

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW**

ROAD TRAFFIC AMENDMENT BILL (NO. 2) 2007

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
THURSDAY, 30 AUGUST 2007**

Members

**Hon Simon O'Brien (Chairman)
Hon Matthew Benson-Lidholm
Hon Sheila Mills
Hon Donna Faragher**

Hearing commenced at 9.20 am**NEILSON, MS REBECCA****Senior Legislation Officer,
Department for Planning and Infrastructure, examined:****HAY, SERGEANT GREG****Police Sergeant, WA Police Traffic Enforcement,
State Traffic Coordination, examined:****KARMELICH, MS ALISON****Policy Advisor, Office of Minister for Police, examined:**

The CHAIRMAN: Good morning and welcome to our hearing, which is focusing on the referral of the Road Traffic Amendment Bill (No. 2) 2007. Firstly, could you introduce yourself, stating your name, your contact address and the capacity in which you appear before the committee?

Ms Neilson: My name is Rebecca Neilson. I am the senior legislation officer with the Department for Planning and Infrastructure, and I was the instructing officer for the amendments that we are going to discuss this morning. My contact address is 441 Murray Street, Perth.

The CHAIRMAN: Thanks, Ms Neilson.

Sergeant Hay: My name is Sergeant Greg Hay. I am attached to Traffic Enforcement Technologies with the WA Police. I was the technical advising officer to the legislation, and I am also the member of the National Committee for Evidential Breathalysers. My contact address is State Traffic Coordination, 2-4 Wellington Street, East Perth.

The CHAIRMAN: Thank you.

Ms Karmelich: I am Alison Karmelich. I am policy adviser to Minister Kobelke for both police and road safety. My contact address is level 20, 197 St Georges Terrace, Perth.

The CHAIRMAN: I see that all witnesses have completed a document entitled "Committee Hearings - Information for Witnesses". Did you read and understand the form?

The Witnesses: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard and a transcript of this hearing will be provided to you. You are asked to provide any necessary corrections by return of that transcript, with the corrections indicated. I also indicate to you that this hearing is open to the public; however, if there is any need to go into closed session, we can do that upon request. The evidence that you give specifically to the committee now is subject to privilege, and therefore should not be discussed publicly outside the hearing until the committee has reported, because that may breach or otherwise affect that parliamentary privilege.

The bill before us has been referred to us because there are some aspects that reflect the implementation of an intergovernmental agreement to legislate in a uniform way, though there are other parts of the bill that fall outside that ambit. So our focus is rather narrow, even though we may touch on some of the other parts of the bill in passing. Perhaps I could invite one of the witnesses, perhaps Ms Neilson, to indicate, by opening remarks, what parts of the bill are subject to intergovernmental agreement, please.

Ms Neilson: Thank you, Mr Chairman. Some of what I am going to say is a little bit pre-emptive and we will move to the questions shortly, I understand, but I am grateful for the opportunity to just make an opening statement to set the context for our responses. The most important context-setting remark that I could make is that the provisions that we are talking about this morning are contained in part 2, division 2, and they relate to breath analysis. The reason that we are here is actually not because we are required to implement these amendments because of an intergovernmental agreement, but in fact because we have a requirement - and Sergeant Hay is the expert so I will hand over to him when the time is right. We have a constitutional obligation to - the commonwealth Constitution enables the commonwealth to impose requirements as to weights and measures. In addition to the Constitution, Australia is a signatory to some international treaties in relation to legal metrology, which I understand means legal units of measurement and legal measurement. The amendments are in order to bring about a national standard, which is actually an international standard, in relation to breath analysis measuring devices that are going to be used for a legal purpose; i.e. where the result is going to be required to be used in court as evidence that someone has committed an offence. So it is not because of an intergovernmental agreement, but it is actually attached to our international treaty obligations and also pursuant to the commonwealth Constitution. Sergeant Hay will give a bit of a better explanation than that.

The only other thing I would say - and I know we will probably deal with it when we get to the questions - is that the standard that Sergeant Hay will talk about is actually a standard that relates to the breath measuring device itself; it is just that the relevant part, the reason that we needed to make amendments, is that that standard requires a complying breath - they call them "evidential breath analysers", EBAs - the standard requires an EBA to produce a result in a particular unit of measurement. Our act currently does not talk about that unit of measurement, so we need these amendments in order to enable us to use that unit of measurement. The actual devices themselves are procured by police and approved by the minister, and there are provisions in the act that already enable that to occur, regardless of whether it is this device or the existing one. Thanks, Mr Chair.

The CHAIRMAN: Thanks for those opening remarks and for putting that into context. So if we look at the scope of the bill that could be seen as uniform legislation, we are looking at, I think you said, part 2, Amendments to the Road Traffic Act -

Ms Neilson: Mr Chair, could I also say - sorry to interrupt you -

The CHAIRMAN: No, please go ahead.

Ms Neilson: Part 2, division 2 is the relevant part of the bill, but in fact not all of the sections contained within division 2 are relevant to the national standard, or the international standard. There are some terminology changes, where we are talking about very technical sorts of changes. We decided that it would be better to use more perfect terminology - we refer to blood alcohol content and we stop referring to percentage - but they are not really necessary for the purposes of implementing the standard. The part that is really relevant, I think the most important part, is clause 10 of the bill. That is the part that is doing what we need it to do.

The CHAIRMAN: Perhaps we will zero in on clause 10. The committee has already noted that much of the preceding parts of part 2, division 2 are changing the terminology about how we define percentage of alcohol in the blood, so we will probably touch on that just to clarify it for the house. I know you have already briefed a number of members of the house about technical aspects, but it probably will not hurt to have that in the committee report to confirm it.

Ms Neilson: Sure.

The CHAIRMAN: So we will focus then on clause 10.

You mentioned that there are some imperatives at a national level, or by international agreement, for us to make the changes that are expressed in clause 10. What are those changes?

Ms Neilson: I might hand over to my technical expert here.

The CHAIRMAN: Thanks. Sergeant Hay.

[9.30 am]

Sergeant Hay: Under section 51(xv) of the Constitution, the commonwealth has the right to dictate weights and measures to the states. In 1999, the commonwealth government amended the legislation - the National Measurement Act - from not only for the purposes of trade, to read for any legal purpose, which encumbers this on us now. We got an opinion from the then State Solicitor to say that we would have to comply with the commonwealth, due to section 109 of the Constitution: if there is a difference between the state legislation and the commonwealth legislation; the commonwealth legislation overrides the state's legislation. That was the basis of this all, starting many years ago, to change.

Australia became a signatory to the International Organization of Legal Metrology in the late 1980s, and it produced its document called R 126 that related to evidential breathalysers. The national representative on the committee brought that back to the then National Standards Commission, which then contacted all the police jurisdictions, and all state jurisdictions have been actively involved in the bringing about of this change.

The CHAIRMAN: Has there been any particular push by a ministerial council meeting or some other imperative that has now brought this on?

Sergeant Hay: Yes. This was brought up at the Australasian Police Ministers' Council meeting - I think it was the senior officers group - and it was an agenda item for some time.

The CHAIRMAN: What I am looking for is some form of intergovernmental agreement or memo of understanding between state jurisdictions and the commonwealth, perhaps, to demonstrate that this change is necessary. Is there any such item minuted, perhaps?

Sergeant Hay: I do not think so, sir. I really do not think so. Again, it has been driven by the National Measurement Institute and the police jurisdictions because, if we were challenged with the current measurement - the percentage system we have at present - under the National Measurement Act, we are actually reporting to the courts in something that is not an Australian legal unit of measurement. That could cause us some grief in providing the convictions for drink-driving in the state at this time.

The CHAIRMAN: Thanks. That has anticipated my question, so we will come to that point now. You mentioned section 109 of the Constitution earlier. I think from what you just said, there is a fear that if we do not -

Sergeant Hay: Comply with the national -

The CHAIRMAN: - comply with the national formulation, ours could be subject to challenge by some clever lawyer in a courtroom or somewhere. Is that about the strength of it?

Sergeant Hay: That is correct, sir.

Hon DONNA FARAGHER: I would just like to ask, with respect to what you have just said, are we aware of whether other state jurisdictions - despite the fact there is no intergovernmental agreement as such, but that they have to follow the constitutional requirements - have actually implemented this change or are we the last, the first or somewhere in between?

Sergeant Hay: We are about the middle. Victoria and South Australia have already implemented and, because it is at this stage, the New South Wales Roads and Traffic Authority rang me the other day wanting a copy of our proposed legislation, so it is in the process. In Queensland, I think the bill has gone through, and it is waiting for a proclamation date. All the states, driven by the police because of this fear of not being able to convict for drink-driving, have been pushing it through their houses.

The CHAIRMAN: That is a very pertinent question; thanks for that information. Are there any proposals to introduce amendments to this bill?

Ms Neilson: No, Mr Chair.

The CHAIRMAN: Are any of these amendments in whole or part due to any deficiencies in the drafting of the current legislation?

Ms Neilson: Again, I would say no, Mr Chair. The provisions, as they are currently, are perfectly fine except for the new unit of measurement that this international/national standard requires us to use.

Hon SHEILA MILLS: Given the urgency of this, has no lawyer in the state got onto the fact that there is a problem?

Sergeant Hay: No, not at this stage.

Hon SHEILA MILLS: Not at this stage. I hope you do not leak!

Sergeant Hay: The National Measurement Institute, in consultation with the police - when we first started we realised the potential for this to go public. The standard has - they used a legal-speak term - actually been invoked but not published. So, we are moving to comply, but they have not provided a copy of the standard outside the manufacturers and the police jurisdictions. I think if people ask for it, they get a copy of the title sheet at present, mainly so that we can hold back until we are in place. We have actually negotiated with the National Measurement Institute for a grandfathering clause, in which we can actually grandfather a sunset clause for our existing instruments, realising the time that it will take to roll out 1 400 evidential breathalysers around Australia. So, we have also sort of addressed that with a sunset clause for our older instruments.

Hon SHEILA MILLS: Thanks.

Hon DONNA FARAGHER: How long will that roll-out take?

Sergeant Hay: We placed our order for 200 and, hopefully, by the end of the year we will be in position. NMI has given an undertaking that the actual standard will not be published until July 2008.

Hon SHEILA MILLS: Further to that, once this legislation hits the Parliament, that is going to flag it, is it not?

Sergeant Hay: We are prepared. Well, I am prepared, I think. I am the one who has to give the evidence.

Hon SHEILA MILLS: Okay.

The CHAIRMAN: I want to turn now to that question of the commencement date. Are there any retrospective elements in this bill?

Sergeant Hay: No. You just might have to hold there, Mr Chair, because I think it has been drafted so that the existing instruments can still be in operation for a time, so it covers that as well. The drafting covers the transitional period, so there is a bit of a retrospective element; the existing instruments can still function until they are replaced.

The CHAIRMAN: Right, so it is more of a transitional arrangement; an overlap.

Sergeant Hay: A transitional period rather than a retrospective – yes.

The CHAIRMAN: Although we have made some remarks about the possible deficiencies in the current legislation because of definition inconsistency with the national standard, I would hope that no-one has been using this technicality as a defence in drink-driving cases so far.

Sergeant Hay: Not at this stage.

The CHAIRMAN: Do you think that there is any real danger that, in the meantime, someone might try to use that successfully?

Sergeant Hay: Yes. I have to answer yes to that question. Again, because it has been in the public arena in Queensland, South Australia and Victoria, we have been waiting, but it just has not occurred yet.

Hon SHEILA MILLS: Perhaps the lawyers in this state are not that smart!

The CHAIRMAN: Order! Let us return to the bill. You have identified clause 10 specifically as the clause that provides the uniform aspect to it. Can you please just discuss that clause and explain to the committee what it is about?

Ms Neilson: Certainly, Mr Chair. The standard, as I mentioned earlier, relates to the EBA - the evidential breath analyser - that is; the piece of equipment into which the person blows his or her breath sample. The standard requires that in order for an EBA to comply with the standard, one of the things that it must do is produce the result in a unit of measurement that is so many grams of alcohol per 210 litres of breath. At the moment, our act contemplates units of measurement that are grams of alcohol per 100 millilitres of blood. The explanatory memorandum explains that it is considered scientifically and legally much more appropriate for a breath sample to be measured in a unit of measurement that has breath as the substance, as opposed to blood. However, the quantity - 210 litres of breath - has been selected specifically because the number of grams of alcohol in 210 litres of breath would correlate at the same point in time with the number of grams of alcohol that are in 100 millilitres of blood. Therefore, what proposed section 65A will do, if clause 10 is passed as it is currently drafted, is that it will say - it is a deeming clause effectively. The reason that we need it is that we continue to express our offence provisions throughout the act in terms of the number of grams of alcohol in 100ml of a person's blood. There are a number of ways that we could have done the amendment: rather than referring throughout the act to the number of grams per 100ml of blood and per 210 litres of breath every time we talk about an offence we have stuck with blood because it is the alcohol in a person's blood that affects his or her ability to control the vehicle. The breath is just an indicator of what is in the blood, so we have stuck with blood, but what we are saying is that if a device measures a person's sample of breath, and it gives a reading using the unit of measurement of 210 litres of breath, it will be deemed to be regarded as the number of grams in 100ml of blood, whether the device itself gives that reading or if it is derived by the deeming provision. That will enable us to not only transition effectively to the new equipment - for a period of time we will have two lots of equipment in operation - but also, when we have the new equipment in place that always produces a unit of measurement using 210 litres of breath, to make that meaningful for the purpose of deciding whether someone has committed an offence that says you cannot drive a vehicle if you have more than .05 grams of alcohol in 100ml of blood. Sorry if that was a little bit confusing.

[9.44 am]

The CHAIRMAN: No, that seems to be a very good and succinct explanation. The next question that obviously flows from that is: how closely will the breath measure under the proposed legislation correlate with the existing expression in grams of alcohol per 100 millilitres of blood?

Ms Neilson: That is the pertinent question.

The CHAIRMAN: To distil the question right down - .08 will still be called .08?

Ms Neilson: Absolutely. This is the reason Mr Chair for the choice of this weird number - 210 litres of breath. We do not want to have to change anything. We certainly could change things but it would not really be worth doing so, because everybody thinks in terms of .05 and .08 and .02. The number of grams in 210 litres of breath - and Sergeant Hay will be able to confirm this as the technical expert - but if I have .05 grams of alcohol in 210 litres of my breath at this minute, and you do a blood test, you will find that I have .05 grams of alcohol in 100 millilitres of my blood.

The CHAIRMAN: I just want to establish for the record - and I think that you now have, and that Sergeant Hay is about to confirm it - that .08 under the existing legislation is going to have an identical or very near identical equivalent under the proposed legislation.

Sergeant Hay: The blood-breath coefficient, as it is called in research, is dictated to range between 2 100:1 through to about 2 300:1. That is, the alcohol in the blood is 23 hundred-times higher than what it is in the breath. That is why we have kept using the 210 figure. It was identified from day one that it was imperative - as Rebecca has said - to keep .05 and .08 for that community education purpose that we have pumped millions of dollars into, throughout this country. We have erred on the side of caution. At 2 100 we are on the low side, so we would never overestimate a person's blood alcohol concentration at the time it is measured. The Australian Standard for personal-use breathalysers actually dictates a coefficient of 2 300:1. That would basically produce a reading 10 per cent higher than an evidential breathalyser. We have always erred on the side of caution. The research that has been conducted from the mid-1960s through to last year has produced very consistent numbers that fall within that varying range. There might be a few that fall around 2 000, but again we have in-built safety measures with our maximum permissible errors. We would not over estimate a person's blood alcohol concentration at the time it is measured.

The CHAIRMAN: Okay.

Sergeant Hay: It is very close, but we are erring on the lower side rather than on the higher side of the blood alcohol concentration readings.

The CHAIRMAN: I would have thought that the use of the term "210 litres of breath" probably gets us closer than perhaps the acceptable margin of error on the machines anyway.

Sergeant Hay: Again, internationally they have accepted that 2 100:1 coefficient. It has been signed-off in the international treaties. In real terms it is fairly close. I think they have put it down to 2 100 plus or minus 34 parts per million - or something similar from memory.

The CHAIRMAN: If that is indicative it tells us that 34 parts per million would be insignificant in the context of what we are talking about. Do any of my colleagues have any further questions?

Hon DONNA FARAGHER: I wish to ask a question about the fact that you need to purchase more equipment. Am I right in assuming that the equipment used to initially test drivers will remain the same, but that the new equipment you are going to purchase will be located in the booze bus and will be used to test drivers after the initial in-car test?

Sergeant Hay: Yes. The evidential breathalyser is the one that we produce in court. If you are driving along and get stopped by a booze bus, there is a screening instrument - we call them preliminary breath tests. They purely provide an indication to the police officer that the person may be over the limit indicating that an evidential breathalyser test is required.

Hon DONNA FARAGHER: That is the one that is inside the booze bus?

Sergeant Hay: Yes. The breathalyser inside the booze bus or inside the police station provides an evidential result.

Hon DONNA FARAGHER: Thank you.

Sergeant Hay: Having said that; the preliminary breathalyser tests will provide a result reading in "grams per 210 litres per breath". It is only a matter of changing a sticker from a per cent sign to a "grams per 210 litres of breath" for consistency.

Hon DONNA FARAGHER: So you do not need to get new preliminary breath testing equipment - you just have to change the sticker.

Sergeant Hay: Yes.

The CHAIRMAN: Would that everything were so simple!

Sergeant Hay: If only.

The CHAIRMAN: If only! I just want to ask you about the purpose of the EBA reading as opposed to a blood sample reading. This follows on from the last question. Which reading would be used in a court proceeding as evidence - both?

Sergeant Hay: Both. The other bill that went through the house compared the driving laws. Once the blood sample is taken, if there is an alcohol reading in excess of the prescribed levels the person can be charged on the basis of that blood result. If the person chooses to undergo an evidential breath test - they can be charged on the result of that test. They can be charged as a result of either - breath or blood.

The CHAIRMAN: Okay. What if the readings conflict? What if someone has a breath test and blows over the limit - to use the common vernacular - and then asks for a blood test which shows that they might be below the limit? What would happen in that situation?

Sergeant Hay: Under 66(7) the person only has the right to elect to have either a breath or blood test. There is significant case law dealing with blood samples that have been obtained after a breath test - in regards to legal precedent.

The CHAIRMAN: So if someone were to blow over the limit as it were - not in a roadside random test but in an evidential breath test; that is they elect to use the Evidential Breath Assessment test at the police station - and then having discovered that they are over the limit according to that apparatus, they then go off to a doctor and have a blood sample taken. What has been the police experience, in real life, of that tactic?

Sergeant Hay: The problem is that when they actually take a blood sample you can do numerous things to a blood sample to release the ethanol from the blood - microwave ovens, leaving it on the dashboard of your car. Plus there is the natural elimination by the human body of the alcohol out of the system. It is set down in section 71, which is probably an underestimate of what it really is, and if it was taken within the four hours and using that back calculation, the results can conflict quite considerably.

The CHAIRMAN: Thank you for that. Would any of my colleagues like to ask a question?

Hon DONNA FARAGHER: Just one and I suppose that it is a side issue. We are going to be having random roadside drug testing very shortly and I appreciate that how that will be done will be different to how a normal alcohol breath test is done. However, can I presume that the measurements and related issues - in terms of an illicit drug test - are in order? I appreciate that there are differences, but are any changes required? I think it is pertinent to ask the question now.

Sergeant Hay: The oral fluid testing is presence-based. The drug only has to be present. It is a qualitative test rather than a quantitative test. Laboratories will naturally do a quantitative test because we have cut-off detection thresholds and reporting thresholds. However, that testing is for the laboratory to do. The laboratory will report to the police that delta-9 tetrahydrocannabinol, meth-amphetamines and ecstasy were present in the sample. There is no quantification of it.

Hon DONNA FARAGHER: Okay.

The CHAIRMAN: Have you received any submissions about the bill from law societies or other interested stake-holders?

Ms Karmelich: No.

The CHAIRMAN: Have you invited any submissions?

Ms Karmelich: No, we have not.

Hon DONNA FARAGHER: What is the estimated cost of the new equipment?

Sergeant Hay: The total, over the whole project, is approximately \$2 million. I wrote a discussion paper on this matter for the APMC many years ago, and we costed it at \$23 million nationally.

Hon DONNA FARAGHER: Really?

The CHAIRMAN: That seems rather a lot of money just to comply with an international standard that we are already complying with.

Sergeant Hay: I have to say yes.

The CHAIRMAN: I would not expect you to comment on that.

Sergeant Hay: I am biting my tongue very hard!

The CHAIRMAN: I am sorry if I am the cause of that.

Hon SHEILA MILLS: This is another takeover of the states by the federal government.

The CHAIRMAN: Well, those are policy matters best reserved for the house.

The CHAIRMAN: I would like to record my appreciation to our witnesses for coming in today to assist the committee - particularly at such short notice - in order to enable the committee to report promptly to the house. Ms Neilson, Ms Karmelich and Sergeant Hay - thank you once again and on behalf of the committee I bid you all good morning.

The Witnesses: Thank you very much.

Hearing concluded at 9.55 am
