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: Drug Driving in the Territory

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.

It is heartening that the ACT has not rushed in by following other states and simply introducing roadside drug testing without a full consideration of the issues. However there now appears to be an unnecessary urgency to introduce drug-driving testing so that the ACT simply falls in line with other states. Being out of step with other states is not a good reason on its own to introduce drug-driving testing. It is a wise practice to delay and scrutinise the evidence before introducing new laws.

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 and reflected in drink driving laws, the procedures that surround those laws and education programs. For example:

- floor levels of alcohol present in the bloodstream and procedures for testing those levels are well established.
- information is provided to the public such as labels on bottles stating the percentage of alcohol, and guidelines on the number and spacing of drinks for which it is safe to drive.

The discussion paper covers this matter well.

For drugs other than alcohol it can be more problematic. Prescription medicine may very well carry a message on the label about possible 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 unknown.

Unlike alcohol there are no guidelines or labeling legislation, but if for no other reasons than road safety some consideration should be given to developing such guidelines.

The use of illicit 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 and misinformation that accompanies illicit drugs and their use. The surveys conducted by the ADF and by a local community organisation which showed that people were concerned with those who use drugs and drive are cases in point. This can easily undermine rational and objective principles intended by the road laws, ie not defining a level of drug in the bloodstream which correlates with impairment simply applies a zero tolerance approach to drug use unrelated to road safety. Such an approach indicates 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 currently may be of concern to some, "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. It states "it is not known to what extent drugs are the causal factors in road accidents". And then: "Road-safety countermeasures need to focus on the impairment associated with drug use, and not drug use *per se."*[1]

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

Furthermore the data provided by the University of Canberra honours student (if calculations are correct) say that less than one third of those involved in serious accidents tested positive to alcohol or another drug or both. The assumption then is that more than two thirds of those who had a serious accident had not consumed any drug. And it is noted that of the drugs methamphetamines and MDMA, only 2% of crash drivers tested positive. There seems therefore to be an excessive concern about those drugs and one needs to ask the question whether the attention to those drugs is primarily because a convenient test for them exists.

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

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 2008 discussion paper the then 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.

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 may 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

[1] ADF 2007, Drugs and driving in Australia.

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 may have little to do with road safety. The Victorians have not demonstrated that their random drug testing has in any way improved road safety[2] nor reduced driving following drug use[3].

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".[4]

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

Legislation in respect of random drug testing in jurisdictions other than the ACT, for the most part only **the presence of certain drugs** not the degree of impairment is identified. And in NT efforts are made to distinguish between heroin and lawful opiates even though those lawful opiates may impair driving equally.

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. In this task the naïve notion that providing such levels and information will "condone or encourage drug use" must be discarded.

There is also a 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, may actually 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 where there is substantial evidence that:

(a) Driving impairment is suspected; or

(b) Tests are available that are economic to administer as roadside drug tests and that can measure degrees of impairment and not just the presence of a drug. The measures should not undermine the credibility of safe driving messages directed at those who consume drugs by, for example, implying

[2] Australian Transport Safety Bureau 2007, Road deaths Australia: monthly bulletin December 2007, Australian Transport Safety Bureau, Canberra.

[3] 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.

[4] 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.

any consumption is a danger when the evidence shows that impairment is for only a short period above a particular level.

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. Nicotine and some stimulants would probably fall into this category.

UK evidence suggests that opioids and benzodiazepines are more implicated in accidents than the three being tested for in most other Australian states. Yet there is little reference to these two drugs in the discussion paper. 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 road laws should not be about:

- drug use *per se*, because that is a separate issue,
- introducing a law based on moral issues,
- uninformed populist views,
- a perceived need to keep up with laws that have been introduced in other states (without the evidential support that is necessary).

The low level of injuries or deaths of truck drivers, who according to anecdotal evidence use methamphetamines, and the low percentage (2%) of persons with positive results to methamphetamines and MDMA following a serious accident, raises serious questions about the intentions of the paper and the proposed legislation.

One has therefore to question whether the recommendation to introduce RDT in the ACT is simply because technology allows it and/or is a populist move, rather than addressing the issues that would make a significant difference to road safety. It should be noted that current drug 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. It is however noted that the necessary framework legislation can be in place while the specific details for particular drugs can be inserted by way of regulation when the technology and the appropriate impairment levels have been determined.

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

- the availability of the technology,
- political convenience,
- demands of an uninformed public (it is Government's responsibility to inform),
- an illogical desire to be the same as other states,
- negative attitudes towards illegal drug users, or
- 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 in drugs by the students. 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. Recent emerging evidence in the USA suggests that the "talk to your children about drugs" campaign raised awareness in some young people and increased their potential to use drugs.

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.

In the Drugs and Driving Forum held on 6 June 2008 participants were exposed 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. Thus any new legislation must have clearly stated objectives to the effect that the legislation is about road safety.

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 seriously impedes 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 reduction approach.

3. A Rational, proportionate and cost effective approach to improving road safety should be adopted.

The discussion paper refers to a rational response but there is much about some options that are proposed that are 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 another 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.

Cost effectiveness

Can the current RBT be made more effective?

McDonald[5] 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) add 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 who test positive.

The cost of introduction of RDT will be significant – estimated to be "as much as $40 per driver tested, compared with a few cents for a breath test"[6].

Capital costs will also be substantial. In addition to the police time there will be the need for a number of mobile laboratories to be co-located with police undertaking the tests, the staffing of those laboratories, and with additional equipment, facilities and staff at the base laboratory. Funding for these 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

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[5] 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.

[6] http://www.tams.act.gov.au/live/about_our_department/community_engagement/community_engagement_activities_and_events/drug_driving_in_the_territory

morning. Specific targeted of this group at that time and day and education may significantly improve road safety. Curfews for P Platers would also be worth consideration. Consideration should also be given as to whether the significant cost of implementation of RDT will mean that other more cost-effective measures are not adopted.

4. Persons whose driving capacity is impaired because of alcohol or other drugs need to be educated about the affects of drugs and driving, and for repeat offenders, which possibly indicates an addiction problem, an appropriate drug and alcohol treatment regime needs to be applied

Data from RBT indicates that, of those detected to be above the prescribed limit, the majority do not re-offend. But there exists a smaller but significant proportion of repeat offenders. It appears to be the case that for most, the detection of the first offence is a sufficient deterrent, but further measures appear to be needed for repeat offenders.

For this latter group, and it appears likely that there would be a similar group of drivers impaired by drugs (prescription, illicit or other type), additional measures fall into the re-education and or drug treatment area.

This could take the form of an assessment followed by a brief drug education intervention and/or therapeutic treatment program followed by proof of attendance and participation before a licence is returned.

It would also be possible for this option to be available for first time offenders but given that most do not re-offend the costs and benefits would need to be examined closely.

These principles are reflective of the recommendations of the Drugs and Driving in Australia report of 2000 - recommendations which have not been fully implemented but which should be revisited.

Recommendations

Should RDT be introduced the following principles should be enshrined in the legislation:

- The objective for RDT should be to improve road safety and not be a new form of drug law enforcement. Such objectives should be included in the legislation.
- The legislation should 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.
- 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
    - economical tests are available that can measure impairment and not just the presence of the substance.
- The legislation should provide the framework for which a drug or substance can 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.

Research should be established to determine appropriate levels for all relevant drugs and to determine appropriate objective messages.

Persons whose driving capacity is impaired because of alcohol or other drugs need to be educated on drugs and driving matters, and for repeat offenders, which possibly indicates an addiction problem, an appropriate drug and alcohol treatment regime needs to be applied.

Cost effectiveness must be a consideration and tests for each specific drug should only be introduced that are economical to administer at the roadside and that can measure degrees of impairment and not just the presence of a drug.

Where persons exceed the prescribed level for a second or subsequent time, compulsory assessment should be implemented followed by a brief drug education intervention and/or therapeutic treatment program. Proof of attendance and participation and a report on the outcome of that participation must be provided before any licence is returned.

B McConnell

President