

CLAUSE NOTES

POLICE OFFENCES AMENDMENT (CLAMPING) BILL 2009

Background:

The Bill introduces legislation to accord with the Tasmania *Together* Community Goal, 'to have confident, friendly and safe communities'. It introduces contemporary legislation to address emerging societal issues and concerns.

PART 1 – PRELIMINARY MATTERS

Clause 1: Short title

Specifies the name of the proposed Act.

Clause 2: Commencement

Specifies this Act commences on the day to be proclaimed.

Clause 3: Principal Act

Specifies that in this Act the *Police Offences Act 1935* is referred to as the Principal Act.

Clause 4: Section 6 amended (Consorting)

Section 6 of the Act provides an offence for consorting with reputed thieves, known prostitutes or persons who have been convicted of having insufficient lawful means of support. This section is outdated and not in line with community expectations.

Section 6 is amended by removing the words 'or known prostitutes or with persons who have been convicted of having insufficient lawful means of support'.

It is not illegal to be a sex worker, and legislative protection for sex workers is now provided within the *Sex Industry Offences Act 2005*.

The offence of 'having insufficient lawful means of support' related to Section 5 of the Act which is now repealed. As this offence is now redundant, the Bill removes reference from section 6 of the Act.

Clause 5: Section 37JA amended (Use of spotlights on vehicles on public streets)

Currently section 37JA allows for the use of spotlights to assist in the repair of vehicles, however the spotlight must be on the vehicle being repaired. This prevented the RACT, for example, from using a spotlight to illuminate another vehicle. A simple amendment has been made to correct this anomaly.

Clause 6: Part IVA, Division 2: Heading amended

This clause amends the heading of Division 2 in Part IVA of the Act by inserting the words ‘and clamping’ after ‘confiscation’.

Clause 7: Section 37K amended (Interpretation of Division)

This clause amends Section 37K by inserting the following definitions:

‘authorised period’ of clamping or confiscation, means the period for which a vehicle may lawfully be clamped under this Division;

‘clamp’ a vehicle, means immobilise the vehicle by means of a clamping device (and ‘clamped’ has a corresponding meaning);

‘clamping device’ means

- a) a wheel clamp, steering wheel clamp or other mechanical device for rendering a vehicle immobile; or
- b) an electronic device for rendering a vehicle immobile;

‘clamped vehicle’ means a vehicle clamped under section 37N;

The clause also omits the definition of ‘forfeiture order’ and substitutes the following definitions:

‘forfeiture order’ means an order, under section 37Y, for the forfeiture of a vehicle to the Crown;

‘key’ to a clamping device, includes, in the case of an electronic clamping device, an electronic key;

‘notice’ of clamping or confiscation, means notice under section 37T;

‘offending driver’ – see section 37T(1)(a)

Clause 8: Section 37MA inserted

Section 37MA Special compulsory penalty for prescribed offences

This clause inserts a new section to provide for a special compulsory penalty for offences where confiscation or clamping of a vehicle is approved under section 37K of the *Police Offences Act 1935*. This penalty is to be prescribed in regulations, and imposed on all offenders where there is a conviction for an offence under sections 37J (excessive noise, smoke from vehicles), 14B (trespass involving the use of a vehicle, vessel or aircraft), 15B (dispersal of persons where a vehicle is used), 48 (racing without a permit) or other prescribed offences listed under section 37K, where confiscation or clamping occurs.

The compulsory penalty is to be in addition to any other penalty which may be imposed by a court, including a fine, imprisonment and/or disqualification of a licence.

The clause also provides the following definition:

‘special compulsory penalty’ means a fine of exactly such amount as the regulations prescribe for the purposes of this section.

Clause 9: Part IVA, Division 2, Subdivision 2: Heading amended

This clause amends the heading of Subdivision 2 of Division 2 of Part IVA of the Principal Act from ‘Confiscation of vehicles’ to ‘Clamping and confiscation of vehicles’.

Clause 10: Section 37N amended (Clamping and confiscation of vehicles)

This clause amends section 37N to authorise clamping, by means of a steering wheel clamp, wheel clamp and or other means, to immobilise a motor vehicle as an alternative to confiscating a motor vehicle for ‘prescribed offences’ under Division 2 of Part IVA of the Act.

The clause also provides for a police officer to serve a notice on the offending driver, requiring the driver to remove or cause the vehicle to be removed to a place, on a date and within a time period specified in the notice, and an offence provision for failing to obey such a notice. The penalty for this offence is a fine not exceeding 40 penalty units.

Clause 11: Sections 37O, 37P and 37Q substituted

This clause repeals section 37O, 37P and 37Q and substitutes those sections to include clamping authorities.

Section 37O Period of clamping or confiscation for first prescribed offence

This clause amends section 37O to include clamping authorities within this section. It provides that the period of confiscation or clamping for a first prescribed offence is:

- a) 7 days for an offence against section 14B (trespass involving the use of a vehicle, vessel or aircraft) or 15B (dispersal of persons where a vehicle is used); or
- b) 28 days in the case of any other prescribed offence.

Section 37P Period of clamping or confiscation for second prescribed offence

This clause amends section 37P to include clamping within this section. It provides that the period of confiscation or clamping for a second prescribed offence is 3 months.

Section 37Q Period of clamping or confiscation for third or subsequent prescribed offence

This clause amends section 37Q to include clamping authorities within this section. It provides that, on the confiscation or clamping for a third prescribed offence, the vehicle is clamped or confiscated until the resolution of all existing charges against the person for those prescribed offences.

Clause 12: Section 37R amended (Transportation of vehicle to holding yard)

This clause amends the penalty within this section from 20 penalty units to 40 penalty units. This amendment brings the penalty in line with other sections relating to vehicle confiscation and clamping.

Clause 13: Section 37S amended (Unlawful interference with, or removal of, confiscated vehicle)

This clause amends section 37S(4), which relates to the authority for a police officer to enter any place for the purpose of confiscating a vehicle for a prescribed offence. The clause inserts the words 'and using such reasonable force, means and assistance as is necessary'. This amendment provides authority for a police officer to use force to enter any property for the purpose of confiscating a vehicle, and also to have assistance for the purpose of confiscation. Such assistance may include a locksmith to access the vehicle.

Clause 14: Section 37SA inserted

Section 37SA – Unlawful interference with clamped vehicle, &c.

This clause inserts section 37SA which relates to unlawful interference with clamping devices and clamped vehicles.

The section provides an offence for any person that unlawfully drives or attempts to drive a clamped vehicle. The penalty for this offence is 40 penalty units.

This clause also provides that a person must not unlawfully –

- a) interfere with the clamping device; or
- b) paint or mark the clamping device; or
- c) damage the clamping device; or
- d) destroy the clamping device; or
- e) release or attempt to release the clamping device; or
- f) remove or attempt to remove the clamping device from the vehicle.

The penalty for committing any of these offences is a fine not exceeding 40 penalty units.

Where there is a contravention of this section, this clause also provides authority for a police officer to seize a vehicle and have it moved to a holding yard. For the purposes of seizing a vehicle a police officer may, without warrant and using such reasonable force, means and assistance as necessary, enter any place where the police officer reasonably suspects the vehicle may be located.

Clause 15: Section 37T amended (Notice of clamping or confiscation to be given).

This clause amends section 37T to provide that, where a vehicle is clamped, a written notice of its clamping is to be given to the person in control of the vehicle at the time of the offence and any registered operator of the vehicle and any owner of the vehicle.

This provision currently exists for confiscated vehicles and this clause merely provides that the same notice be issued for clamped vehicles.

Clause 16: Section 37U substituted

Section 37U – Content of notice for first offence

Provision already exists within the Act for the content of a notice for the first offence where a vehicle is confiscated. This clause amends this provision to include the content of a notice for a first offence where the vehicle is clamped.

It provides that a notice for a first offence, where a vehicle is clamped or confiscated, must include:

- a) the period of time for which the vehicle will be confiscated or clamped, and that it will not be sooner unclamped or released without the order of the Court of written authority of a police officer of or above the rank of inspector;
- b) directions as to how the vehicle may be unclamped or released;
- c) notice of the offences and penalties relevant to the clamping or confiscation.

In the case of a clamped vehicle the notice must state that, before the vehicle may be unclamped, there will be a requirement to produce to a police officer satisfactory evidence of identity.

The Act already provides that evidence of identity must be produced prior to the release of a confiscated vehicle.

Clause 17: Section 37V amended (Content of notice for second or subsequent offence)

Provision already exists within the Act for the content of a notice for the second or subsequent offence where a vehicle is confiscated. This clause amends this provision to include the content of a notice for a second or subsequent offence where the vehicle is clamped.

The clause provides that a notice for a second or subsequent offence, where a vehicle is clamped or confiscated, must state:

- a) the period of time for which the vehicle is confiscated or clamped;
- b) that an application may be made to the Court by a police officer for the forfeiture of the vehicle;
- c) that an application may be made to the Court for the unclamping or return of the vehicle, until the application is heard and determined;
- d) that in support of an application under (c), the registered operator or owner may be required to produce evidence of ownership of the vehicle;
- e) that if the vehicle is unclamped or returned under (c) the court may impose conditions on its unclamping or return.

The notice is also to state the offences and relevant penalties.

In the case of a clamped vehicle the notice must state that, before the vehicle may be unclamped, there will be a requirement to produce to a police officer satisfactory evidence of identity.

The Act already provides that evidence of identity must be produced prior to the release of a confiscated vehicle.

Clause 18: Section 37W amended (Advice to registered operator of date of hearing)

Provision already exists within the Act for the Court to give written advice of a hearing date for an application for forfeiture that relates to a confiscated vehicle. This clause amends this section to provide that the same written advice is to be provided for an application for forfeiture of a clamped vehicle.

It provides that as soon as is reasonably practicable after a date is set for the hearing of an application for forfeiture of a clamped or confiscated vehicle, the court is to give written notice of the date, time and place of hearing to:

- a) the offending driver; and
- b) any registered operator who can be ascertained after reasonable inquiry; and
- c) any owner of the vehicle who can be ascertained after reasonable inquiry.

Clause 19: Section 37Y substituted

Section 37Y – Application for forfeiture of vehicles

This clause amends section 37Y to provide that an application for forfeiture can be made when a vehicle is confiscated or clamped for a third or subsequent offence.

The clause removes the three-month period in which an application for the forfeiture of a vehicle must be made to the court; and provides that an application may be made on the date of conviction, or at any time during the 14 days immediately following the date of conviction for a third or subsequent prescribed offence.

The clause retains the provisions relating to the ability for an owner, offending driver, or registered operator to make application to the Court for the return of the vehicle, until the forfeiture application is heard and determined. It amends this section to allow for the same application to be made where a vehicle is clamped or confiscated.

The clause also provides that, if the Court orders the return of the vehicle until the forfeiture application is heard, the owner or registered operator of the clamped vehicle must not dispose, sell or substantially alter the vehicle prior to the determination of the forfeiture application. This provision already exists for confiscated vehicles.

Clause 20: Section 37Z amended (Defence to show no knowledge and consent)

This clause relates to proceedings for the forfeiture of a vehicle. Provision already exists within the Act for a registered operator or owner to show that the relevant prescribed offence that led to the forfeiture order application happened without his or her knowledge and consent. If the Court is satisfied with the defence raised by the owner or registered operator, the Court may order the vehicle be returned to the registered owner or operator.

This clause amends this section to provide that the same defence may be raised by the owner or registered operator of a clamped vehicle that is subject to a forfeiture order.

Clause 21: Section 37ZA substituted

Section 37ZA Powers for enforcing forfeiture order

Section 37ZA relates to situations where the Court has previously ordered the release or unclamping of a vehicle, and later makes a forfeiture order in respect of the same vehicle. The clause provides that the Court may, in the forfeiture order, authorise a police officer to clamp the vehicle or seize the vehicle and move it to a holding yard. The forfeiture order may authorise a police officer to, without warrant and using such reasonable force, means and assistance as is necessary, enter any place where the police officer reasonable believes the vehicle may be located.

Clause 22: Part IVA, Division 2, Subdivision 4: Heading amended

This clause amends the heading of Subdivision 4 of Division 2 of Part IVA of the Principal Act from 'Recovery and return of vehicles' to 'Unclamping and recovery, &c., of vehicles'.

Clause 23: Section 37ZC substituted

Section 37ZC Unclamping or recovery of vehicle clamped or confiscated for prescribed offence

Section 37ZC currently relates to the return of vehicles confiscated for a prescribed offence. This clause amends section 37ZC to include provisions for the unclamping of vehicles that are clamped for a prescribed offence.

It provides the following definitions:

'authorised claimant', of a clamped or confiscated vehicle, means –

- a) the offending driver; or
- b) the owner or registered operator of the vehicle; or
- c) a person who has the written authority of the owner or registered operator of the vehicle;

'police clamping device' means a clamping device used by the Police Service for the purposes of this Division.

The clause provides that, at the expiry of the authorised clamping period, the authorised claimant may collect a key to the clamping device from a police station during normal business hours and use this key to release and remove the clamping device from the vehicle. The clamping device and key must then be returned to a police station within 4 days of the date of collecting the key to the clamping device.

The clause provides offences for:

- a) failing, without reasonable excuse, to return the key and the clamping device within 4 days of the date of collection;
- b) damaging the key or causing or allowing another person to damage the key; or
- c) lending the key to another person without the express approval of a police officer of or above the rank of inspector; or
- d) copying, or attempting to copy, a key to a police clamping device without the approval of a police officer of or above the rank of inspector.

The penalty for these offences is a fine not exceeding 40 penalty units.

Where no person seeks to have the vehicle unclamped within 10 days after the end of the authorised clamping period, a police officer may unclamp the vehicle and retrieve the clamping device. For the purpose of retrieving the clamping device, the clause provides that a police officer may, without warrant and using such reasonable force, means and assistance as is necessary, enter any place where the police officer reasonably suspects the clamped vehicle may be located.

The clause does not change the recovery provisions for confiscated vehicles.

Clause 24: Section 37ZD amended (Unclamping or recovery of vehicle clamped or confiscated for second or subsequent prescribed offence)

Section 37ZD currently provides for the offending driver, registered operator or owner to apply to the Court to have a confiscated vehicle returned. If the Court is satisfied that the confiscation of the vehicle is causing, or will cause severe hardship to a person, the Court may order that the vehicle be returned.

This Clause amends this section to allow for the same application to be made in the case of a clamped vehicle.

The Clause provides that, where the Court orders the release or unclamping of the vehicle, it may impose such conditions as it considers appropriate on the subsequent use of the vehicle.

Clause 25: Section 37ZE amended (Clamped or confiscated vehicle may be unclamped or returned in certain circumstances)

Section 37ZE provides that if a police officer of or above the rank of inspector considers it necessary or desirable in the circumstances, he or she may authorise the return of a confiscated vehicle. This clause amends this section to extend the same authority for a clamped vehicle.

The section also provides that if a confiscated vehicle was, at the time of the commission of a prescribed offence, stolen or was being hired, the vehicle must be returned to the registered operator or owner as soon as is practicable. The clause amends this section to include the unclamping of a vehicle in such circumstances.

Clause 26: Section 37ZF amended (Unclamping or return of vehicle in case of severe hardship)

Section 37ZF of the Act provides that a Court can order the return of a confiscated vehicle, if satisfied that the confiscation or forfeiture of the vehicle will cause severe hardship to a person. The clause amends this provision to include the removal of a clamp if the court is satisfied that the clamping will cause severe hardship to the person.

If the court makes an order for the removal of the clamp in such circumstances, the clamp is to be removed as soon as reasonably practicable.

Clause 27: Section 37ZG substituted

Section 37ZG Return of vehicle if offending driver not convicted, &c.

This section currently provides that where a vehicle is clamped for a prescribed offence, and a person is not convicted of the prescribed offence or the proceedings for the prescribed offence are not instituted or discontinued, the vehicle must be returned as soon as reasonably practicable. This clause amends this section to make it applicable to a vehicle clamped for a prescribed offence.

The section provides that the vehicle is to be unclamped or released in these circumstances unless the vehicle is subject to another clamping, confiscation or forfeiture order.

Clause 28: Part IVA, Division 2, Subdivision 5: Heading inserted

This clause inserts a new heading 'Subdivision 5 – Disposal of vehicles, &c.' for sections 37ZH, 37ZI, 37ZJ, 37ZK and 37ZL.

Clause 29: Section 37ZH amended (Disposal of confiscated vehicle)

This clause makes a minor amendment to remove the words 'a period' and substitute 'the authorised period'. This makes the section consistent with the Division.

Clause 30: Section 37ZJ amended (Voluntary transfer of ownership of vehicle to Crown)

This clause amends this section to allow the owner to transfer ownership of a clamped vehicle to the Crown at the end of the period of clamping. This provision already exists for confiscated vehicles, and the agreement is to be written and witnessed by a person who is authorised to witness a statutory declaration.

It provides that if the Crown agrees in writing to the transfer of the confiscated or clamped vehicle: -

- a) the vehicle becomes the property of the Crown; and
- b) the Commissioner may sell or dispose of the vehicle and anything in it or on it in a way the Commissioner considers appropriate; and

- c) before the vehicle is transferred, the owner or person authorised by the owner may remove any contents from the vehicle that are not part of the vehicle or attached to it.

Clause 31: Section 37ZK amended (Clamped or confiscated vehicle not to be sold or disposed of)

Section 37ZK currently provides that a confiscated vehicle must not be sold or otherwise disposed of during the period of confiscation. This clause amends this section to include that a clamped vehicle is not to be sold or otherwise disposed of during the period of clamping, or whilst it is subject to a Court order under the Act.

Clause 32: Part IVA, Division 2, Subdivision 6: Heading inserted

This clause inserts a new heading 'Subdivision 6 – Miscellaneous.' for sections 37ZLA and 37ZM.

Clause 33: Section 37ZLA inserted

Section 37ZLA Power of Commissioner to authorise unclamping

This clause allows the Commissioner to authorise police officers or other approved persons to unclamp a vehicle:

- a) at the end of the authorised period of clamping; or
- b) at any other time if the Commissioner considers it necessary or expedient to do so for the purposes of this Division.

This clause will allow a third party provider to be approved for the purpose of removing clamping devices, should this be considered necessary.

The clause also provides that, a police officer exercising an unclamping approval made by the Commissioner may, without warrant and using such reasonable force, means and assistance as is necessary, enter any place where the police officer reasonably suspects that the vehicle to be unclamped may be located.

The clause also expressly states that the Commissioners ability to authorise unclamping is not capable of being exercised inconsistently with a judicial determination or an express provision of Division 2.

Clause 34: Section 37ZM amended (Protection from liability)

Subsection (1) of this clause provides that a police officer acting in good faith is not liable for any damage to, any depreciation in the value of, any loss of use of or any loss of a vehicle that may result from its clamping or confiscation.

This clause provides that any liability that would, but for subsection (1), attach to a police officer attaches instead to the Crown.

Clause 35: Repeal of Act

This clause provides that the *Police Offences Amendment (Clamping) Act 2009* is repealed on the ninetieth day from that day on which it commences.