



New South Wales

# Road Transport Legislation Amendment (Drug Testing) Bill 2006

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The objects of this Bill are:

- (a) to make amendments to the *Road Transport (Safety and Traffic Management) Act 1999* (**the Principal Act**):
    - (i) to create a new offence of driving a motor vehicle with any presence of 3 specified illicit drugs in the driver's oral fluid, blood or urine (being the drugs known as THC, speed and ecstasy), and
    - (ii) to create a new offence of driving a motor vehicle with any presence of morphine or cocaine in the driver's blood or urine, and
    - (iii) to enable NSW Police to carry out random roadside oral fluid testing for the 3 specified illicit drugs referred to in subparagraph (i) (being the drugs known as THC, speed and ecstasy), and
    - (iv) to enable NSW Police to carry out blood and urine testing for drugs on all drivers involved in fatal accidents, and
    - (v) to enable persons to be prescribed by the regulations as **prescribed sample takers** to take blood and urine samples for the purposes of the Principal Act, and
-

- (vi) to increase the period of time after driving during which a person can be required to submit to sobriety assessment or be required to provide blood and urine samples after such an assessment or if they have refused to undergo such an assessment from 2 to 4 hours after driving, and
- (b) to amend the *Crimes Act 1900* to enable evidence from blood and urine analysis undertaken in accordance with the proposed new provisions relating to sampling of drivers involved in fatal accidents (as referred to in paragraph (a) (iv) above) to be used in certain prosecutions under section 52A of that Act (which relates to dangerous driving), and
- (c) to amend the *Criminal Procedure Act 1986* to enable certain certificate evidence from blood and urine analysis undertaken in accordance with the proposed new provisions to be used in all criminal proceedings (other than proceedings under the *Drug Misuse and Trafficking Act 1985* relating to the use or administration of prohibited drugs), and
- (d) to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to enable police officers to prohibit a person who has failed an oral fluid test, or has refused or failed to undergo an oral fluid test, or has refused to provide an oral fluid sample, from driving the person's vehicle for a period of 24 hours or from supervising a learner driver for such a period, and
- (e) to make consequential amendments to the provisions of the *Road Transport (General) Act 2005* that relate to driver disqualification to take account of the amendments to the Principal Act referred to above.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the *Road Transport (Safety and Traffic Management) Act 1999* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.

**Clause 5** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

## **Schedule 1      Amendment of Road Transport (Safety and Traffic Management) Act 1999**

**Schedule 1 [1]** inserts proposed Division 1A (proposed section 11B) into Part 2 of the Principal Act to give effect to paragraph (a) (i) and (ii) of the Overview above.

Proposed section 11B (1) provides that a person must not, while there is present in his or her oral fluid, blood or urine any prescribed illicit drug (being the drugs known as THC, speed and ecstasy), drive or attempt to drive a motor vehicle or, while holding a driver licence, sit next to a learner driver driving a motor vehicle.

Contravention of the proposed subsection is to be an offence with a maximum penalty of 10 penalty units in the case of a first offence (currently \$1,100) or 20 penalty units in the case of a second or subsequent offence (currently \$2,200).

**Schedule 1 [27]** amends the Dictionary to the Principal Act to provide that a *prescribed illicit drug* is any of the following:

- (a) delta-9-tetrahydrocannabinol (also known as THC),
- (b) methylamphetamine (also known as speed),
- (c) methylenedioxymethylamphetamine (also known as ecstasy).

Proposed section 11B (3) provides that a person must not, while there is present in his or her blood or urine any morphine or cocaine, drive or attempt to drive a motor vehicle or, while holding a driver licence, sit next to a learner driver driving a motor vehicle.

Contravention of the proposed subsection is to be an offence with a maximum penalty of 10 penalty units in the case of a first offence (currently \$1,100) or 20 penalty units in the case of a second or subsequent offence (currently \$2,200).

Proposed section 11B (5) and (6) provide that it is a defence to a prosecution for an offence under proposed section 11B (3) if the defendant proves that the presence in the defendant's blood or urine of morphine was caused by the consumption of a substance for medicinal purposes. A substance taken to be consumed for medicinal purposes only if it is:

- (a) a drug prescribed by a medical practitioner taken in accordance with a medical practitioner's prescription, or
- (b) a codeine-based medicinal drug purchased from a pharmacy that has been taken in accordance with the manufacturer's instructions.

**Schedule 1 [2]** makes a law revision amendment so that the Principal Act refers consistently to "home" throughout instead of the archaic "place of abode".

**Schedule 1 [3]** inserts proposed Division 3A (proposed sections 18A–18H) into the Principal Act to give effect to paragraph (a) (iii) of the Overview above.

Proposed section 18A sets out certain definitions that are to be used in the proposed Division, including *oral fluid test* which is defined to mean a test carried out by an approved oral fluid testing device for the purpose of ascertaining whether any prescribed illicit drugs are present in a person's oral fluid.

Proposed section 18B enables a police officer to conduct one or more random oral fluid tests of a person if the police officer has reasonable cause to believe that the person is or was driving or attempting to drive a motor vehicle on a road or road related area or that the person was the holder of a driver licence sitting next to a learner driver. A failure to undergo a random oral fluid test when required will be an offence for which the maximum penalty will be 10 penalty units (currently \$1,100). It will be a defence to a prosecution for this offence if the defendant satisfies the court that the defendant was unable, on medical grounds, to undergo the oral fluid test at the time the defendant was required to do so.

Proposed section 18C authorises a police officer to arrest and detain a person so that the person may provide oral fluid samples if an oral fluid test indicates that there may be one or more prescribed illicit drugs in his or her oral fluid or if the person refuses to undergo an oral fluid test.

Proposed section 18D enables a police officer to require a person arrested under proposed section 18C to provide an oral fluid sample. A refusal or failure to do so will be an offence for which the maximum penalty will be 30 penalty units (currently \$3,300) in the case of a first offence or 50 penalty units (currently \$5,500) or imprisonment for 18 months or both in the case of a second or subsequent offence. It will be a defence to a prosecution for the offence if the defendant satisfies the court that the defendant was unable, on medical grounds, to provide an oral fluid sample at the time the defendant was required to do so.

Proposed section 18E enables, except in the circumstances set out in proposed section 18F, a police officer to require a person who has attempted to provide an oral fluid sample as directed but has been unable to comply (for example, because no oral fluid was physically able to be produced) to provide a sample of the person's blood (whether or not the person consents to the provision of the sample) in accordance with the directions of a medical practitioner, registered nurse or prescribed sample taker. A refusal or failure to do so will be an offence for which the maximum penalty will be 30 penalty units (currently \$3,300) in the case of a first offence or 50 penalty units (currently \$5,500) or imprisonment for 18 months or both in the case of a second or subsequent offence.

Proposed section 18F specifies the circumstances where a police officer cannot require a person to undergo an oral fluid test or provide an oral fluid or blood sample.

Proposed section 18G makes it an offence for a person to wilfully introduce, or alter the amount of, any prescribed illicit drug in his or her oral fluid or blood following a request for an oral fluid test or for an oral fluid or blood sample. The maximum penalty for such an offence will be 30 penalty units in the case of a first offence (currently \$3,300) or 50 penalty units in the case of a second or subsequent offence (currently \$5,500).

Proposed section 18H creates an offence that prohibits:

- (a) samples of oral fluid or blood taken or provided under proposed Division 3A (a *Division 3A sample*) being supplied for prohibited analysis (being any analysis other than one for the permitted purpose of determining whether any prescribed illicit drugs are present in the sample), and
- (b) the carrying out of prohibited analyses of Division 3A samples, and
- (c) the inclusion of information derived from prohibited analyses on DNA databases kept under the law of this State or the Commonwealth or of another State or a Territory.

Contravention of the proposed section carries a maximum penalty of 30 penalty units (currently \$3,300).

**Schedule 1 [5]** amends section 23 (6) of the Principal Act to enable a blood sample taken from a patient admitted to hospital as a result of a fatal accident, who was driving or attempting to drive a motor vehicle or the holder of a driver licence sitting next to a learner driver driving a motor vehicle involved in the accident, to be tested for drugs other than alcohol. Currently, a blood sample taken from a hospital accident patient may only be so tested if:

- (a) a police officer has reasonable grounds to believe that, at the time of the accident concerned, the person from whom the sample was taken was under the influence of a drug other than alcohol, and
- (b) no police officer attended the scene of the accident that led to the taking of the sample or, although a police officer or police officers attended the scene of the accident, there was no reasonable opportunity to require the person from whom the sample was taken to submit to an assessment of his or her sobriety.

**Schedule 1 [6]** inserts proposed Division 4A (proposed sections 24A–24D) into Part 2 of the Principal Act to give effect to paragraph (a) (iv) of the Overview above.

Proposed section 24A enables a police officer to arrest certain persons involved in accidents that the police officer believes are fatal accidents (or accidents that more likely than not will lead to a person dying within 30 days) so that blood and urine tests for drugs can be carried out. Those persons must be at least 15 years of age and at the time of the accident driving or attempting to drive a motor vehicle involved in the accident or the holder of a driver licence sitting next to a learner driver who was driving a motor vehicle involved in the accident. The proposed section will not apply to persons who are admitted to hospital as a consequence of the accident. Those persons are dealt with under the current Division 4 of Part 2 of the Principal Act.

Proposed section 24B enables a police officer to require a person arrested under proposed section 24A to provide blood and urine samples in accordance with the directions of a medical practitioner, registered nurse or prescribed sample taker for drug testing. The proposed section also deals with the taking of those samples and the analysis of those samples. (Note: *prescribed sample taker* is to be defined in the Dictionary—see paragraph (a) (v) of the Overview above and **Schedule 1 [27]** below).

Such a sample may only be analysed if a police officer has notified the analyst in writing:

- (a) that a person involved in the accident has died within 30 days of the accident, or
- (b) that a person involved in the accident has died during the period beginning 30 days after the accident and ending 12 months after the accident and a medical practitioner has given advice that the person died as a result of the accident.

A blood or urine sample that has been provided under this proposed section must be destroyed without being analysed if, at the expiry of 13 months after the accident concerned, no police officer has made such a death notification.

Proposed section 24C specifies the circumstances where a police officer cannot require a person to provide blood and urine samples under the proposed Division.

Proposed section 24D creates certain offences relating to the drug testing under the proposed Division.

**Schedule 1 [4]** makes an amendment to the heading to Division 4 of Part 2 of the Principal Act consequential on the insertion of proposed Division 4A into that Part.

**Schedule 1 [7] and [8]** make amendments to give effect to paragraph (a) (v) of the Overview above. The items amend various provisions in Division 5 (Sobriety assessments and related drug analysis) of Part 2 of the Principal Act to enable prescribed sample takers, in addition to medical practitioners and registered nurses, to take blood and urine samples under that Division.

**Schedule 1 [9]** amends section 28 (When sobriety assessment and taking of samples not permitted) of the Principal Act to give effect to paragraph (a) (vi) of the Overview above. **Schedule 1 [10] and [13]** make consequential amendments.

**Schedule 1 [11]** inserts proposed sections 33A–33D into the Principal Act.

Proposed section 33A facilitates the admission into evidence in proceedings for an offence under proposed section 11B of the presence of a prescribed illicit drug in the defendant's oral fluid if the oral fluid sample analysed was provided within 2 hours after the event that occasioned the analysis unless the defendant proves that the absence of the drug at the time of the event.

Proposed section 33B enables certificate evidence concerning oral fluid sampling and analysis to be used as evidence in proceedings for offences under proposed section 11B.

Proposed section 33C facilitates the admission into evidence in proceedings for an offence under proposed section 11B of the presence of a prescribed illicit drug, morphine or cocaine in the defendant's blood or urine if the blood or urine sample analysed was provided within 4 hours after the event that occasioned the analysis unless the defendant proves that the absence of the drug at the time of the event.

Proposed section 33D enables certificate evidence concerning blood and urine sampling and analysis to be used as evidence in proceedings for offences under proposed section 11B.

**Schedule 1 [12] and [15]** are consequential amendments to enable sections 34 and 35 of the Principal Act to apply to blood and urine samples and analyses taken under proposed Divisions 3A and 4A.

**Schedule 1 [14] and [22]–[24]** are consequential amendments related to the new provisions allowing prescribed sample takers to take blood and urine samples for the purposes of the Principal Act.

**Schedule 1 [16]–[21]** are consequential amendments related to the creation of new offences in proposed Divisions 1A, 3A and 4A.

**Schedule 1 [25]** inserts proposed section 39A into the Principal Act.

Proposed section 39A makes it clear that nothing in the Principal Act prevents a police officer requiring a person to undergo both breath testing and oral fluid testing. The proposed section also provides that if a police officer requests or signals a driver of a motor vehicle to stop for the purpose of both section 13 (Power to conduct random breath testing) and proposed section 18B (Power to conduct random oral fluid testing) and the driver fails to comply with the request or signal, the driver may be convicted of an offence under section 13 (5) or an offence under proposed section 18B (5), but not both.

**Schedule 1 [26]** amends Schedule 2 (Savings, transitional and other provisions) to the Principal Act to enable regulations of a savings or transitional nature consequent on the enactment of the proposed Act to be made.

**Schedule 1 [27]** inserts a provision into Schedule 2 (Savings, transitional and other provisions) to the Principal Act to provide that the Minister for Roads is to conduct a review of the proposed Act 12 months after the significant amendments made by that Act have commenced. A report of the review is to be tabled in Parliament.

**Schedule 1 [28]** inserts certain definitions into the Dictionary to the Principal Act. The Dictionary will define a *prescribed sample taker* to be a person, or class of persons, prescribed by the regulations as authorised to take samples of blood for the purposes of proposed Division 3A of Part 2 of the Principal Act and samples of blood or urine or both for the purposes of proposed Divisions 4A and 5 of Part 2 of the Principal Act.

## **Schedule 2      Amendment of other Acts**

**Schedule 2.1 [1]–[3]** amend the *Crimes Act 1900* to give effect to paragraph (b) of the Overview above. Specifically, the amendments insert proposed section 52AA (3A) and (3B) and amend other provisions of section 52AA of the *Crimes Act 1900* to enable evidence from blood and urine analysis undertaken in accordance with the proposed new provisions relating to sampling of drivers involved in fatal accidents to be used in certain prosecutions under section 52A of that Act (which relates to dangerous driving).

**Schedule 2.2** amends the *Criminal Procedure Act 1986* to give effect to paragraph (c) of the Overview above. Specifically, section 283 of the *Criminal Procedure Act 1986* is amended to enable certificate evidence from blood and urine analysis undertaken in accordance with the proposed new provisions that would be admissible in proceedings for an offence under the Principal Act to be used in all criminal proceedings (other than proceedings under the *Drug Misuse and Trafficking Act 1985* relating to the use or administration of prohibited drugs).

**Schedule 2.3** amends the *Law Enforcement (Powers and Responsibilities) Act 2002* to give effect to paragraph (d) of the Overview above.

**Schedule 2.3 [1]** inserts proposed sections 189A–189C into the *Law Enforcement (Powers and Responsibilities) Act 2002*. Proposed section 189B enables a police officer to prohibit a driver from driving a motor vehicle for a period of 24 hours if the driver has:

- (a) undergone an oral fluid test and the test has indicated that one or more prescribed illicit drugs may be present in the driver's oral fluid, or
- (b) refused or failed to undergo an oral fluid test, or
- (c) refused or failed to provide an oral fluid sample in accordance with the directions of a police officer.

The proposed section also deals with the handing over of ignition keys and the movement or immobilisation of the vehicle.

Proposed sections 189A and 189C make similar provision in relation to supervisors of learner drivers who are intoxicated, or who have failed or refused to undergo oral fluid tests, or refused or failed to provide oral fluid samples, as current section 189 and proposed section 189B make in relation to drivers in those situations.

Section 191 of the *Law Enforcement (Powers and Responsibilities) Act 2002* makes it an offence with a maximum penalty of 10 penalty units (currently \$1,100) to contravene any prohibition or requirement made by a police officer under the proposed sections or attempt in any manner to obstruct a police officer in the exercise of any such power conferred on the police officer. Section 192 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that expenses incurred in connection with such an immobilisation, removal or detention of a motor vehicle may be recovered from the person who was driving (or about to drive) the vehicle, or from the owner of the vehicle, as a debt in a court of competent jurisdiction.

**Schedule 2.3 [2]–[4]** make consequential amendments.

**Schedule 2.4 [1]–[7]** amend the *Road Transport (General) Act 2005* to give effect to paragraph (e) of the Overview above. Specifically, provisions of section 187 and 188 of the *Road Transport (General) Act 2005* (that relate to driver disqualification) are amended to take account of certain of the proposed new offences contained in the proposed Act.