby become liable for a range of offences (e.g. they may accept a lift after a function not knowing that the driver is a learner driver). It is noted that while regulation 11 excludes holders of learner or provisional licences from the definition of 'licence holder', the regulation cannot be used to interpret the provisions in the Act.

- a. *Why does the Bill include the holders of learner and provisional licences in relation to proposed s 19(7)?*

Department Response

Only a fully licensed driver should be occupying the front passenger seat when supervising a learner driver. A person who holds a learner or provisional licence, and who occupies the front passenger seat while the vehicle is being driven by a learner licence holder commits an offence under regulation 12(5) of the *Traffic Regulations 1999*.

- b. *What would be the effect on the operation of the Bill of including a provision in the Act that defines 'licence holder' in the same way as it is defined in regulation 11?*

Department Response

There would be no adverse effect because the offence is aimed at people who undertake the responsibility of supervising a learner driver, not learner and provisional licence holders who are legally incapable of supervising learner drivers.

**CI 28 – Section 29AAG amended (Requirement to give blood sample) –
s 29AAG(1)(ab)(i)**

5. Proposed s 29AAG(1)(ab)(i) allows a police officer to require a person to give a sample of blood if the breath analysis instrument is malfunctioning. Given the invasive nature of such a procedure it is questionable that such a procedure should be allowed without the officer having cause to believe that there is a relevant concentration of alcohol in the person's breath or blood, something that is not required in this provision.
- a. *What is the rationale for requiring a blood test rather than taking the person to another place where there is a functioning breath analysis instrument?*

Department Response

It is a moot point as to whether police have the power to require a person to undertake breath analysis under subsection 29AAC(1) of the *Traffic Act 1987* without first undertaking a breath test, if they have been pulled over specifically for the purpose of submitting to a breath test under subsection 29AAB(1)(a).

Police operate on the basis that they do not have that power, so whenever a driver is pulled over to undergo a random breath test, they are always required to undertake a breath test. If that test is positive, or if they fail to provide a sufficient sample of breath, they are then required to submit a breath analysis.

A driver would only be required to undertake a breath analysis without first undergoing a breath test in the unusual circumstance where they were pulled over because the manner in which they were driving gave police reasonable cause to suspect that they were impaired by alcohol, and the police officer had a breath analysis instrument but no breath testing kit.

There is already a power to require a person to undergo a second or further breath analysis that could be undertaken with a different device under subsection 29AAD(1) of the *Traffic Act 1987*.

However, a second breath analysis device might not always be available outside Darwin, Palmerston or Alice Springs. If it was available in a place without a hospital, it would always be chosen as there is no guarantee that there will be someone available and willing to take a blood sample in a health clinic.

Even in urban areas, it is a lot easier to administer a second breath analysis that provides an instant result, if there is a device available, than having to take a driver who has failed a breath test to hospital for a blood test.

If there is no other breath analysis instrument available, there is currently no power to require the person to undertake a blood test.

A person required to provide blood when a breath analysis machine fails will be someone who:

- was pulled over because the manner in which they were driving had given police reasonable cause to suspect that they had committed a drink driving offence; or
- was required to undergo a random breath test and either:
 - the test was positive; or
 - they failed to provide a sufficient sample of breath (noting that if a person is physically incapable of providing a breath specimen, they are currently required to undergo a blood test).

It is not correct to say that this will happen in a circumstance where police have no cause to suspect that the person had been drinking and driving.

- b. *What would be the effect on the operation of the Bill of substituting the requirement for a blood test in relation to proposed s 29AAG(1)(ab)(i) with a requirement that the person submit to a breath test on a functioning machine?*

Department Response

Any change would have to be limited so that the requirement to undertake a second breath analysis would only apply where a second device was reasonably available. If a breath analysis instrument failed in Pine Creek, it would be impracticable to wait for a device to be sent from Katherine.

Limiting the ability to require a blood test upon the failure of a breath analysis instrument to provide a result, to circumstances where it was impracticable for police to require further analysis under subsection 29AAD of the *Traffic Act 1987*, will not impact on police practice, but it may pose some difficult drafting issues in specifying when it is or isn't practicable to require a driver to submit to a second or further breath analysis before being required to undergo a blood test.

Placing restrictions like this on police testing powers makes it more difficult to secure a conviction and does nothing to improve road safety, particularly when the driver involved was either pulled over either because police had cause to suspect the driver had committed a drink driving offence, has failed a breath test, or the driver failed a breath test before being required to submit to breath analysis.

CI 32 – Section 43B replaced – Exemptions

6. Proposed s 43B is framed in terms of exempting persons rather than vehicles, with the rationale for this being that the *Traffic Act 1987* regulates owners and drivers and not vehicles. Sub-section (1) of proposed s 43B appears to allow the exemption of a person or class of persons from any provision of the Act. Although subsection (2) attempts to link this with a particular vehicle or class of vehicles, the use of the phrase 'may apply in relation to a particular vehicle or class of vehicles' means that while an exemption may apply to vehicles it is not limited to such exemptions. Subsection (3) does not rectify the problem as while it is concerned with determinations in relation to a class of vehicles it does not exclude exemptions in relation to other matters.

- a. *What would be the effect on the operation of the Bill of reframing sub-section (2) to provide that an exemption under subsection (1) is confined to provisions dealing with a particular vehicle or class of vehicle?*

Department Response

It would prevent an exemption from being granted to an individual that was not limited to their use of a particular vehicle or class of vehicle, however the Registrar of Motor Vehicles cannot recall ever having given such an exemption.

The current exemption powers have been used to allow the limited use of vehicles that are incapable of being registered, or for which there is no class of driver licence, such as segways, pedelecs, golf buggies and quad bikes.

CI 34 – Section 53 amended (Regulations) – proposed s 53(2)(za) and reg (10)

7. The effect of proposed s 53(2)(za) 'is that any licence holder who is supervising a learner driver can be liable for an offence committed under the regulations by the learner driver, regardless of endeavours made by the supervisor to prevent that breach' (p. 6 legal advice, Ned Aughterson). Although proposed regulation 12(11) provides that it is a defence where the supervisor is able to prove they took reasonable steps to prevent the learner from committing the offence, it is questionable whether this protection should be left in the regulations rather than in the Act.

- a. *What would be the effect on the operation of the Bill of moving the protection proposed in regulation 12(11) to the Act?*

Department Response

Although an Act might have defences that are of general application to various offences under the Act and Regulations made under that Act, it would be most unusual to have a defence in an Act that is targeted at a specific offence in a regulation.

An alternative to moving the defence from the regulations to the Act would be to replicate it in the Act as a limit on the exercise of the regulation making power. The effect of such a limit would be to ensure that the regulation could not validly be changed in the future to remove the protection. Given that all changes to regulations are scrutinised and can be disallowed, such a scenario seems unlikely.

8. As with proposed s 19(7), proposed s 53(2)(za) gives rise to the potential for learner and provisional licence holders, who do not see themselves as supervising the learner driver, to be liable for an offence committed against the Regulations by the learner. Although this problem would not arise under the current regulations, with regulation 11 excluding learner and provisional licence holders from the definition of 'licence holder', 'regulations can be altered from time to time and there is a question of whether such protections should be included in the Act itself' (p. 6 legal advice, Ned Aughterson).

- a. *What would be the effect on the operation of the Bill of amending the Bill so that “licence holder” in proposed s 53(2)(za) has a similar definition to that in regulation 11?*

Department Response

This raises the same issues as the suggestion that the defence in regulations 12(10) should be shifted to the Act.

It could be done by limiting the exercise of the regulation making power to regulations that make a licence holder, other than a learner and provisional licence holder, liable for the offences of the learner driver under their supervision, but that seems unnecessary when the restriction is already built into the regulation and any change to the regulations will face scrutiny and be subject to disallowance.

CI 12 – Section 137E inserted – Motor Vehicles Act 1949 – Information sharing

9. Proposed s 137E provides for the Registrar to share medical history and driving history of a licensed driver or an applicant for a licence with any person who is assisting the Registrar to assess an applicant’s capacity or fitness to hold a licence.
- a. *Please describe the processes and safeguards that are in place to protect a person’s privacy when medical and driving history are released to a third party.*

Department Response

In considering the proposal for the provision of information by the Registrar to an expert or expert panel, to advise the Registrar in carrying out their statutory functions, the Information Commissioner advised that this would fall within the scope of the primary purpose for information collection or, if not, be a permitted disclosure for a directly related secondary purpose.

The Motor Vehicle Registry (MVR) has developed processes and safeguards to protect a person’s privacy when medical and driving history are released from the Registrars record to a third party. In the instances where a Medical Review Panel is required to be convened the following process is followed:

- only where the person has provided consent will information held by the Registrar be released;
- once the person’s consent had been obtained, the composition of the Medical Review Panel would be established according to the nature of the medical incapacity to be discussed, and a meeting date determined;
- relevant records held by the Registrar would be electronically transmitted direct to each Panel Member for the sole purpose of assessing that person’s capacity, or fitness to drive;
- each Panel member is bound by the Information Privacy Principles under the *Information Act 2002*.
- an offence is proposed to be created should a person who receives information when assisting the Registrar to assess an applicant’s capacity or fitness to hold a licence to disclose that information on contravention of the legislation (Refer clause 12 of the *Transport Legislation Amendment Bill 2019*).

In addition, due to the sensitivity of a licence holder's medical particulars:

- a dedicated email account is used for health professionals to send any notifications to MVR;
- there is only one Medical Compliance Officer at MVR who is principally responsible for the administration of all medical notifications received, where an assessment is required of the person's eligibility to hold a drivers licence;
- the Medical Compliance Officer receives assistance from time to time from the Licensing Officer, and is supported by the Senior Licensing Officer and Manager Driver Licensing;
- each of these officers have access to the dedicated email account;
- all medical notifications as well as files notes are securely stored; and
- notes held on the Registrar's driver licence database (MOVERS) are only of a generic nature.

Each party is also bound by Information Privacy Principles. MVR Officers are bound by the NTPS Code of Conduct. Health professionals are subject to the Australian Medical Association's Code of Ethics.