ROAD TRAFFIC AMENDMENT (BLOOD ALCOHOL CONTENT) BILL 2019

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement —

Mr P.A. KATSAMBANIS: Clause 2 is the commencement clause. It is a pretty standard clause that states that part 1 will come into operation on the day on which the act receives royal assent. The second part of the commencement states that the rest of the act, the operating provisions of the act, will come into force on the twenty-eighth day after the date on which the act receives royal assent. That is standard and fine, but it gives rise to the question, minister, as to whether any regulatory changes will be required before the passing of the bill and its commencement. What sort of changes need to be made to police operations, protocols and procedures so that the police on the ground are able to use the new provisions contained in the act?

Mrs M.H. ROBERTS: I thank the member for raising the question. I clarify for him that no regulatory changes need to occur before the rest of the bill becomes law. The reason for the 28 days is to allow plenty of time for training, a matter that the member just highlighted. Clearly, the police manual, which is electronic these days, will need to be updated. It will be updated, and training and advice will be provided to police officers. Hopefully, this will be a lot simpler for police officers and a much more straightforward way of doing things. As we heard from a couple of members in this chamber who are former police officers, police officers have been keen to have this legislation for some time, so that effectively what people blow is what they go for, rather than the old-fashioned back-calculation. As the member is aware, these amendments will bring us in line with the rest of Australia. Police officers have been waiting for these amendments and are keen to adopt them. The 28-day provision will allow time for officers to be properly trained and the electronic manual to be updated so officers are clear about what will be required of them on the date on which these provisions become law. After the bill becomes law, with part of the act being proclaimed, officers will know on what date they need to start using the new procedures.

Mr P.A. KATSAMBANIS: Clearly, this will be timesaving for police officers. The two members in this chamber who are former police officers talked about procedures being time-consuming and rather arcane. Do we have an estimate as to how much additional time, on average, it takes a police officer to do the required calculation and, hence, how much time will be saved when they do not have to do the calculation in the future?

Mrs M.H. ROBERTS: On a routine matter, I am advised that about five minutes, certainly no more, will be saved. That is valuable when it is calculated over lots of officers over a long period. There may well be other timesaving in terms of people who attempt to plead not guilty or who have tried to get around the system. A more straightforward system may mean that fewer people will contest what they have been charged with. They may accept the penalty meted out, effectively, on the spot. Not a lot of time will be saved but certainly some time—in the order of or slightly under five minutes is the best estimate.

Mr P.A. KATSAMBANIS: That five minutes could actually be important. I think the member for South Perth made the point in his contribution yesterday—I think in jest—that there is an understanding or appreciation in the community that when people are not likely to trouble the scorers, they are waved on by the police at the booze bus, and that perhaps when they are sitting in their car doing a quick calculation on their fingers, it is Murphy's Law that they are pulled in and given the opportunity to blow into the machine.

Mrs M.H. Roberts: If all police officers were as efficient in their calculation as the member for Cottesloe, they would probably save only one minute!

Mr P.A. KATSAMBANIS: Of course! But it is a point that the five minutes spent inside a bus is five minutes an officer is not spending on the road holding the machine. Hopefully, we are likely to see fewer people waved past, especially those people who trouble the scorers so that we can get them off the roads. The strong message is that more time will be freed up for police officers to conduct tests, and the likelihood that a drink-driver will get away with drinking and driving will be lower than it has been in the past, and that is a good thing.

Mrs M.H. ROBERTS: I thank the member for Hillarys for his comment and support. The real motivation for this legislation is not the timesaving element but the principle of sending a strong message that when people blow an amount on the side of the road, there is no back-calculation and no chance of getting off with a lower reading. Effectively, we are achieving a bonus, which makes the law all the more worthwhile.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Section 71 replaced —

Mr P.A. KATSAMBANIS: Clause 4 is really the main operative clause of the bill. It effectively specifies that "what you blow is what you go for" will be enshrined in law and the back-calculation will be removed. There are two provisions dealing with different offences under the Road Traffic Act, but essentially it is the same principle in both. Clause 4 states that in each case in any proceedings that are brought, in the absence of proof to the contrary, a person is to be taken to have a particular blood alcohol content at the time of driving basically as measured. Can the minister explain what the term "in the absence of proof to the contrary" means and what sort of proof to the contrary in practice would be expected to be led after the back-calculation is removed and is certainly not evidence? What is the expectation around putting in that provision "in the absence of proof to the contrary", and what is likely to be considered proof to the contrary?

Mrs M.H. ROBERTS: I thank the member for his question. The evidentiary test determines the legal alcohol blood content of the accused, which is the presumption. The term "in the absence of proof to the contrary" creates the rebuttal presumption. This provides fairness to the accused in the unusual or unforeseen circumstances that can be argued before a court. The argument would need to be cogent and persuasive enough to displace the presumption. This is likely to turn on the individual facts of the case. This makes it difficult to be certain what a court may include as a persuasive argument. The standards the court generally sets in the absence of proof to the contrary is expert evidence and corroborated sworn evidence from a credible witness or witnesses.

Case law already exists in other states and it sets the proof required at quite a high standard. In the case DPP v Mitchell in the Victorian Supreme Court, the accused claimed that after being involved in an accident, he had consumed alcohol before the breath test. The court found that it was not enough that the accused claimed to have consumed the alcohol; rather, the accused had to prove that he had consumed alcohol. Self-serving statements are not going to satisfy a court; there have to be independent, corroborative, believable witnesses or, in turn, some kind of scientific evidence. There are currently no rebuttable presumptions. Section 71(4) provides that the legal blood alcohol content is a conclusive presumption after back calculation is applied. This brings us in line with other jurisdictions.

From that explanation, most people are going to come to the conclusion that they have somewhere between little and no chance of rebutting that presumption. Every case is going to be individual; the circumstances could be different. I have a couple of hypothetical scenarios that I can share with the member if he is interested.

Mr P.A. Katsambanis: Yes, go ahead. It's helpful for further interpretation.

Mrs M.H. ROBERTS: Yes. In this scenario, the accused is driving from work to a wedding and is involved in a traffic collision. The accused calls the police to report the collision, but before the police arrive gets a taxi to the wedding. At the reception the accused consumes alcohol. Two hours later, the police attend the venue, looking for the accused. They conduct a breath test. The accused blows over .08 and is charged with drink-driving and failure to stop at the scene of an accident.

At the trial, the accused pleads guilty to failure to stop at the scene of an accident, but not guilty to the drink-driving charge. The presumption that applies is that the accused's BAC at the time of driving was the BAC that was determined at the time of testing. The accused bases their defence on the fact that they did not consume any alcohol until after they had completed driving. The onus is on the accused to show that the BAC at the time they were driving was lower. To do this, the accused may try to adduce evidence from eyewitnesses, such as co-workers, the taxidriver or other wedding guests; documentary evidence, such as drink receipts; or expert evidence about the effect of the volume of alcohol consumed, to prove that their consumption of alcohol was within those limits in that time frame. Whether the accused is successful depends on whether the court is satisfied that the evidence is sufficient, on the balance of probabilities, due to the BAC result, and rebuts the presumption. In this example, with sufficient corroborating evidence, it is possible that a defence would succeed.

That is just a possible scenario. On that basis, I personally think that if the accused were to advise the police that they had evidence to show that they were not drinking, there is a choice for the police to continue with the charge or not, and the prosecutor would make an assessment.

Mr P.A. KATSAMBANIS: I thank the minister; that is actually quite helpful. I assume the example the minister gave about the wedding guest is a hypothetical rather than something drawn from previous experience in other states. I have had some experience in this area as a legal practitioner. I was admitted to practice almost 30 years ago, which is quite scary!

Mrs M.H. Roberts: Longer than I've been in Parliament!

Mr P.A. KATSAMBANIS: I was about to say, even longer than the minister has been in this place!

I have been in cases and read about cases in which a lot of these supposed defences, excuses or attempts to provide proof to the contrary have been tried on. We can see the evolution over the years. The margin for error has become narrower and narrower, and police procedures have improved as well. From my experience of dealing with these matters in Magistrates Courts, the most regular occurrence was situations in which police prosecutors could not

provide evidence that the machine had been calibrated in the time frame required. I think back then it was 12 months, and it may still be 12 months; I am sure Mr Higgins would be able to tell us. It was really about evidence that the machine had been properly calibrated and tested, and the time frames for doing the calibrations. Some cases involved expired certificates; in others, certificates that could not be found. That was my experience. I think nowadays that has got a lot better as well. The experience of police officers is critically important in this area. One really strong protection that Western Australia has is that the operator of the machine has to be specifically licensed to do so, so one would imagine that they have reached a level of training at which they understand all this.

Other than that, I really have not come across too many excuses except for the usual, "I went home; I was shocked; I drank a bottle of whisky" type of scenarios that we hear of occasionally. I have never heard that led in evidence in a court, to be frank, but it may well have happened. Anecdotally, people talk about it, and it may have happened, but I am comfortable that the standard of proof is going to be pretty high. I agree with the suggestion the minister made at the outset of her response that this is really going to depend on individual circumstances. Following on from that hypothetical, I simply proffer the example I have from my own experience, which really was all about technical certification and calibration issues that often provide proof to the contrary rather than any particular evidence adduced that the alcohol consumption had occurred after any particular incident or the act of driving had been undertaken. I am relatively comfortable that this provision is going to achieve what it is intended to achieve and that the window or margin for someone to find a way of gaming the system is significantly tighter and narrower.

Mrs M.H. ROBERTS: The member has made some good points. This really does place the onus on the potential offender to disprove the presumption, so I think that achieves an end that we are all very comfortable with. With regard to the mechanics of the machines, they are tested 12-monthly. That is the requirement here also, and Commander Higgins has confirmed that it remains the requirement. As with all machinery and appliances, they have become simpler to use and more foolproof, so to speak, over time. We have only to look at the advances with mobile phones and other devices generally over the last 10 or 20 years. They are smaller, they can do more and they are easier to operate, so the opportunities for error have become less and less. The machines are much simpler and easier to use, with computers and present-day technology. There are simple call-ups in the system so we can routinely ensure that all our equipment is continuously accredited, and that is something that the police obviously take very seriously. No-one wants to see a case fall over in court because the equipment was not appropriately accredited at the time. That is something that the Western Australia Police Force is very, very vigilant about. I understand that all systems are in place to make sure that that accreditation is continuously up to date so that someone does not get off on a technicality.

Dr D.J. HONEY: The first part of this is not a question. I vividly recall some defences around a disease called GORD—gastro-oesophageal reflux disease—which was in fact making a connection between the stomach and the breath, but someone would be able to prove that medically as a defence.

The bit I was interested in is at the bottom of the first page of the explanatory memorandum, where it describes clause 4. Point 1(a) states —

> New section 71(1)(a) establishes that the presumption will apply to the results of a blood or urine test taken within 12 hours after the time of the instructor was providing instruction.

That is how it reads; I do not think it is grammatically quite correct. Does this also cover urine tests? I have not seen that anywhere. I also wondered what the term "instructor" means: is that the driver or some other person?

Mrs M.H. ROBERTS: Well spotted! The police do not take urine samples anymore, so it will not apply to that. Police officially ceased collecting urine samples on 30 November 2017, but that practice had actually fallen into disuse well before that date.

Dr D.J. HONEY: I thank the minister. I was concerned, because that is a notoriously unreliable indicator of blood alcohol level.

Clause put and passed.

Clauses 5 to 9 put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

MRS M.H. ROBERTS (Midland — Minister for Road Safety) [12.43 pm]: I move —

> That the bill be now read a third time.

There have been very positive contributions from everyone who has participated in the debate on the Road Traffic Amendment (Blood Alcohol Content) Bill 2019. I had a closer look through some of the comments made during the course of the second reading debate. A whole lot of suggestions were made by many members of this house, not just strictly with respect to this legislation, but also on a broad range of road safety matters. People in here are obviously genuinely concerned about what we can do to reduce the road toll and the number of serious crashes and injuries on our roads. As a number of members commented during the second reading debate, we are about to embark on a new road safety strategy to take us into the future. I will ensure that the Road Safety Council and the Road Safety Commission are apprised of members' comments and suggestions, so that they can be contemplated as part of the review of road safety and as the future strategy is developed. The member for Mirrabooka at one point suggested that we could perhaps consider a blood alcohol reading of zero as the limit. Although that might be the ideal, it is not something that we actually have under consideration.

Ms J.M. Freeman: I also said we should look at .04; that was considered by the Education and Health Standing Committee. I was just throwing it out.

Mrs M.H. ROBERTS: Yes. There was a range of opinions on that. A couple of members suggested how easy it is to actually get to .05. Once this legislation is in place, it will be a case of "what you blow is what you go". The argument was put by the member for Burns Beach that this effectively lowers the limit a little, because it does not give that bit of leeway that the current testing method allows—that is, someone can go over .05, but still get a number that comes under that. This will reduce that a little.

When we first put in place drink-driving legislation, the concept of a skipper was promoted. That, again, was something I referred to in my second reading speech. We still encourage people who are going to be the one driving to have a blood alcohol level of zero. Taxi and Uber drivers need to have a zero level. Zero is the ideal. To anyone who wants to adopt that as their practice, I would say: "Well done; that is the best thing." It is far better to not drink at all and drive, but we have to choose a number to enforce. In this bill, we are choosing the methodology with which we will enforce that, which will also bring us into line with other states. I certainly commend the member for Mirrabooka on her suggestion. On one level I think it is a good one and one that we should all personally adopt. Maybe a future Parliament or government might consider .04 or .03.

Another member talked quite a lot about technology and how this was going to assist in reducing the number of road deaths into the future. The point they did not get to and I do not think anyone really focused on was the potential for people to use more and more ride-sharing options. Public transport is one option and taxis have been another. The anecdotal advice that I receive is that young people by and large are using Ubers and are not driving. I commented that a lot of young people do not choose to get their licence at 17 or 18. Certainly in my era, people were chomping at the bit to get their licence and their wheels, so that they had the freedom that having a driver's licence provided. Now, it is quite common for 22, 23 and 24-year-olds to not have a licence, because they do not have a need for it and are quite comfortable with using public transport. Now with the rise of ride-sharing, more and more people are using rideshare. Over time, I think we will see the number of vehicles per household go down, that individual private drivers will drive less, and more rideshare-style offerings will be taken up by people. This will have an impact across a range of areas. It certainly puts a responsibility onto those drivers. At this point in time, we are certainly not contemplating lowering the current limits. However, I will be very keen to see the impact of the message we are giving via this legislation, once we have it in place.

I thank every member who contributed to the debate. I think everyone was very genuine in the suggestions that they made and many members—in particular, the member for Swan Hills—did quite a lot of research into the legislation. Given the occasion of yesterday, many people were highly complimentary of my 25-year career and certainly my commitment to road safety. I have always taken road safety very, very seriously indeed. I thank members for their contributions. I am hopeful that this legislation will get swift passage through the upper house and that we will be able to enact the legislation without delay.

Question put and passed.

Bill read a third time and transmitted to the Council.