

Response by Civil Liberties Australia to

Discussion Paper:
*Review of the Road Transport
(Alcohol and Drugs) Act 1977*

Produced by Territory and Municipal Services, ACT Government
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Introduction

Civil Liberties Australia considers addressing the road toll and the road injury consequences in the ACT an important community initiative. It welcomes endeavours by Government and community organisations to implement programs and initiatives that make the roads safer for the community.

Civil Liberties Australia also recognises that achieving road safety outcomes needs to be balanced against the civil and human rights of all members of the community. Finding an appropriate balance is not an easy task, but improvements in technologies, road design and science can assist the processes. Also, as better and reliable information becomes available on measures that can influence driver behaviour, attentiveness and use of the road, better behavioural outcomes can be implemented.

Civil Liberties Australia has considered the Discussion Paper and provides the following comments which may be published:

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

The question accepts as a given that there is a need for drug testing and implies that the limits should be similar to that of alcohol. The Discussion Paper and its references do not provide any substantive argument to the fundamental questions in this issue – At what level do drugs impair driving and which drugs impair driving?

The first issue to be addressed is one of WHY drug testing is necessary and not HOW to introduce a drug testing regime.

Civil Liberties Australia observes that any proposed Roadside Drug Testing (RDT) program will be costly. It also notes that there is no discussion on what are the most prevalent causes of road accidents in the ACT. Apart from alcohol, what are the main contributing factors that, if addressed, would reduce the road toll and injury rates in the ACT? Any serious discussion on reducing the road safety risks, as this paper purports to do, needs to take into consideration those risks and introduce remediation actions; whether it be use of mobile phones, driver inattention, road surfaces, speed etc. This Discussion Paper needs to put in context the RDT program and its relative priority to other risk mitigation needs, prior to the allocation of scarce resources to address road safety. It has not been demonstrated that an RDT program warrants such a priority in the deployment of Government funding over other programs that could reduce road safety risks.

Turning to the issue of drugs, the relevance of the findings quoted in the Discussion Paper are not statistically valid and cannot be used in any rational discussion on the use and abuse of drugs, especially as it affects the impairment of drivers. Internet surveys, biased roadside

sampling and ‘small’ voluntary studies do not represent any valid findings and cannot be used in any serious analysis of issues. The short two-paragraph discussion in the Discussion Paper does not provide any ‘evidence’ on drug taking prevalence.

The cryptic one-paragraph discussion on the prevalence of drug driving in the ACT is based on anecdotal information that does not support any of the inferred research outcomes. Further, no evidence is provided on the correlation between the prevalence of drug driving (if indeed it is as high as suggested) and the road toll.

The Discussion Paper fails to establish that drug driving is prevalent in the ACT, hence it is questionable whether this proposal is based on road safety considerations and aimed at reinforcing other drug enforcement objectives of Government or whether it is a ‘me too’ response to the introduction of RDT programs in some States. The reported random 2.4% of Victorian drivers detected with the presence of drugs was not ‘random’ but a result from a biased targeted selection of locations and drivers¹.

Of potential relevance in this discussion is the prevalence of drugs in accident drivers expressed as ratios to alcohol and non alcohol by drivers involved in accidents. While this data should be available from the ACT hospitals, it needs to be also presented in the context of drug impairment and elapsed time from the drug consumption to the accident, noting that drug residue will show up in testing well after any impairment may have been a factor of an accident.

Similarly, the presence of a drug(s) in an accident driver does not by itself infer that the driver caused or contributed to the accident.

Question 1a - Which drugs should be included in the testing program?

If it is to be mandated that drug testing be introduced without any statistical or scientific basis that particular drugs cause driving impairment at specified levels, the question is which drugs should be included in testing?

The Discussion Paper notes that a number of older drivers maybe impaired by prescription medicines. The paper argues that *prescription drugs* should not be included on the basis that further research is warranted. Significantly, the Discussion Paper makes a similar observation about the knowledge of other drugs on driving behaviour, yet manages to determine that conducting RDT for these drugs without further research is warranted. The inconsistency of the considerations and conclusions is quite remarkable and can only point to one of two plausible explanations; enforcement of laws through driving legislation is the real purpose of these proposed amendments or the pharmaceutical industry has asserted undue influence in the development of the Discussion Paper and Government consideration to ensure that its use by the community is beyond legislative consideration.

As a matter of principle the coverage by the testing program should be of all drugs (illicit and prescribed) that induce demonstrated driver impairment to endanger the community.

It is clear from the Discussion Paper that there is no scientific evidence of the level of drug taking that produces impairment. As the Paper notes, there is no knowledge of exactly how drugs affect behaviour at different levelsⁱⁱ. The Paper also refers vaguely to the scientific evidence that does exist in terms of ‘increasing evidence’; ‘broad agreement’; ‘evidence ... is increasing’; all of which demonstrate the lack of any rigorous scientific basis, or evidence on the issue of drug use and consequential driver impairment.

It is also of interest the Paper refers to the high incidence of methamphetamine in truck drivers and then prophesises that this is especially dangerous due to the ‘*long stretches of highway in the ACT*’. As in the earlier parts of the Paper, this statement is an assertion based on no reliable data; is emotional in its implied linking the ACT’s few long stretches of highway to the majority of roads that are suburban in nature; and does not address whether the drug found in such accident truck drivers was of a level to cause impairment. Of course it is possible any drug reading could have been from some much earlier drug consumption that had no practical relevance to the accident other than it, along with other substances, factors and road conditions, was noted at the time.

Similarly, the Paper identifies benzodiazepines as a potential cause of accidents given its *high presence*ⁱⁱⁱ in crash victims. The Paper fails to argue the same response for benzodiazepines as it does for methamphetamine, hence appears biased in its proposition, reinforcing a perception that the RDT program is more about illicit drug use than road safety.

Civil Liberties Australia is also aware that some organisations (e.g. foreign defence forces) prescribed a cocktail of drugs (including those considered for banning) to enhance the combat effectiveness of their personnel when those personnel maybe deployed for protracted periods of time. This practice would suggest that during the life cycle of a drug’s presence in the body, that the body performs at heightened levels of performance and not, as suggested in the Paper, always at an impaired level of performance.

Civil Liberties Australia would only support adoption of a principle where ***all drugs, regardless of legitimacy, that cause demonstrated driving impairment be subject to a testing program.***

The Paper also addresses the reliability of the testing procedures and notes that a full testing regime takes some 35-40 minutes. As the Paper also notes, the initial screening device is unreliable and is not recommended for random roadside drug testing in Europe. It therefore recommends the unreliable modified Drug Wipe be followed up with a confirmatory device. This process can result in a blood sample being required in 13%^{iv} of instances referred for confirmatory testing, even though the victim may well be innocent of any offence. This results in an invasive procedure that could be regarded in other circumstances as an assault. In search of some higher outcome based on unproven science, the State determines it is lawful to assault innocents!

Civil Liberties Australia does not support invasive evidence collection based on immature screening techniques.

The Paper also argues that, as there is no scientific basis to determine if a driver is impaired by a drug present in saliva testing, it is appropriate to record an offence for any presence of a nominated illicit drug. Clearly, this proposal is based on attacking the use of illicit drugs and not the purported road safety measure it is supposedly being introduced to support. There is no scientific argument presented to suggest that the mere presence of a drug impairs driving. For consistency, if the presence of a drug constitutes an offence, then a zero tolerance to alcohol must also be adopted. It is inappropriate in a road safety context to implement a blanket ban on the presence of a drug. Consistency of approach would dictate that where there is a similar impairment of prescription drugs on driving behaviour they should be subject to the same testing regime.

The discussion on *Human Rights Considerations* is disingenuous when it suggests that a non-consenting blood sample represents a ‘*medical treatment*’ as, by any subjective definition, it is not a treatment and is invasive and in other contexts would represent an assault!

The human rights argument is that the proposed RDT program serves *an important and significant objective* in its aim to reduce the road safety risks. Clearly, from the above, there is no assessment of impairment in the application of the RDT program, hence it fails to fulfil this essential requirement as it cannot demonstrate that the mere presence of a drug increases the safety risk. It potentially could be argued that a reduction of alcohol to a zero tolerance would do more to reduce road safety risks than any RDT program. If the Government’s objective is to significantly reduce road safety risks it should introduce zero tolerance for all drugs (including alcohol).

The Paper’s discussion, contrary to its assertion, does not demonstrate that the implementation of invasive blood testing satisfies a proportionality test as it cannot demonstrate what the risk of the drug’s presence constitutes.

The human rights consideration also raises the issue of what information is recorded on those convicted of a drug related driving offence. While there are assurances given that information is not used to pursue in other ways members of the public identified with a drug result, what assurances in law exist to ensure that **any** information obtained through the RDT program is not passed on through intelligence based processes/programs, or database function to other elements of the ACT or other Australian or overseas law enforcement agencies? Civil Liberties Australia is acutely aware that ACT Policing is a law enforcement arm of the Australian Federal Police (AFP) who considers it has a higher duty to the Australian public and may not necessarily agree to or support ACT privacy and human rights requirements given that it (the AFP) operates under federal legislation. Given the unique arrangements pertaining to the relationship between ACT Policing and the AFP, the legislation should contain a criminal offence for each instance if information is passed contrary to the Act.

Question 1b - Should drug driving offences and penalties mirror those that currently exist for drink driving?

The Discussion paper provides no discussion or argument in support of the proposition of mirroring alcohol penalties and only in passing addresses the matter based on simplicity.

The mere presence of a drug does not constitute impairment to the point a person cannot safely operate a motor vehicle and the Paper fails to make any argument as to that link, which is crucial in any consideration of drug driving. It does not follow the principle adopted for alcohol testing where there is direct and demonstrated robust scientific evidence to link impairment and that drug of dependence (for some).

As there is no evidence on the correlation between the level of presence of a drug and the level of impairment, it stands to reason that it is also flawed to determine a penalty regime based on alcohol which is currently scaled to reflect the seriousness of an offence based on impairment. As there is no scientific data to relate fluid/saliva samples to impairment levels, a mirroring of penalty is inappropriate.

The Discussion Paper suggests a penalty regime could mirror that of drink driving penalties, but, noting that drink driving has a range of penalties based on blood alcohol, it is not clear whether it is intended to have a sliding scale based on some arbitrary judgement about drug levels and impairment. This proposition is not sufficiently developed to warrant serious consideration by the community.

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

This proposition effectively advocates an apparent doubling of the sentence for the single offence of driving while impaired. While the first impairment is scientifically based, the second impairment is judgemental at best, but the proposition seeks to impose a cumulative sentence for the offence of driving while impaired and would be inappropriate.

Question 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?

On a principle of equality, this proposition could be supported if it included a testing for **any** drug presence, be it alcohol, an illicit drug or a prescribed drug. To test for only some drugs (e.g. alcohol or illicit) would appear to defeat the purpose of testing, that is to determine a cause of the accident and better develop a statistical basis for determining which drugs have a higher statistical significance in accidents.

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

Impairment is the issue associated with reducing the road safety risk which is the objective of the issues in the Discussion Paper. If this is the primary objective, what appears lacking is the ability of ACT Policing to perform a physical impairment test or ‘sobriety test’ to determine if a person is capable to drive – this is done in some other jurisdictions. With the advent of new technologies such as car mounted video cameras and hand held video cameras, there is every opportunity to be proactive and provide basic evidentiary material of impairment. As the Paper notes, Western Australia undertakes such testing.

Question 5- Should police be permitted to conduct a breath test in the driveway or entrance to a multi-unit residential development if they suspect a person of driving under the influence?

Civil Liberties Australia supports the proposition.

Question 6 - Should the police be able to breath test the supervisors of learner drivers (whether a professional driving instructor or not)?

Civil Liberties Australia supports the proposition.

Question 7- Should a person be required to undergo a breath analysis test if the results of their screening test show any presence of alcohol?

The Discussion Paper advances no rationale for a change other than Victoria has such legislation. It would be interesting to know from the Victorian experience the statistical data resulting from such testing. It is also noted that such a provision could be open to abuse by use beyond its intended purpose in such legislation. Again, what is implicit in the Victorian legislation is that impairment can be determined other than by a random drug or alcohol test? Civil Liberties Australia does not support the proposition based on the rationale and evidence advanced in the Discussion Paper.

Question 8 - Should all blood sample/s taken under the ACT legislation - including the sample currently given to the driver - be sent to an approved laboratory for storage and/or testing?

The proposition for doing away with the driver being given a sample of blood/urine is based on the practicality of the driver doing anything with the sample or, if they did, its evidentiary worth. As the Paper notes, there is a flaw in the current practice which can be remedied by the driver sample being passed to a second laboratory for independent analysis. In such an approach, the second sample is being undertaken with the driver as client and not a government agency(s). This process can maintain the evidentiary trail and provide assurance to the driver that the process is fair and unbiased.

The storage of samples is also a matter of concern. Any storage and use of any sample should only be for the purpose of the Act and should be destroyed immediately a matter is determined; see also Civil Liberties Australia response to Question 10.

Question 9 - Should 'body sample' be replaced in the ACT legislation by more a specific term/s? (e.g. blood, sweat, urine, saliva)?

Civil Liberties Australia supports the proposition of more appropriately defining the term *body sample* as used in the Act. The New South Wales legislation is seen as appropriate.

Question 10 - Should the use of blood or other samples taken under the ACT legislation be limited only to prosecutions under that Act?

A body sample is being taken to test for the presence of a substance that impairs driving. To extend the use of that sample beyond its stated purpose is to encourage the misuse of the legislation to gain by other means DNA or body samples that could not otherwise be lawfully gathered. If body samples are sought for other purposes, then those purposes need proper and appropriate discussion and legislation to cover such information gathering.

To use a body sample for other than a test of driver impairment would undermine the public's confidence in the road safety risk reduction campaign and in government's motivations more generally.

The balance struck in South Australia, Victoria and NSW appears appropriate with sampling limited to a 'permitted purpose', providing that purpose is enshrined in the Act and not by regulation.

As discussed in Question 8, the relationship between ACT Policing and the AFP warrants specific legislative coverage and penalties for passing on information to any other parties that either the AFP or ACT Policing have agreements with. Any legislation should clearly state that the ACT Government owns all data including, any data that is held on the ACT Policing/AFP database(s) or other records.

Question 11 - Should police be able to confiscate the vehicle keys from suspected drink drivers to prevent them from driving until the alcohol or drug screening tests have been completed?

The purpose of this requirement is unclear. Under existing law, ACT Policing have adequate powers^v to detain drivers who test positive to a breath sample. This provision seems to extend powers for no apparent reason. However, what can be implied from the wording is that police are seeking powers, potentially on a pretext of drink driving, even though a test has not been administered to achieve another purpose; this essentially can lead to abuse of the intent and purpose of the law and is not supported.

Question 12 - Should the police be able to immediately suspend the drivers' licence of a person detected of driving with a BAC in excess of the prescribed limit?

The implementation of an immediate suspension of a licence may have unintended consequences. Apart from the issue of being contrary to the human rights principle of innocent until proven guilty, the driver may rely on driving for a living. An immediate cancellation does not enable a court to determine whether a restricted licence should be granted. In such circumstances, the arbitrarily pre-sentence penalty imposed by licence confiscation is more severe and disproportionate to another member of the community.

As also noted in the Discussion Paper, the determination of guilt or innocence by a Court could take months and exceed the penalty that could be imposed by the Court.

While the testing for alcohol may rarely be successfully contested, it is not to say that a drug result is beyond doubt, unless the legislation does not take account of the primary purpose of road safety risk reduction that is the driver's driving was impaired. As noted in the Discussion Paper, there is a lack of robust scientific evidence to suggest at what level a driver's ability is impaired by drugs (illicit or prescription).

It is also noted that any power granted to a police officer to immediately suspend a licence would effectively give police a judicial type power, which would be open to abuse and clearly violate any separation of enforcement and judicial power.

Civil Liberties Australia does not support immediate suspension of driving licence.

Civil Liberties would, however, observe that if the Government was persuaded to introduce immediate licence suspension, then it would also be appropriate for the State to bear a cost for any determination of not guilty by the Court. That cost should be based on the deprivation incurred in not having access to a vehicle. The cost should be based on (say) the use of taxis to undertake daily activity indexed for inflation for the period of licence suspension.

Question 13 - Should the BAC limit for learner and provisional drivers be lowered to zero?

The proposition that *it has been suggested that a BAC limit of 0.02 has caused uncertainty amongst young drivers* is un-sourced and of little standing. It is further asserted in the Discussion Paper that a wrong message is sent to novice drivers that drinking and driving can mix. To suggest a lowering of the BAC to zero would rectify this message is somewhat fanciful when plainly it is obvious that while other drivers can drink and drive that the message is obvious and evident; the only realistic way to *send a message* would be to have a community zero tolerance standard. To do otherwise would be to reinforce a message that the young are victims of double community standards.

As with all laws, a driver must learn to accommodate the laws of the State/Territory they are driving in. Confusion as to BAC levels is no more an issue than other rules of the road.

Question 14 - Should the BAC limit for motorcyclists during their first year of riding be lowered to zero (even if they have previously held a drivers licence for more than one year)?

It is noted that the Discussion Paper advances no basis for the BAC zero tolerance for novice riders other than Victoria has done it! As the Paper does not present any evidence to the contrary that this is a real issue, the proposition has no substance to underpin its need.

Question 15 - If the supervisors of learner drivers are subject to random breath testing (see Q2), should the BAC limit be set at zero?

The proposition of supervisors of learner drivers being subject to a zero BAC limit is not about impairment to drive; if it was, the community standard should change. Providing role models in supervision of driving is not about safety but in reinforcing a stereo-type image of young drivers. This proposition is not supported.

Question 17 - Should the BAC limit for a person who has been convicted of a drink driving offence be zero after s/he is re-licensed?

Imposition of a zero BAC level on re-licensed drink drivers is an additional penalty to that already imposed by the Court. It is unclear whether this is an additional penalty for drink driving and it is also unclear for what period of time this penalty would apply.

Civil Liberties Australia notes that the discussion and consideration of penalties is treated in an ad hoc fashion in the Paper. It is unclear whether each penalty discussed in various questions is in lieu of or in addition to existing penalties and what the cumulative impact of some or all of the outcomes of this Discussion Paper would be.

Overall, there is no cohesive presentation of what a penalty outcome would be in the consideration of the permutations of the Discussion Paper. Furthermore, it is also unclear what the behavioural outcome would be from introducing the range of options being proposed in this Paper.

Question 18 - Should the special BAC limit for COMCAR drivers be removed?

As the Paper notes COMCAR drivers are equivalent to a taxi driver. It is unclear why the penalty applying to one class of driver would not apply to a similar class of driver.

Question 19 - If the BAC limit was lowered to zero for some drivers, should the ACT legislation include a limited defence to account for consumption of alcohol for the purpose of religious observance or administration of a medicine or the like?

Civil Liberties Australia supports this proposition as being a reasonable and balanced approach to the 'innocent' consumption of alcohol. It is also a consideration that a magistrate would take account of in any hearing.

Question 20 - Are the existing penalties for drink driving in the ACT appropriate?

Civil Liberties Australia would only observe that the discretion given to Magistrates is to allow consideration of all circumstances and other relevant matters regarding an offence and a penalty. The fact that Magistrates at times record no conviction is a matter for each individual case. Contrary to the implied assertion in the Discussion Paper that the Magistrates are lenient^{vi} and dealing inappropriately with matters, it demonstrates that Magistrates are considering the merits of each case and that justice is being seen to be done. Also it is noted elsewhere that the Government reflects favourably on the professionalism of the Magistrate Courts in dealing with matters^{vii}. The Discussion Paper quite clearly does not support the use of discretion by a magistrate, but seeks to impose arbitrary penalties; in other areas of law this has been demonstrated to be a flawed approach and a denial of basic human rights.

The suggestion in the Discussion Paper is that increased penalties provide an additional deterrence effect, but there is no support to that assertion. The cynic would suggest it is more about revenue raising with little, if any, deterrent effect.

Question 21 - Should there be a compulsory obligation for offenders to attend a rehabilitation program or drink driver education course following conviction for a drink driving offence?

Civil Liberties Australia supports well developed and funded rehabilitation programs that are part of the sentencing consideration.

Question 22 - Should offenders be required to make an application to the court for restoration of their licence following disqualification for a drink drive offence?

a. If so, what should be the criteria for restoration of an offenders licence?

While Civil Liberties Australia recognises the difficulty in presenting a Discussion Paper of this type, it does observe that any outcome from the consultation process needs to be consistent. In this proposition it is proposed to give Magistrates the discretion as to

whether and when a licence can be re-instated. However, as part of the discussion at Question 20, the Paper clearly implies Magistrates cannot be trusted to exercise the existing sentencing regime appropriately. Any outcome needs to adopt a consistent view on how matters are approached, perceived and exercised.

Question 23 - Should vehicle sanctions such as vehicle impoundment or confiscation be introduced in the ACT?

a. If so, in what circumstances should vehicles be impounded/confiscated?

While the Discussion Paper states there is some merit to the use of vehicle sanctions it does not provide any detail of what they may be. However, the issues the Paper notes that need to be addressed are significant including the massive penalties that could be incurred including confiscation of a vehicle that could be worth (say) \$60,000+ .

No consideration should be given to this proposition until the many issues associated with it have been satisfactorily resolved and subject to further community consultation.

Question 24 - Should Police be able to immediately impound the vehicles of drink drivers?

There is no discussion on this proposition; hence there is no context in which to consider the ramifications of this proposition. As with Question 23, there are too many similar issues needing resolution before this proposition can be appropriately considered.

Question 25 - Should the ACT introduce an alcohol interlock program?

Civil Liberties Australia 'in principle' supports the use of interlocks when combined with well funded and developed support programs.

Question 25e - Should the ACT provide a subsidy to low income participants in an interlock scheme?

The provision and maintenance of any interlock scheme needs to be free. To introduce any form of subsidy to any particular group based on any criteria e.g. income is discriminatory and creates two levels of justice. Justice needs to be seen to be done and in its essence is about equality before the law; and any departure from that fundamental principle undermines the administration and respect for justice.

If the true objective is to reduce road safety risks, some of the revenues raised by governments on the sale of alcohol should be re-invested in minimising any harm that

sale and consumption may do to the community. In this context, funding of interlock devices by all users should be borne by government.

Question 26 - Should restricted licences continue to be issued to convicted drink drivers?

Civil Liberties Australia supports the continued discretion given to Magistrates to determine whether and under what conditions a restricted licence can be granted.

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ⁱ Drummer, O, Gerostamoulos, D, Chu, M, Swann, P, Boorman, M, and Cairns, I, 'Drugs in oral fluid in randomly selected drivers' (2007) *Forensic Science International*, Vol 170, issues 2-3, pp107 para 3.3.

ⁱⁱ Discussion Paper Page 8 and Endnote 13 of the Discussion Paper

ⁱⁱⁱ Discussion Paper Pg 11

^{iv} Drummer, O, Gerostamoulos, D, Chu, M, Swann, P, Boorman, M, and Cairns, I, 'Drugs in oral fluid in randomly selected drivers' (2007) *Forensic Science International*, Vol 170, issues 2-3, pp107.

^v Section 11 of Road Transport (Alcohol & Drugs) Act 1977.

^{vi} Discussion Paper Pg 24

^{vii} *Discussion Paper – Reforms to court jurisdiction, committal processes and the election for trial alone judges* – ACT Department of Justice and Community Safety May 2008 Pg 8, para 24