ROAD TRAFFIC AMENDMENT (BLOOD ALCOHOL CONTENT) BILL 2019

Second Reading

Resumed from 21 March.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [6.02 pm]: I rise as the lead speaker for the Liberal opposition to indicate our support for the Road Traffic Amendment (Blood Alcohol Content) Bill 2019. The bill proposes a reform of the manner in which blood alcohol content is calculated for the purposes of the Road Traffic Act 1974, which will eliminate the formula for calculating blood alcohol content currently contained within the legislation which is now regarded as unsophisticated and clumsy. The second reading speech states that drink-driving is a key factor in about one in five fatal crashes and one in 10 serious injury crashes in Western Australia. Those statistics are said to be derived from the Road Safety Commission's information for 2019. Although that is a high figure—I am not diminishing the significance of 20 per cent of fatal crashes and 10 per cent of serious injury crashes involving alcohol and drink-driving—we must also consider what the other 80 per cent of fatal crashes and the other 90 per cent of serious injury crashes are caused by and look at what can be done to alleviate that particular scourge on the community. Also not mentioned in the second reading speech is the extent to which illicit drugs or drugs generally are a key factor in any of these incidents. Be that as it may, here we intend to correct, if you like, an element of the Road Traffic Act that bears on the ability of the police to assess the blood alcohol content when there has been an incident, and in particular to determine the extent alcohol has played a part in that incident.

[Interruption.]

Hon MICHAEL MISCHIN: I am sorry, was that an interjection?

Several members interjected.

The ACTING PRESIDENT: If a member wishes to interject, could they raise their voice little bit, please!

Hon MICHAEL MISCHIN: Currently, the assessment of blood alcohol content is done on the basis of a back calculation. It was introduced some 40-odd years ago. The governing principle it takes into account, the rule of thumb, as it were, which is pretty reliable as a general rule, but, of course, un-nuanced, is that one's blood alcohol content will rise at the rate of 0.016 grams per millilitre over two hours and that it will peak and start to drop off by the same amount over two hours. At the end of four hours, we would expect that there would be close to zero grams of blood alcohol content. The current formula takes into account a number of considerations. On the basis of that theory, that formula, we are looking at a time when the person is stopped by police, the police ascertaining when the last drink was taken and doing a calculation to assess the blood alcohol content at the material time the person was driving. The material time can be either when the police have stopped a driver or following some kind of incident involving a motor vehicle. Currently section 66(1) of the Road Traffic Act states that a police officer may require the driver or person in charge of a motor vehicle, or any person the police officer has reasonable grounds to believe was the driver or person in charge of a motor vehicle, to provide a sample of that person's breath for a preliminary test in accordance with the directions of the police officer and in accordance with the manner in which these tests can be reliably conducted. I was informed at a briefing kindly organised by the minister earlier today and at very short notice to the advisers who attended—I am grateful for them having sacrificed other things they were working on at the time, including some family obligations, I believe, to attend that briefing—that the sophistication of the preliminary breath-testing equipment has increased over the years. In the past, it would show either a green light if the blood alcohol content was below a certain amount or a red light if a person was over a certain limit, so 0.05. Now it can indicate something in between, but it is still a rough test. A more sophisticated evidential test is conducted only if the test shows a red light—a positive test—indicating a certain amount of blood alcohol content over 0.05 is in the suspect's system. That appears under section 66(2) of the Road Traffic Act, which states that if a person fulfils certain criteria, a police officer may require that person to provide a sample of his breath or to allow a prescribed sample taker to take a sample of his blood for analysis or to allow a sample of blood to be so taken and provide a sample of his urine for analysis. Apparently, urine testing is no longer done. I was informed that the last urine testing was in about 2011. Routinely, urine samples are not obtained. Be that as it may, there is a limit on the requirement for a person to submit to such a test, as contained in section 66(4), which states that the breath test can be required to be taken only within a period of four hours.

Police officers are further empowered under section 66(7), which refers to subsection (8B). It states —

> (7) Subsection (8B) applies if a police officer has reasonable grounds to believe that —
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> (a) the presence of a motor vehicle has occasioned, or its use has been an immediate or proximate cause of serious bodily harm to, or the death of, a person; and

(b) a person … may have been the driver or person in charge of the motor vehicle at the time of that presence or use.

In these circumstances, under subsection (8B), the police officer may require that person to allow a prescribed sample taker to take a sample of blood for analysis; provide a sample of urine for analysis; or, indeed, provide a breath sample.

As mentioned, the current regime provides for a back-calculation formula. That is now considered to be archaic. I am informed that the police are not aware of any other jurisdiction—certainly none in Australia—that uses that sort of back-calculation formula anymore. A proposed substitute for that is within the constraints of proposed new section 71—the sample that is taken as an evidential sample will be the evidence of consumption and blood alcohol content at the material time.

We do not propose to stand in the way of this, and I can understand the rationale in the absence of some other idea as to how it might be properly done. There do not seem to be too many alternatives to what is being proposed; however, there are some risks to it. An example of such a risk, given by the member for Cottesloe during the debate in the other place, was a theoretical example—although not an unrealistic one—of someone who goes for an after-dinner drink and sculls a schooner of beer, only has to drive five minutes to get home, and gets into their car. They would clearly be under the limit under normal circumstances by the time they get home, but they are stopped by the police, a preliminary test is positive and indicates that they are over a certain limit, and they are over the prescribed limit by the time there is an evidential test for blood alcohol content; hence, in the absence of proof to the contrary, they will find themselves having breached those relevant provisions of the Road Traffic Act. There is a theoretical—probably realistic, as I understand it—prospect that people who are not over .08 may very well be caught out because the test is conducted at a particular time and they will be guilty of an offence. That troubles me. We may need to get some clarification of the risks involved in that, and I am sure that either the minister or his advisers will be able to assist us in that regard.

A justification that is given is that a small number of people may fall into that category, and that the purpose of the bill is to send a message that people should not consume any alcohol. That may be right, but if that is supposed to be the message sent by this legislation, we should make it a blanket ban on drinking and driving and zero ought to be the acceptable amount. It would be easy to detect by a preliminary test and confirm by an evidential test that there is some quantity of alcohol in someone's system. In my view, it is wrong for people who are not guilty of being over a certain limit at a particular time, because their blood alcohol level increases after they are stopped and tested by police, to then be found guilty by operation of section 71. There is a let-out in this, and again how it will operate will require some explanation from the minister on behalf of the Minister for Road Safety; Police and those who are assisting with the management of this bill; we are not meant to talk about advisers, but the non-existent advisers he may have consulted outside this chamber. Proposed sections 71(1) and (2) provide that, in any proceedings for an offence—there is some nuancing about the sorts of offences involved—the person, in the absence of proof to the contrary, is taken to have a particular alcohol content at the time of driving, if it was proved that at the time of the testing or sampling they are over a certain level. "Absence of proof to the contrary" reverses the onus of proof. We have heard a lot during the last two parliaments about the unsatisfactory nature of reversing the onus of proof, so I think we need to explore that, but there is a prospect of then overturning the presumption, which is effectively a deeming provision.

I would like to get some clarification in due course of the standard of proof involved, and the sort of evidence that might be satisfactory to relieve someone who, at the material time, was not over the limit, by ensuring that they are not wrongly convicted of an offence. There is something to that effect in section 71(3), with the calculations back and the like, and if there is any doubt, the benefit of the doubt is to be given to the person charged. There is no let-out of that nature here, and I quite agree that those who previously had been slipping through the net, having been over the limit but, through either guile or circumstances, are not able to be charged with being over the limit, be brought to account. Having said that, I think it would be most unfortunate and wrong if people who are under the limit fall prey to this simply because we are taking the easy way out. In due course, no doubt we will get some analysis of that.

There are some other elements of the bill that remove some redundant provisions, and there is a saving provision to ensure that the proposed amendments are not retrospective. Otherwise, apart from those technical matters, the opposition supports the policy behind the bill and what it is trying to achieve, and we will seek the minister's guidance. That essentially concludes my remarks, and I look forward to dealing with the bill in more detail in due course.

HON CHARLES SMITH (East Metropolitan) [6.18 pm]: I rise this evening to make a brief statement of my support, and that of One Nation, for the Road Traffic Amendment (Blood Alcohol Content) Bill 2019. It is my view that the back calculation of blood alcohol levels is largely unnecessary and, from my own meandering experience, a waste of police time. Although I appreciate the effort to replace section 71, I am of the view that the so-called two standard drinks mantra that many people repeat, should be done away with. That is, I think that

a person should not operate a motor vehicle at all after consuming alcohol, until the alcohol has left that person's system. People's ability to metabolise alcohol varies too much and a low blood alcohol rating in some people can significantly affect their ability to operate a vehicle safely. Unfortunately, the bill has missed a good opportunity to address so-called drug-driving. Drug-driving gets significantly less discussion than drink-driving. This is particularly egregious considering criminal penalties for drug-driving are largely the same as the drink-driving equivalents. I believe drug-driving should be treated much more severely, particularly given the likely aggravating factor of illicit substance use.

Debate adjourned, pursuant to standing orders.