



Families and Friends for Drug Law Reform (ACT) Inc.

committed to preventing tragedy that arises from illicit drug use

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FFDLR Submission on The Discussion Paper: Review of the Road Transport (Alcohol and Drugs) Act 1977

Introduction

This submission by Families and Friends for Drug Law Reform relates primarily to the issue of road safety where illicit drugs and driving are involved. FFDLR fully supports rational and evidence based efforts to improve road safety.

At the outset the ACT must be congratulated for not rushing in and simply introducing roadside drug testing. It is a wise practice to delay and wait for substantial evidence before introducing new laws.

It is also commendable that this issue has been opened up for discussion and contribution by the community. However it must be noted that the discussion paper does contain errors. On page 7 for example it refers to the ADF report “Drugs and Driving in Australia” and states: “There is evidence to suggest that illicit drugs impair driving ability and that driving under their influence increases crash risk”. In fact the report did not say that. It said: “it is not known to what extent drugs are the causal factors in road accidents. the suggestion was that, just because someone involved in an accident has consumed a drug, does not mean that the drug was the reason that the accident occurred. experts indicated that more research is required to better understand the relationship between levels of drug use and crash risk”.¹

There can be no argument that some drugs or substances have mind-altering effects or can in other ways impair a person’s ability to safely control a vehicle (or any other dangerous machinery). The degree to which driving ability can be impaired is well established with drink driving laws, the procedures that surround those laws and drink driving education programs. For example floor levels of alcohol present in the bloodstream and procedures for testing those levels are well established. Improving safety through information to the public such as standard drink labels on alcoholic drinks, and publicity campaigns such as number and spacing of drinks for which it is safe to drive.

For drugs other than alcohol it can be more problematic. Prescription medicine may very well carry a message on the label about impaired driving ability but the degree of impairment is not spelt out. In a similar but more problematic way illicit drugs are not labeled and unlike pharmaceuticals the quantity of active ingredient is usually unknown.

There are further problems with illicit drugs. The use of these drugs is prohibited which can and does cause confusion between the objectives of the drug laws and the road laws. And overlaying this is the prejudice that accompanies the subject of illicit drugs. This can easily undermine the principles intended by the road laws, for example not defining a floor level of drug in the bloodstream which correlates with impairment but simply applying a zero

¹ ADF 2007, Drugs and Driving in Australia, p25

tolerance approach. Such an approach signifies confused thinking and if adopted for the ACT would signify nothing more than political expediency.

The ADF Drugs and Driving in Australia Report indicates that drugs and driving, while it may currently be of concern to some, it “is very much in its infancy” and there is little or no evidence upon which to conclude that roadside drug tests contribute to improved road safety. In the words of that report: “Road-safety countermeasures need to focus on the impairment associated with drug use, and not drug use *per se*.”²

Surveys show that a high proportion of young people who use illicit drugs do so regularly but there is little or no evidence in respect of the degree of correlation between drug use and impairment.

Principles to be adopted if RDT is introduced

The relevant principles that should be adopted include:

1. The objective for RDT should be to improve road safety and not be a new form of drug law enforcement.
2. Testing should only be introduced for any substance, ie pharmaceuticals, legal drugs or illegal drugs, following research which shows substantial evidence that:
 - use impairs driving capacity; and
 - tests are available that can measure impairment and not just the presence of the substance. The measures should not undermine the credibility of safe driving messages directed at those who consume drugs by, for example, implying any consumption is a danger when the evidence shows that impairment is for only a short period above a particular level.
3. Rational, proportional and cost effective approach to improving road safety should be adopted.

1. The objective for RDT should be to improve road safety and not be a new form of drug law enforcement

First and foremost the laws associated with drugs and driving must be about road safety for the driver, passengers and other road users. It must be about the degree of impairment above which a driver endangers himself and other road users. It must not be a new form of drug law enforcement.

In launching the discussion paper the Minister for Territory and Municipal Services, John Hargreaves made the following statements: “I need to be certain that the testing was about road safety and not about catching drug users and punishing them for using drugs rather than endangering other road users. As Minister, I will do whatever I can to improve road safety but I am not going to be involved in punishing ACT drug users for their addiction.”

These principles are well expounded in the laws about drink driving, that is, there is a level of alcohol in the bloodstream above which it is considered to be a danger to other road users. Those principles are well supported by research and have been evaluated to demonstrate their efficacy.

² ADF 2007, Drugs and driving in Australia.

On the other hand there is little or no evidence about the degree of impairment when a driver uses other drugs – be they illicit or prescription or over the counter drugs.

The research and surveys that have been undertaken in respect of illicit drugs and driving largely rely on “opinion” or simply identify whether a person has in their bloodstream or saliva the presence of certain drugs. Such results relating to the prevalence of drugs have nothing to do with driver impairment.

By way of example the discussion paper advises that Victoria ran a trial “the results of which showed that more than twice the number of drivers tested positive to recent use of one or more of three illicit drugs (cannabis, methamphetamine and ecstasy) than to levels of alcohol **over the prescribed BAC limit** [my emphasis]”. The flaw in this statement and the thinking behind it is the assumption that only alcohol can have a measurable safe lower test result level but other drugs cannot. (ie. lack of evidence that presence is linked to incapacity.) Thus, while the results of such tests may be interesting, they have little to do with road safety. The Victorians have not demonstrated that their random drug testing has in any way improved road safety³ nor reduced driving following drug use⁴.

The Swedish study referred to in the discussion paper concluded: “Sweden's zero-concentration limit has done nothing to reduce DUID or deter the typical offender because recidivism is high in this population of individuals (40–50%). Indeed, many traffic delinquents in Sweden are criminal elements in society with previous convictions for drunk and/or drugged driving as well as other offenses (sic). The spectrum of drugs identified in blood samples from DUID suspects has not changed much since the zero-limit law was introduced”.⁵

This is in marked contrast to the big reduction in road trauma that followed the introduction of random breath tests for alcohol.

In the discussion paper – Review of the Road Transport (Alcohol and Drugs) Act 1977 - only **the presence of certain drugs** not the degree of impairment is identified. Clearly it is problematic to define certain floor levels but it is not impossible. Some early work has been undertaken in respect of cannabis. And like alcohol it is possible to provide safe driving messages for that drug. It is simply a matter of research to establish appropriate levels and appropriate messages

There is a real possibility that the introduction of random drug testing in circumstances of a lack of a strong evidence that the presence of particular drugs materially diminishes driving capacity would reduce road safety, for example by provoking panic reactions to avoid testing.

2. Conditions under which testing should be introduced

Testing should only be introduced for substances whether legal or illegal when there is substantial evidence that:

- (a) Use impairs driving capacity; and

3 Australian Transport Safety Bureau 2007, Road deaths Australia: monthly bulletin December 2007, Australian Transport Safety Bureau, Canberra.

4 Quinn, B 2008, Victorian trends in ecstasy and related drug markets 2007: findings from the Ecstasy and Related Drugs Reporting System (EDRS), Australian Drug Trends Series no. 13, National Drug and Alcohol Research Centre, University of New South Wales, Sydney.

5 Jones, A 'Driving Under the Influence of Drugs in Sweden with Zero Concentration Limits in Blood for Controlled Substances', (2005), Traffic Injury Prevention, Volume 6, Issue 4.

- (b) Tests are available that can measure impairment and not just the presence of the substance.

This implies that such tests should include alcohol, illicit drugs, prescription drugs, over the counter drugs in fact any drug or substance that has been demonstrated by evidence to impair driving ability whatever its legal status. It also means that drugs that enhance driving ability whatever their legal status should be excluded. Tobacco and some stimulants would probably fall into this category.

UK evidence suggests that opioids and benzodiazepines are more implicated in accidents than the three mentioned in the discussion paper. Yet there is no reference to these two drugs in the paper. This is a serious error in the discussion paper and perhaps the direction that RDT is taking is also erroneous.

The road laws should not be about drug use per se because that is a separate issue. They should not be about introducing a law based on moral issues, nor on the basis of a perceived need to keep up with laws that have been introduced in other states (without the evidential support that is necessary), ie “me tooism”

The discussion paper refers to just three drugs (apart from alcohol) that are of concern – cannabis, methamphetamine, and MDMA – for which there is limited or no evidence in respect of their impairment, but does not refer to other drugs for which there is a substantial body of research highly implicating them in adverse road safety outcomes such as benzodiazepines and opioids.

The low level of injuries or deaths of truck drivers (p8), who according to anecdotal evidence use methamphetamines, also raises serious questions about the intentions of the paper and the proposed legislation.

One has to therefore question whether or not roadside drug testing will be a matter of convenience and available technology ie because the technology is available to undertake these tests “we should use it”, rather than addressing the real issue of road safety. It should be noted that current testing equipment is rudimentary and can only test for a limited range of drugs and does not link in with degree of impairment. Thus it is a very good reason to wait until those matters are resolved before proceeding.

Care needs to be taken that the implementation of roadside drug testing is not because

- of the availability of the technology,
- of political convenience,
- of demands of an uninformed public (it is Government’s responsibility to inform),
- other states are doing it, so the ACT should too,
- of negative attitudes towards illegal drug users, or
- of a desire to criminalise non-mainstream behaviour.

The measures should not undermine the credibility of safe driving messages

In much education about illicit drugs the message used undermines the intent of the education. Research into a well-known drug education program in the USA – the DARE program – showed that the program itself sparked interest by the students in drugs. The outcome was that not only did the program not reduce drug use; it actually increased drug use for students who participated in the program when compared to students who did not participate.

It is known that exaggerated messages can be counterproductive to effective education programs. In a similar manner exaggerated claims in respect of drugs and driving or claims that are not based on fact and evidence can undermine the objectives of the proposed legislation.

Similarly the Drugs and Driving Forum held on 6 June 2008 exposed participants to a variety of misleading and in some cases biased information. There was confusion in the messages presented by NSW and Victorian police representatives about whether they were concerned about road safety or illicit drug use – and this is a matter that needs to be explicitly clarified in any new legislation. The survey of drivers conducted by the University of Canberra did not test for levels of drugs that affected impairment but simply tested for any presence of only three drugs. And none of those drugs are those that have been referred to by the UK's research.

What was most improper was the claim about a photograph, published in newspapers, of an accident where a driver ploughed into a bike race. It was presented as fact that the driver had used marijuana and had fallen asleep. The truth of the matter is that the report in the paper (in fact any paper in Australia that carried the story which was sourced from Associated Press) was that the driver was drunk (ie on alcohol) and had fallen asleep. (See The Canberra Times June 4, 2008, p11).

If a zero tolerance approach to illicit drugs and driving is adopted, as with Sweden, it is unlikely to make a significant difference to drugs and driving. It will however put a limitation on any drugs and driving education program. For example such a program could not say “do not drive within x hours of using this or that drug”. A blanket ban unrelated to incapacity gets in the way of road safe messages to drug users where, for example, use diminishes driving capacity for only a limited time.

It is important that accurate and truthful information on drugs and driving be provided. The ADF Drugs and Driving Report has noted that respondents to the survey “reported being well informed about the effect of alcohol on driving ability, ... they were considerably less informed about methamphetamines, ecstasy and benzodiazopines”. It goes on to say that “more detailed information, based on reliable, accurate and the best available scientific evidence, needs to be disseminated to specific drug using populations regarding the impairment to driving ability associated with illicit drugs”. Thus it would be a harm minimization approach.

Note also that driver education, and testing are different. There are driver education campaigns for alcohol as well as random testing. It is confusing to mix them.

3. Rational, proportionate and cost effective approach

The discussion paper refers to a rational response but there is much about the direction that this proposal is taking that is not rational and is not about the objective of the exercise – road safety. The proposition to test for **any** presence of a drug irrespective of its impairment or otherwise on driving and before establishing any such level is not rational. Such levels need to be established for each drug before its inclusion in RDT.

It must be made clear that the RDT is not about illicit drug user detection by other means. In addition to other measures referred to in this submission, it would be appropriate to include in the legislation similar provisions to those in the UK which prohibit the results being used for other criminal charges (*cf discussion paper*).

Cost effectiveness

Can the current RBT be made more effective?

McDonald⁶ has provided a graph of RBT tests and their results over a number of years. The relationship between the number of tests and the detections of persons over the BAC limit appear to be somewhat random but it is noted that at times of low numbers of tests there are high numbers of detections of persons exceeding the BAC limit. This suggests that at times the police have a more targeted than random approach. If this is the case then it is a practice that should be adopted as a matter of course and would be a more cost-effective approach.

Cost-effectiveness for the possible introduction of RDT must also be a consideration. Is it cost effective to introduce a measure for which, as evidenced from other countries and perhaps also from Victoria, that makes no difference to road safety nor to the use of drugs by drivers? The clear conclusion one would draw should the legislation proceed in the ACT is that it would simply be one of political expediency and not based on evidence.

There is also the possibility of loss of confidence by the community in law enforcement and loss of confidence in the political process.

Other considerations of a cost effectiveness nature would be the drain on police resources or perhaps the diversion of funds from other vital services to provide for RDT. It is also highly likely that there will be fewer RBTs – that most effective road safety measure – when providing RDTs.

A simple calculation will provide some indication of the ongoing cost. In Sept 07 quarter police undertook over 25,000 RBTs. To undertake RDTs at the same time would, at say an extra 10 minutes per test, (ie an initial explanation by police to driver, administer the test, wait 6 minutes for result and closing by police) have added more than 4,000 extra police manhours. A figure that is likely to be understated because there would be follow-up work required for those drivers that test positive.

The cost of introduction of RDT will be significant with no discernable improvement in road safety. In addition to the police time there will be the need for a number of mobile laboratories that would need to be co-located with police undertaking the tests, the staffing of those laboratories, and additional equipment, facilities and staff at the base laboratory. The resources would need to be found from existing resources. And if not adequately resourced and sufficient numbers of tests undertaken there will be little or no deterrent effect.

The investigation of alternatives needs to be undertaken. This would include provision of driver education and public education campaigns or more speed detection programs to determine whether or not more cost-effective measures are possible for improvement of road safety. We know for example that the majority of road deaths are single vehicle accidents resulting in the death of the drivers who are aged between 17-25 years and occurring between the hours of midnight and 6am on a Saturday morning. Specific targeted education of this group at that time and day may significantly improve road safety.

Consider also whether the significant cost of implementation of RDT will mean that other more cost-effective measures are not adopted.

⁶ McDonald, D 2008, *The extent and nature of alcohol, tobacco and other drug use, and related harms, in the Australian Capital Territory, February 2008*, Social Research & Evaluation Pty Ltd, Canberra, p. 14, derived from Department of Justice and Community Safety and, *ACT criminal justice statistical profile, September 2007 quarter*, ACT Department of Justice and Community Safety, Canberra.

Putting those principles into law

The legislation

Current legislation

Current legislation has provisions that relate to driving while under the influence of drugs and the schedule to the Act lists some particular drugs. While that provision is there, there is no provision for roadside drug testing and nor are there any levels of impairment correlated to bloodstream contents as there is with alcohol.

The relevant part of the legislation is as follows:

Driving under the influence of intoxicating liquor or a drug

(1) A person who drives a motor vehicle on a public street or in a public place while under the influence of intoxicating liquor or of a drug to such an extent as to be incapable of having proper control of the motor vehicle commits an offence.

Drug means—

- (a) a substance specified in schedule 1; or*
- (b) a controlled drug within the meaning of the Criminal Code, chapter 6 (Serious drug offences); or*
- (c) any other substance that, on its own or in combination with alcohol, may influence the driving of the person who has taken the drug.*

Proposed

It is proposed that the following be incorporated in the legislation:

- The legislation to include a specific set of principles or objectives that state that the legislation is aimed at improving road safety.
- The legislation could provide the framework for which a drug or substance could be included. And only when appropriate levels of the drug and the degree of impairment and relevant testing procedures have, by evidence, been established for a specific drug then that drug could be incorporated by regulation.
- The legislation to provide appropriate safeguards, such as those incorporated in UK legislation, that ensures that the legislation is not used as an additional means of drug law enforcement.

Responses to questions in the discussion paper

1. How should random roadside drug testing be introduced in the ACT?

It should only be introduced based on evidence that it will improve road safety. Tests should be about the level of impairment to driving. RDTs should only be introduced after research has identified an appropriate level of blood/drug level above which driving is impaired. Otherwise it should not be introduced.

a. Which drugs should be included in the testing program?

Any drug where the evidence is clear that driving is impaired and where impairment can be correlated to a level of the drug in the bloodstream. Otherwise the drug should not be included.

b. Should drug driving offences and penalties mirror those that currently exist for drink driving?

Yes but only if a correlated level of impairment to bloodstream drug level can be established.

2. Should drug testing be compulsory for all drivers who have returned a positive result when breath tested for alcohol?

Not necessarily. A positive BAC should be sufficient to remove a person from the roads who is at that time a road safety problem.

3. Should blood samples already taken under ACT legislation when a driver involved in a motor vehicle accident attends a hospital be tested for drugs as well as alcohol?

Not necessarily. A positive BAC should be sufficient to remove a person from the roads who is at that time a road safety risk.

4. What other strategies could be adopted to address the incidence of drug driving in the ACT?

It is not a matter of drug driving. This is the wrong question. It is a matter of driving with a level of drugs in the body that impairs driving and is a road safety risk.

B McConnell

President