

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

Improving road safety by reducing drink and drug driving on the Territory's roads

May 2008



A discussion paper to seek input from the public to the review of the *Road Transport (Alcohol and Drugs) Act 1977*

The purpose of this discussion paper is to seek input from the ACT community to the review of the *Road Transport (Alcohol and Drugs) Act 1977*. It is intended to assist individuals and organisations to prepare submissions to the review. It is not intended to limit comment. Individuals and organisations are encouraged to provide information and comment on any issues that they consider relevant. All ACT legislation, including the *Road Transport (Alcohol and Drugs) Act 1977*, can be found at <http://www.legislation.act.gov.au/>.

Due date for submissions

Monday 16 June 2008

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Please indicate in your Submission, via email, or through the web form whether you agree that your comments be published on the TAMS website. If you do not include this information, your comments will not be published.

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Introduction

Despite significant improvements since the 1980s, drink driving remains a serious threat to public safety. During 1981, 44% of all drivers and motorcycle riders killed in road crashes in Australia had a blood alcohol concentration (BAC) of 0.05 (grams of alcohol per 100 millilitres of blood) or greater. This had reduced to 26% in 1998.¹ Over 1 in 5 drivers and riders killed in Australia have a blood alcohol concentration exceeding the legal limit.² For everyone killed, injured or disabled in a road crash in which alcohol is a factor there are many others affected. The annual economic cost of road crashes in Australia has been conservatively estimated at \$18 billion.³

Although still not as prevalent as drink driving, the rate of drug driving (driving under the influence of a drug other than alcohol) is also a growing concern. According to the 2004 National Drug Strategy Household Survey, 3.3% of drivers reported driving under the influence of a drug other than alcohol in the past 12 months. The rate of drug driving was even higher among young people (and males in particular).⁴ A recent analysis of the first year of random roadside drug testing in Victoria (2004-2005) showed that 2.4% of drivers were driving with presence of THC (the active constituent of cannabis from recent use) or methamphetamine (commonly speed or ice).⁵

The *Motor Traffic (Alcohol and Drugs) Act 1977* was enacted following an ACT Law Reform Commission Report in 1976 into alcohol and drug driving in the Territory. The Act underwent a name change as part of road transport reforms in the late nineties, to become the *Road Transport (Alcohol and Drugs) Act 1977* (the ACT legislation), but has remained largely unchanged. The purpose of this paper is to canvas some of the developments and issues that have arisen since the ACT legislation commenced 30 years ago, and to seek public input into some of the issues of alcohol and drugs as they relate to road transport.

Current Drink Driving Laws

The ACT legislation prescribes BAC limits for drivers. The BAC for drivers holding a “full licence” is 0.05, while a lower limit of 0.02 is set for learner and provisional drivers, heavy vehicle drivers and public passenger vehicle drivers. An offence occurs when alcohol is detected above the prescribed limit (of either 0.02 or 0.05). Proving an offence does not rely on proof that the driver was under the influence of alcohol or was driving while impaired. In the past, the need to prove “impairment” or “driving under the influence” frequently resulted in protracted evidentiary disputes.

Random breath testing is the primary mechanism used to detect and deter drink driving. Drivers are randomly stopped by police and given an alcohol breath test using an approved roadside screening device. Where this test does not indicate a BAC over the prescribed limit, no further analysis is conducted and the driver is free to go. If the test indicates that the driver is over the prescribed limit, a second test is conducted using a breath analysis instrument. If the breath analysis instrument confirms that the person is over the prescribed limit, the person is charged with a drink driving offence.

Following a road accident, a driver may also be breath tested by police, or have a blood sample taken while being attended to at hospital. If a blood sample is taken by a doctor or nurse, the sample will be divided into two. Half the sample will be given to the driver while the other half is sent to a laboratory for testing. If alcohol over the prescribed limit is detected when the sample is analysed the person may later be charged with a drink driving offence.

The penalties for drink driving vary according to the level of alcohol detected in an offender's blood and include fines, licence suspension, imprisonment, good behaviour bonds, and/or referral to a drink driver rehabilitation course.

Current Drug Driving Laws

The ACT legislation currently provides for the police to require a driver of a motor vehicle to submit to blood analysis if they suspect the person of driving under the influence of an impairing drug (see Chapter 1 for the meaning of “drug”). It is an offence to drive under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle. Random roadside drug testing is not authorised under the current ACT legislation.

A blood test for drugs may be done at the request of police if a driver has been involved in a road crash and attends hospital, but only a small number of samples are currently tested for drugs other than alcohol. Note that unlike alcohol, where prosecution generally occurs based on the level of alcohol in the driver's blood, there is no offence for driving with a particular level of a drug. Instead, it must be proven that driving was impaired due to the influence of a drug.

The penalties for driving under the influence of an impairing drug include fines, licence suspension, imprisonment, good behaviour bonds and/or referral to a drug and alcohol rehabilitation course.

Human Rights Impact

The *Human Rights Act 2004* (Human Rights Act) is the ACT's Bill of Rights, and sets out basic rights for all ACT citizens. Any changes to ACT legislation must be assessed for their human rights impact under the Human Rights Act. For example, the introduction of random roadside drug testing (see Chapter 1) would need to carefully balance people's right to privacy against the broader road and public safety arguments.

Summary of discussion questions

This discussion paper poses a series of questions in each chapter to help frame submissions to the review of the *Road Transport (Alcohol and Drugs) Act 1977*. See page (i) for details on how to make a Submission to the review.

1. Drugs and Driving

(pages 6 - 12)

1. How should random roadside drug testing be introduced in the ACT?
 - a. Which drugs should be included in the testing program?
 - b. Should drug driving offences and penalties mirror those that currently exist for drink driving?
2. Should drug testing be compulsory for all drivers who have returned a positive result when breath tested for alcohol?
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?
4. What other strategies could be adopted to address the incidence of drug driving in the ACT?

2. Improving Detection of Drink Driving

(pages 13 – 16)

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?
6. Should the police be able to breath test the supervisors of learner drivers (whether a professional driving instructor or not)?
7. Should a person be required to undergo a breath analysis test if the results of their screening test show any presence of alcohol?
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 (ACTGAL) for storage and/or testing?
9. Should ‘body sample’ be replaced in the ACT legislation by more a specific term/s? (e.g. blood, sweat, urine, saliva)?
10. Should the use of blood or other samples taken under the ACT legislation be limited only to prosecutions under that Act?

3. Interventions to Prevent Drink Driving

(pages 17 - 18)

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?
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?
 - a. If so, in what circumstances should immediate licence suspension apply?

- b. Should it be limited to drivers with a high range BAC and/or repeat drink drivers?

4. Blood Alcohol Concentration (BAC) Limits

(pages 19 – 22)

13. Should the BAC limit for learner and provisional drivers be lowered to zero?
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)?
15. If the supervisors of learner drivers are subject to random breath testing (see Q2), should the BAC limit be set at zero?
16. Should the BAC limit for taxi, bus, restricted and heavy vehicle drivers be lowered to zero?
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?
18. Should the special BAC limit for COMCAR drivers be removed?
19. If the BAC limit is 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?

5. Penalties for Drink Driving

(pages 23 – 29)

20. Are the existing penalties for drink driving in the ACT appropriate?
 - a. Should penalties be increased to mirror those in NSW?
 - b. Should the penalties for repeat offenders be increased?
 - c. Should any other penalties be amended?
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?
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?
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?
24. Should police be able to immediately impound the vehicles of drink drivers?

6. Alcohol Interlocks

(pages 30 – 33)

25. Should the ACT introduce an alcohol interlock program?
 - a. If yes, how could the ACT encourage participation in the program?
 - b. Which offenders should be targeted?

- c. Should offenders using an interlock device be able to avoid serving a period of licence suspension?
- d. How should the period for participation in the program be calculated?
- e. Should the ACT provide a subsidy to low income participants in an interlock scheme?

7. Granting Restricted Licences to Drink Drivers

(pages 34 – 35)

- 26. Should restricted licences continue to be issued to convicted drink drivers?
 - a. If so, in what circumstances should restricted licences be issued (e.g. to first offenders only)?
 - b. Should the courts be required to take public safety as the primary consideration when making decisions in relation to granting of restricted licences?

1. Drugs and Driving

The ACT legislation makes it an offence to drive under the influence of a drug, and provides for blood analysis where the police suspect a driver of driving under the influence of an impairing drug. It does not authorise random roadside drug testing (RDT).

In considering whether the ACT should adopt RDT, it is important to weigh the road safety arguments for preventing drug driving against human rights considerations and the harm minimisation approach generally taken towards drug users in the ACT.

1.1 Australian Random Roadside Drug Testing Programs

Over the past few years, RDT programs have been introduced in most Australian jurisdictions, with Victoria putting in place a world-first random RDT program in 2004. These RDT programs test for a variety of drugs, and use a number of legislative measures to allow saliva or blood samples to be taken. The following table shows the status of these regimes:

DRUG DRIVING STATUS

VICTORIA

Legislation passed in December 2003 allowing the trial of random roadside drug testing (RDT) for THC and methamphetamine. The trial began in December 2004. In July 2006, MDMA was added and the Victorian program became permanent.

NEW SOUTH WALES

Legislation came into force in December 2006 allowing random roadside saliva drug testing, charging motorists with driving under the influence of drugs if impairment suspected, and blood sampling for drivers involved in fatal traffic crashes. The first conviction under the new roadside drug-testing laws was reported in March 2007.

SOUTH AUSTRALIA

RDT on THC and methamphetamine began in July 2006, with MDMA added in September 2006.

QUEENSLAND

RDT legislation passed in February 2007 and trials conducted. RDT program started 1 December 2007.

NORTHERN TERRITORY

In November 2006, the NT Government approved a range of Road Safety Taskforce recommendations for drug driving and an RDT program is anticipated to start in 2008.

TASMANIA

A 'live trial' of four or five devices for roadside testing began in January 2005, with two devices selected that together test for five drugs. Legislation was passed in July 2005 making it an offence to be found with drugs in the body if blood tested (13 drugs) or if positive result in oral fluid testing (5 drugs).

(Note: There is no program of stationary high-volume roadside drug testing in Tas. as in other states.)

WESTERN AUSTRALIA

Legislation came into force in August 2007 to allow drug driving testing and random roadside saliva drug testing for THC, methamphetamine and MDMA.

AUSTRALIAN CAPITAL TERRITORY

RDT legislation was rejected by the Legislative Assembly in 2005. Drug Driving Working Party established to consider the implications of RDT initiatives in other jurisdictions for the ACT.

Adapted from *Of Substance: the National Magazine on Alcohol, Tobacco and Other Drugs*, July 2007

1.2 Prevalence of Drug Driving

The Australian Drug Foundation recently released a report '*Drugs and Driving in Australia*' based on an online survey of nearly 7000 Australians relating to their drug driving habits. The key findings of the report are that:

- While alcohol remains the drug of most concern in relation to road safety, drug driving is also of considerable concern.
- There is evidence to suggest that illicit drugs impair driving ability and that driving under their influence increases crash risk; of particular concern are THC - the active constituent of cannabis, methamphetamine - commonly 'speed' or 'ice', and MDMA - 'ecstasy'.
- The findings of the internet survey suggest that the proportion of people driving within three hours of using cannabis is comparable to the proportion of people who reported driving under the influence of alcohol.
- Pharmaceutical drugs such as benzodiazepines (e.g. valium) are also implicated in a significant number of accidents and road trauma, although research is still ongoing regarding the prevalence and road safety impact of driving under the influence of prescription medications.⁶

Victoria ran a trial during the first year of its RDT program, 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. These results should not however be directly extrapolated to the general driving population, as the Victorian RDT program targets particular sub-groups of drivers (notably rave party-goers and truck drivers).⁷

Prevalence of drug driving in the ACT

Anecdotally, driving under the influence of drugs is becoming increasingly common, as young people in particular use drugs such as cannabis or methamphetamine rather than risk being caught over the BAC limit. A small controlled study of RDT conducted by the University of Canberra in 2006 found that 7% of the voluntary participants tested positive for one or more of the three drugs (cannabis, methamphetamine and ecstasy), a figure much higher than expected in an opt-in trial. These participants had all tested negative for blood alcohol (i.e. BAC less than 0.05).⁸

1.3 How do Drugs Affect Driving Ability?

Alcohol continues to be the drug found most often in the bodies of fatally and non-fatally injured drivers, followed by cannabis, amphetamines and benzodiazepines (e.g. valium).⁹ While the research into the impact of drugs on driving is a relatively new and rapidly expanding field, there is increasing evidence to suggest that certain illicit drugs (namely cannabis, methamphetamine and ecstasy) and some prescription medications (benzodiazepines) impair driving ability and increase risk of collision. Recent studies have also found drugs to be present in a significant number of fatally and non-fatally injured drivers.¹⁰

Evidence on the level at which particular drugs have an unacceptable impact on driving ability is increasing; for example, a recent study has confirmed a level at which cannabis has the equivalent impact on driving performance as a BAC of 0.15 – see below. However, it is more difficult to measure the impairment effects of drugs compared to alcohol, as outlined by an expert quoted in the *Drugs and Driving in Australia* Report:

“[with alcohol] if you measure how much is in the breath, that tells you how much is in the blood, which in turn tells you how impaired the person is. With drugs, the level in the blood actually does not have very much relationship to how impaired the person is. We still don’t know a lot about exactly how drugs affect behaviour at different levels.”¹¹

There is however broad agreement among experts that some drugs impair driving ability regardless of the level of the drug present.¹²

A submission by Victorian police to the House of Representatives Standing Committee on Family and Human Society Inquiry into the Impact of Illicit Drug Use on Families in 2007 included a road safety statement in support of RDT:

“The physiological, pharmacological and toxicological aspects of drug use vary according to circumstance and the relationship between the level of a drug present and the effect of different drugs on driving can not be established as easily as alcohol. [However], the evidence does show that the relationship between illicit drug use and increased collision risk is not dependent on the presence of a specific level of a drug.”¹³

Illicit drugs

Cannabis, methamphetamine and ecstasy are the illicit drugs of most concern from a road safety perspective, and are the focus of most Australian RDT programs. They are the most common drugs based on drug use surveys, are not found in any Australian prescription medicine, and can be detected at levels likely to cause driving impairment using existing roadside testing devices.

In relation to cannabis, there is increasing evidence that the presence of at least 5 ng/ml of active THC (i.e. the component of cannabis that is present in a person’s system after recent use) can produce an equivalent crash risk to that of a person with a BAC of 0.15. When used in combination with alcohol, cannabis has been shown to impair driving, even when the BAC level is less than 0.05.¹⁴

The high presence of methamphetamine in the bodies of killed and injured truck drivers is also of particular concern. The statistics are likely to underestimate the true prevalence of drug use by truck drivers, as they are relatively infrequently killed or seriously injured in crashes. The absence of long stretches of highway in the ACT may mean that these concerns are not as great as in other regional and remote areas; however, the ACT is a hub for freight loading and unloading at the end of long haul journeys.

Prescription and over the counter drugs

Prescription and over the counter drugs are also of concern; a 1998 study found that therapeutic concentrations of certain drugs could have an intoxication result similar to alcohol.¹⁵ The same study suggested that the involvement of prescription drugs in road trauma may be much greater than previously thought, and that further research was warranted. A recent report by the ACT Council on the Ageing and the ACT NRMA Road Safety Trust has also highlighted the number of older drivers whose driving ability may be impaired by prescription medicines.¹⁶

Tasmania is the only jurisdiction to include prescription medication in its drug testing program to date. It is noted that the impaired drug driving provisions of the ACT legislation currently refer to any substance that may influence the driving of a person, but that police rarely use these provisions outside of an accident.

Polydrug use

Another area of concern is polydrug use, which often involves alcohol in combination with another licit or illicit drug. A combination of drugs is likely to produce a greater level of driver impairment than alcohol or drug use alone.

1.4 Practicalities of Random Roadside Drug Testing

Another issue that needs to be considered is the availability of reliable and cost effective technology that can be used in a mass roadside context. A number of commercially available saliva testing kits have come onto the market in recent years. The Securetec DrugWipe (which is used in Victoria, NSW, South Australia and Tasmania) takes around five minutes to return a result. In Victoria and South Australia a driver who returns a positive result to a roadside saliva test is also required to undertake an oral fluid analysis (using the Cozart Rapiscan device) or blood test. In most cases, an oral fluid analysis will take around 30 minutes. Most other roadside saliva tests take around 15 to 20 minutes to return a result.

A recent ROSITA (Roadside Testing Assessment) study funded by the European Commission examining the reliability of saliva testing devices found none of the devices reliable enough to recommend them for random roadside drug testing at this time. Detailed analysis of the data collected by the study showed that some roadside devices (such as the DrugWipe) gave a negative result even when very high concentrations of THC (the active component in cannabis) were found to be present in subsequent laboratory analyses.¹⁷

The Victorian RDT program addresses the efficacy of the devices by using an initial screening device that produces an immediate result (a modified version of the DrugWipe), followed by a confirmatory device should the screening device return a positive result. The combination of the two devices has produced a false positive rate of less than 1%, largely alleviating concerns about the efficacy of the devices. It is also noted that the Victorian legislation has not been challenged in court despite over 500 infringements issued to date.

1.5 Drug Driving Offences and Penalties

When introducing RDT programs, other jurisdictions have mirrored drink driving offences and penalties for their drug driving legislation. The main difference between drink and drug driving offences is that the provisions based on saliva testing can refer only to presence rather than a level of a drug (see 1.3 above). To overcome the difficulties associated with establishing a “level”- based test for drugs in drivers, other Australian jurisdictions have adopted a presence-based approach to drug driving. For example, in NSW it is an offence to drive with the presence of any of the following drugs in oral fluid, blood or urine:

- active THC (Cannabis);
- Methylamphetamine (Speed/ice); or
- Methylenedioxyamphetamine (MDMA or ‘ecstasy’)¹⁸

If an RDT program were to be introduced in the ACT, the simplest way to structure the offences/penalties would be to mirror the drink driving provisions, replacing blood samples with oral fluid/saliva samples where appropriate.

Views are sought on whether this or an alternative approach (such as the sobriety testing in the New Zealand scheme) should be adopted for an RDT program in the ACT.

1.6 Human Rights Considerations

An ACT RDT program, like all new policy proposals which affect human rights, must be scrutinised for compatibility with the *Human Rights Act 2004* (Human Rights Act). While other Australian jurisdictions have adopted RDT schemes, none of these jurisdictions were required to scrutinise these schemes in line with human rights principles. This includes the Victorian scheme which was enacted before to the Victorian *Charter of Human Rights and Responsibilities Act 2006* came into force.

The proposal to introduce a RDT program, particularly in combination with a ‘presence’ offence for drug driving, engages a number of human rights protected by the Human Rights Act, including the right not to be subject to medical treatment without consent; the right to privacy; the right to be free from arbitrary detention; and the right to the presumption of innocence.¹⁹ There are two questions that need to be addressed when assessing any new policy against the Human Rights Act – first, whether a RDT scheme serves an important and significant objective; and second, whether there is a rational and proportionate relationship between that objective and the limitation on rights.²⁰

Important and significant objective

The purpose of a proposal that may impact human rights must be more than a general goal of protection from harm. The purpose must be so pressing and substantial that it warrants the imposition of a limit on the exercise of those rights. In this case, the important and significant objective is that RDT schemes aim to reduce the road safety risk of drug driving for both the drivers themselves, and other road users.

Rational and proportionate response

Proportionality is about finding a fair balance between the protection of individual rights and the interests of the community at large. That balance can only be achieved if limits on individual rights are strictly proportionate to the legitimate aim they pursue. An example of a proportionate response is the grading of penalties imposed for drink driving (see Chapter 5), whereby penalties increase for repeat offenders.

The current ACT legislation provides that police must have a “reasonable suspicion” that a person is driving under the influence of an impairing drug before they can request a blood test. This means that the risk to road safety from drug impaired driving must be established before an invasive testing procedure (i.e. a blood test) can be carried out. In these circumstances, a more invasive test is proportionate to the increased road safety risk.

The same proportionality test will need to be applied to random roadside saliva testing; is the road safety risk posed by drug driving sufficient to justify the use of the proposed testing procedure? Based on the increasing body of research into the impairment effects of drugs on drivers, and the high presence of particular drugs in the bodies of fatally injured drivers (see 1.3 above), the risk to road safety posed by drug driving is significant enough to satisfy the proportionality test.

Educational campaigns are an important in deterring drug driving. While early research from Victoria indicates some positive effects on the driving behaviour of nightclub attendees, researchers in Sweden have found that Sweden’s zero-concentration drug driving laws (which have been in place since 1999) have done little to reduce the level of driving under the influence of drugs or to deter the typical offender, with recidivism rates at around 50%.²¹

The objectives of road safety should be separate from control of illicit drugs. In the UK, for example, there are specific clauses in the road traffic laws which prohibit the results of the tests to be used for any other criminal charge (see 2.6 below).

1.7 Other Strategies to Prevent Drug Driving

In addition to an RDT program for the ACT, other strategies could increase the perceived risk of apprehension for drug driving, and raise awareness of the dangers of drug driving.

Compulsory drug testing of oral fluid or blood of all drivers who return a positive result when breath tested could increase the perceived risk of apprehension for drug driving because the use of alcohol is commonly combined with the used of other drugs. In addition, it is important to note that alcohol can interact with other drugs in a way that produces greater impairment than that which would be caused by either alcohol or the drug on its own.²²

Blood testing for drugs other than alcohol could also be made mandatory if a driver (or suspected driver) has been involved in a motor vehicle accident and attends hospital,

without the need for police to prove the person was driving under the influence of an impairing drug. Note that blood is already taken and tested for alcohol in such cases.

For both of these cases, views are sought on which drugs should be included in this testing (if it were to commence), and what penalties and offences should apply (i.e. whether penalties and offences should mirror those for drink driving). The high presence of benzodiazepines in crash victims also suggests that there might be benefit from educational activities to raise awareness of the risks associated with some medications and driving. A more general education campaign about the dangers of drug driving also warrants consideration.

Other jurisdictions

Prior to announcing the introduction of random roadside drug testing, the Western Australian Government introduced amendments to enhance their current legislation and was working towards the introduction of standardised impairment assessment procedures, which would be used by police to help facilitate proof of a new offence of ‘driving under the influence of drugs’.²³ Studies into the accuracy of field sobriety tests (for cannabis at least) have found results from these tests to accord well with toxicological results.²⁴

Following the introduction of random roadside drug testing, Victoria also required mandatory testing of all blood samples taken from people who had been the driver or suspected driver of a vehicle involved in a motor vehicle accident for drugs as well as alcohol.

Have your say

1. *How should random roadside drug testing be introduced in the ACT?*
 - a. *Which drugs should be included in the testing program?*
 - b. *Should drug driving offences and penalties mirror those that currently exist for drink driving?*
2. *Should drug testing be compulsory for all drivers who have returned a positive result when breath tested for alcohol?*
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?*
4. *What other strategies could be adopted to address the incidence of drug driving in the ACT?*

2. Improving Detection of Drink Driving

The ACT currently uses both breath and blood testing to detect the presence of alcohol in drivers in accordance with the prescribed limits. Breath testing occurs at random as part of the ACT random breath testing regime, or at a specific time if a police officer suspects a driver is impaired by alcohol.²⁵ Blood testing occurs for all drivers or suspected drivers involved in a motor vehicle accident who attend hospital, and can be requested by police if a breath analysis sample is not possible.²⁶ The ACT legislation also has provision for use of a ‘body sample’ to detect the presence of alcohol (e.g. saliva, urine, sweat).

2.1 Random Breath Testing

Random breath testing (RBT) was first introduced in the ACT in the 1980s and has been widely praised as having successfully achieved its goal of reducing the number of alcohol related crashes in the Territory. The most significant element of RBT is that a driver can be pulled over and breath tested by police at any time without there being any suspicion that they are under the influence of alcohol. This is in contrast with sobriety checkpoints and tests in the United States, where drivers must be assessed as being likely to be impaired before they can be required to submit to a breath test.²⁷

One of the primary goals of RBT is to deter drink driving. This occurs in two ways - first, by specifically deterring drivers who are caught, and second by creating a general perception amongst potential drink drivers that they are at risk of being caught for drink driving. RBT has not only had an immediate deterrent impact, but has contributed over the longer term to a general change in attitude towards drink driving. Surveys undertaken in NSW suggest that RBT has resulted in greater numbers of people monitoring the number of drinks they consume rather than relying on symptoms of alcohol impairment, greater numbers of people planning to use alternative transport if they expect to consume alcohol, and a changing moral attitude to drink driving.²⁸

2.2 Where Can a Breath Test Take Place?

A police officer may require a person to undergo a breath test if the person is the driver of a motor vehicle in a public street or a ‘public place’ while impaired.²⁹ Police have expressed a concern with the ambiguity of the current definition of “public place” in the ACT legislation, particularly in relation to their ability to conduct a breath test in the driveway or entrance of a multi-unit residential development. Police report that drivers are seeking to avoid detection by driving into a multi-residential complex. Due to a drafting anomaly, there is no ambiguity about police power to conduct a breath test in a single dwelling residential driveway.

Have your say

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?*

2.3 Breath Testing of Driving Instructors

In NSW, Victoria, Tasmania and South Australia express provision is made for the random breath testing of the supervisors of learner drivers. In NSW, Victoria and Tasmania, this power extends to non-professional as well as professional driving instructors.³⁰

The ACT legislation gives the term ‘drive’ a broad meaning, which includes being in control of the steering, movement or propulsion of a vehicle. While it may be argued that ‘drive’ includes driving instructors in this sense, an express provision in similar terms to the provisions of other jurisdictions would put the matter beyond doubt.³¹ Views are therefore sought on whether police should be able to breath test the supervisors of learner drivers. The prescribed BAC limit for supervising drivers is also considered in chapter 3.

Have your say

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

2.4 Breath Analysis Tests

If a person returns a ‘positive’ result when breath tested (i.e. the breath test has shown that a person’s BAC is over the prescribed limit³²) the person can be required to undergo further testing using a breath analysis instrument. A breath analysis instrument is calibrated before and after use, and provides a hard copy print out of the results which can be used as evidence in court should the person be later charged and prosecuted for a drink driving offence.

In Victoria and NSW, police have wider powers, and can require a person to undergo a breath analysis if the result of their breath test shows any presence of alcohol.³³ In practice police will not require a breath analysis test unless the person screens at or more than the prescribed limit. On occasion however, an officer may suspect that the person’s state of impairment is inconsistent with the reading shown. The Victorian legislation provides the officer with the discretion to proceed with a breath analysis test, or perhaps even a drug impairment test, if they suspect the driver is impaired.

Have your say

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

2.5 Handling of Blood Samples

When a doctor or nurse takes a sample (of blood or urine) from a person under the ACT legislation, they must place equal quantities of the sample into two containers. One container is given to the driver, while the other is sent to the ACT Government Analytical Laboratory (ACTGAL) for analysis. If the driver can't take the sample (e.g. because they are unconscious), both parts of the sample must be sent to ACTGAL.³⁴

There is a question of whether the sample given to the driver could realistically be admitted to court as evidence, as the evidential trail cannot be accurately accounted for once the sample leaves the hospital. The driver may not know how to treat the sample to preserve its forensic value.

Have your say

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?*

2.6 Meaning and Use of 'Body Samples'

The ACT legislation currently allows for the collection of a 'body sample' for the purposes of detection of alcohol or an impairing drug.³⁵ The term is not currently defined in the ACT legislation. The impact on, and the engagement of, individual human rights vary depending on the type of body sample collected and how it is collected. For example, collecting a saliva or blood sample is more invasive than a simple breath analysis test. Defining the meaning of 'body sample' would clarify the extent to which the ACT legislation engages or limits human rights principles. The NSW legislation refers to the presence of alcohol or drugs in oral fluid, blood or urine, which may be sufficient for the ACT legislation.

There is also the question of whether samples taken under the ACT legislation could be used for other purposes. For example, could a blood sample taken to determine presence of an impairing drug be used to prosecute a person for drug use under drug-related legislation? Could a sample be placed on a DNA database? While this is possible under existing arrangements (although there would be concerns about conflicts with the Human Rights Act), there has been no recorded case in the ACT of a blood sample taken under road transport legislation being used for prosecution under any other legislation. Views are sought on whether the use of samples taken under the ACT legislation should be limited to prosecutions under road transport legislation only.

Interstate Examples

Victoria, NSW and South Australia have all responded to concerns from civil liberty and drug user groups by prohibiting use of blood samples taken under road transport legislation for any other purpose. The Victorian, NSW and South Australian legislation

also addresses another concern with use of samples by specifically prohibiting their use for the purposes of DNA analysis or addition to any DNA database. They limit use only to a “permitted purpose”, namely whether there are any prescribed illicit drugs present in the sample.³⁶

Have your say

9. *Should ‘body sample’ be replaced in the ACT legislation by more a specific term/s? (e.g. blood, sweat, urine, saliva)?*
10. *Should the use of blood or other samples taken under the ACT legislation be limited only to prosecutions under that Act?*

3. Interventions to Prevent Drink Driving

While random breath testing and media campaigns are aimed at the general driving population, there are a number of other specific measures utilised to prevent drink driving. The purpose of this section is to consider some of those measures.

3.1 Confiscation of Vehicle Keys from Suspected Drink Drivers

In the ACT, a police officer may only take the vehicle keys from a driver once that driver has shown a positive BAC reading or has been charged with a drink or drug driving offence and is taken into custody. At this point, the police officer may drive the vehicle to a retention area. The police officer is not required to return the keys and release the vehicle to the driver until the police officer is satisfied that the person can drive the vehicle without committing an offence under the ACT legislation (i.e. the person is no longer under the influence of alcohol or drugs).³⁷

In order to prevent a driver from returning to their vehicle and commencing or continuing to drive while they are over the BAC limit or under the influence of an impairing drug, other Australian states such as NSW, Victoria and Tasmania enable police to confiscate the vehicle keys of a person suspected of driving or attempting to drive a vehicle while under the influence of alcohol or drugs (i.e. before any screening test has taken place).³⁸ Prior to returning the keys, a police officer can require a person to undergo a breath test or roadside drug test.³⁹

Have your say

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?

3.2 Immediate Suspension of Drivers Licence by Police

In the ACT, licence suspension may only be imposed by a court following conviction for a drink driving offence, meaning disqualification often does not commence until many months after the drink driving incident.⁴⁰

Immediate licence suspension is an effective sanction used by various states to limit the incidence of re-offending by drink and/or drug drivers. In NSW for example, police may serve a notice of immediate licence suspension on a person charged with a middle-to-high range drink driving offence (i.e. a BAC of greater than 0.08).⁴¹ Similar provisions exist in Victoria, where police may immediately suspend the licence of any driver who has been charged with a middle-to-high range drink driving offence until such time as the charge is heard in court.⁴²

The immediacy of similar action in the ACT could send a strong message to drivers and reinforce the notion of deterrence. Some people may be less likely to drink and drive because of the risk of immediately losing their licence should they be caught. (The issuing of restricted licences is also relevant here – see chapter 6 for detail).

The effectiveness of immediate licence suspension is also supported by a recent study of drivers in 46 US states, which has shown that immediate suspension of licence has a strong deterrent effect on repeat offenders. In particular, drivers with BAC levels just above the prescribed limit who had had their licences suspended were 5% less likely than those who had not to be involved in a fatal accident. Conversely, drivers who did not have their licence suspended were much more likely to be convicted of a further drink driving offence. The study concluded that:

“the effectiveness of a deterrence policy appears to be more strongly affected by... the speed by which punishment is applied after the offending behaviour.”⁴³

That said, to give the police the power to immediately suspend a drivers licence could run contrary to human rights principles, in particular the right to a presumption of innocence until proven guilty. The suspension of a person’s drivers’ licence, albeit for even a short period, would result in the person being unable to legally drive until the case is heard by the court many months later, at which point they may be found not guilty of the offence charged. However, a counterpoint to this is that drink driving charges based on the result of a breath analysis or blood test are rarely successfully contested, and there is a high conviction rate for these offences.

Have your say

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?

- a. If so, in what circumstances should immediate licence suspension apply?*
- b. Should it be limited to drivers with a high range BAC and/or repeat drink drivers?*

4. Blood Alcohol Concentration Limits

The measure of alcohol in a driver's blood is expressed in the ACT legislation as the mass of alcohol (in grams) per 100 millilitres of blood. In other words, a BAC of 0.05 means there are 0.05 grams of alcohol in each 100 millilitres of blood. Research conducted over the past 30 years has consistently demonstrated the link between increased BAC levels and increased crash risk.

The ACT legislation prescribes a BAC limit of 0.05 for holders of a 'full' driver licence. A lower level of 0.02 is set for learner, provisional and restricted licence holders. Heavy vehicle drivers and public passenger vehicle drivers are also required to comply with the lower 0.02 limit.⁴⁴ An offence occurs when alcohol is detected in drivers above the prescribed limit (of either 0.02 or 0.05). This means that it is not necessary to prove that the driver was under the influence of alcohol or was driving while impaired (although driving under the influence remains a separate offence in the ACT legislation).

The purpose of this section is to consider whether the current BAC limits for certain categories of drivers are appropriate.

4.1 Learner and Provisional Drivers

All other Australian jurisdictions with the exception of Western Australia have implemented a zero BAC limit for novice (i.e. learner and provisional) drivers. Western Australia is also reviewing its BAC levels, with the likely introduction of a zero BAC for novice drivers in the near future. It should be noted that the 0.02 (and not zero) levels for novice drivers were originally put in place across Australia at a time when the breath testing devices could not accurately measure below 0.02; modern devices are substantially more accurate down to a BAC level of 0.0001 (although prosecutions are not always carried out for BACs under 0.02).⁴⁵

Young drivers and drink driving

There is considerable evidence to suggest that young inexperienced drivers are more adversely affected by alcohol at lower levels than more mature drivers. Young drivers are over represented in alcohol related crashes in Australia and are more at risk because their driving skills are still developing and they need to exercise more conscious control over their driving. There is also research suggesting that the drinking behaviours of some young people (i.e. generally higher alcohol consumption patterns) place them at additional risk of being involved in an accident when drink driving.⁴⁶

It has been suggested that a BAC limit of 0.02 has caused uncertainty amongst young drivers, who believe they can drink small amounts of alcohol and not have their driving ability impaired. There is also evidence to suggest that young novice drivers find it difficult to effectively monitor their alcohol consumption to stay below 0.02.⁴⁷ Another unfortunate consequence of a 0.02 limit is that it is said to send the wrong message to novice drivers (i.e. that drinking and driving can mix). Lowering the BAC limit to zero would send a less contradictory message to young drivers regarding drinking and driving.

Cross-border issues

There is also potential for the ACT's 0.02 BAC limit for learner and provisional drivers to lead to confusion about the laws applying to them when they driver across the border in NSW. Legislation has recently been enacted in NSW which requires novice drivers from any jurisdiction to comply with NSW's zero BAC levels when driving in NSW.

4.2 Novice Motorcycle Riders

Views are also sought on whether a zero BAC should be set for novice motorcycle riders. Even if a rider has held a car licence for some time, their riding skills are less developed and more susceptible to alcohol impairment at lower levels when they first begin to ride. The Victorian legislation imposes a BAC limit of zero on novice motorcycle riders whether or not they have previously held a car licence for a period of at least one year.⁴⁸

4.3 Driving Instructors

In chapter 2 of this issues paper, views were sought on whether the police should be able to breath test the supervisors of learner drivers. The introduction of a zero BAC limit for people supervising learner drivers, along with the random breath testing of those drivers, could send a clear message to people teaching others to drive that alcohol and driving do not mix, and ensure that they set a good example by not drinking and driving. A zero BAC would also assist supervisors to exercise the skill and concentration required to teach another person to drive.

The industry code of practice regulating professional driving instructors already requires professional instructors to maintain a BAC below 0.02 while instructing or assessing a student.⁴⁹

4.4 BAC Limits for “Special Drivers”

The ACT currently imposes a 0.02 limit on special drivers, including a person who has a suspended or expired licence, as well as taxi, bus, learner, provisional, restricted, heavy vehicle drivers. Other jurisdictions impose a zero limit on such drivers.

4.5 Zero BAC Conditions for Convicted Drink Drivers

Some other Australian jurisdictions such as Victoria also impose a zero BAC limit on drivers when they are re-licensed following a drink driving offence.⁵⁰ This method may prove effective at preventing recidivism when imposed in combination with an alcohol interlock device or drinking driving rehabilitation program. A zero BAC would also send a clear message that drinking and driving don't mix, and eliminate potential confusion, as there is evidence that convicted drink drivers tend to believe they can drink alcohol and not have their driving ability impaired.

4.6 COMCAR Drivers

The BAC limit for COMCAR drivers in the ACT is currently 0.02.⁵¹ This lower limit was put in place to reflect the fact that COMCAR vehicles undertake the carriage of passengers, similar to taxi and hire car fleets. COMCAR was previously engaged in transporting members of the public (such as general public servants). However, more recently COMCAR passengers have been restricted to a small cross section of the community (for example the Governor General and Members of Parliament), and the service is now more like an “in house” contracted transport service.

Views are sought on whether a special BAC limit for COMCAR drivers is still appropriate, or whether consideration should be given to abolishing the special limit and imposing the normal BAC limit (0.05). The matter for BAC levels for COMCAR drivers would then be left to the COMCAR organisation as an employer.

4.7 Detection of ‘Innocently’ Consumed Alcohol

A common concern raised in other jurisdictions with respect to the introduction of a zero BAC has been the effect that ‘innocently’ consumed alcohol (e.g. cough medications or food containing alcohol) can have on the BAC of drivers. A recent study conducted in Western Australia concluded that current breath testing procedures and instrumentation was sensitive enough to rule out mouth alcohol affecting the measurement of a zero BAC.⁵² Similarly, it also showed that cough mixtures and foods prepared with alcohol, when consumed in ‘normal quantities’, are unlikely to influence blood alcohol levels to an extent that would seriously confound the measurement of a drivers BAC.⁵³

Notwithstanding this, NSW has taken the precautionary measure of including a limited defence in their legislation for drivers who register a BAC between zero and 0.02 if the driver can prove to the court that their reading was the result of the consumption of a beverage for the purpose of religious observance such as holy communion, or administration of a medicine or the like.⁵⁴

Have your say

- 13. Should the BAC limit for learner and provisional drivers be lowered to zero?*
- 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)?*
- 15. If the supervisors of learner drivers are subject to random breath testing (see Q2), should the BAC limit be set at zero?*
- 16. Should the BAC limit for taxi, bus, restricted and heavy vehicle drivers be lowered to zero?*

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

5. Penalties for drink driving

The ACT legislation currently provides for a range of penalties for drink driving offences, including fines, licence suspension, good behaviour bonds, and custodial sentences. As well as reviewing the current penalties for drink driving, the purpose of this section is to consider the merits of a number of other types of penalties, such as the confiscation and impoundment of the motor vehicles of offenders and mandatory attendance at drink drive rehabilitation courses. Each of these measures is discussed in further detail below.

5.1 Current Penalties for Drink Driving

The following table provides a summary of penalties for current offences under the ACT legislation:

Offence	Penalty	Minimum disqualification period	Default disqualification period	
SPECIAL DRIVERS (learner / provisional/ heavy vehicle drivers etc)				
Level 1 (BAC 0.02 < 0.05)	“First offender”	Maximum Fine \$500	1 month	3 months
	“Repeat offender”	Maximum fine \$1000	3 months	12 months
ALL DRIVERS				
Level 2 (BAC 0.05 < 0.08)	“First offender”	Maximum Fine \$500	2 months	6 months
	“Repeat offender”	Maximum fine \$1000	3 months	12 months
Level 3 (BAC 0.08 < 0.15)	“First offender”	Maximum fine \$1000, imprisonment for 6 months or both.	3 months	12 months
	“Repeat offender”	Maximum fine \$1000 imprisonment for 6 months or both.	6 months	3 years
Level 4 (0.15 or above)	“First offender”	Maximum fine \$1500, imprisonment for 9 months, or both	6 months	3 years
	“Repeat offender”	Maximum fine \$2000, imprisonment for 12 months, or both	12 months	5 years
Refuse a breath test, breath analysis or blood analysis	“First offender”	Maximum imprisonment for 6 months	6 months	3 years
	“Repeat offender”	Maximum imprisonment for 12 months	12 months	5 years

Driving under influence	“First offender”	Maximum imprisonment for 6 months	<i>6 months</i>	3 years
	“Repeat offender”	Maximum imprisonment 12 months	<i>12 months</i>	5 years

Note: A level 1 Blood Alcohol Level only applies to Special Drivers, such as taxi, bus, learner, provisional, restricted, heavy vehicle etc.

“Repeat Offender”

A “repeat offender” for the purpose of the ACT legislation is a person who has been convicted of a relevant offence in the past five years, including a “corresponding offence” in another jurisdiction. Relevant offences are not limited to drink driving offences and include negligent or culpable driving and driving whilst disqualified. Other Australian jurisdictions also include drug driving convictions in the “relevant offence” category for drink driving.

Period of Licence Disqualification

An automatic period of driver licence disqualification applies to offenders convicted of a drink driving offence. Drivers convicted of an offence and subject to a period of disqualification from driving may apply for a restricted licence permitting them to drive for a specific purpose. The granting of restricted licences to drivers is discussed in further detail on in Chapter 6 of this paper.

For some offenders, particularly offenders with financial means, the imposition of a fine may have little deterrent impact (i.e. they can pay the fine and move on). However, the impact of licence disqualification and inability to legally drive is felt over the full period of the suspension.

Release without conviction

A mandatory period of licence disqualification does not apply to offenders discharged on a good behaviour bond without recording a conviction, despite a finding of guilt.

A recent NSW study has observed a rising use of dismissals and conditional discharges without recording a conviction by the NSW courts in sentencing drink drivers.⁵⁵ Court data from the ACT Magistrates Court would suggest a similar trend in the ACT,⁵⁶ which suggests a rising number of offenders are avoiding a period of licence disqualification because no conviction is recorded against them.

Penalties across the border

The table below compares the penalties that apply to drink driving offences in the ACT with those in NSW (further information on drink driving penalties in other jurisdictions can be found on state and territory transport websites). Views are sought on whether the ACT penalties should be modified in line with other jurisdictions, and whether the penalties for repeat offenders should be increased to provide an additional deterrence effect.

Drink driving penalties in ACT and NSW

	Level 1 (BAC zero or 0.02 < 0.05)	Level 2 (BAC 0.05 < 0.08)	Level 3 (BAC 0.08 – 0.15)	Level 4 (BAC 0.15 or above)	Refuse a breath test, breath analysis or blood analysis	Driving under influence
ACT						
First Offender	<ul style="list-style-type: none"> • Max \$500 • Min licence disqual 1 month, default 3 months 	<ul style="list-style-type: none"> • Max \$500 • Min licence disqual 2 months, default 6 months 	<ul style="list-style-type: none"> • Max \$1000 or gaol 6 months or both • Min licence disqual 3 months, default 12 months 	<ul style="list-style-type: none"> • Max \$1500 or gaol 9 months or both • Min licence disqual 6 months, default 3 years 	<ul style="list-style-type: none"> • Max gaol 6 months • Min licence disqual 6 months, default 3 years 	<ul style="list-style-type: none"> • Max gaol 6 months • Min licence disqual 6 months, default 3 years
Repeat Offender	<ul style="list-style-type: none"> • Max \$1000 • Min licence disqual 3 months, default 12 months 	<ul style="list-style-type: none"> • Max \$1000 • Min licence disqual 3 months, default 12 months 	<ul style="list-style-type: none"> • Max \$1000 or gaol 6 months or both • Min licence disqual 6 months, default 3 years 	<ul style="list-style-type: none"> • Max \$2000 or gaol 12 months or both • Min licence disqual 12 months, default 5 years 	<ul style="list-style-type: none"> • Max imprisonment 12 months • Min licence disqual 12 months, default 5 years 	<ul style="list-style-type: none"> • Max gaol 12 months • Min licence disqual 12 months, default 5 years
NSW						
First Offender	<ul style="list-style-type: none"> • Max \$1100 • Min licence disqual 3-6 months, default 6 months 	<ul style="list-style-type: none"> • As per level 1 	<ul style="list-style-type: none"> • Max \$2200 or 9 months gaol or both • Min licence disqual 6 months, default 12 months • Immediate licence suspension 	<ul style="list-style-type: none"> • Max \$3300 or 18 months gaol or both • Min licence disqual 12 months, default 3 years • Immediate licence suspension 	<ul style="list-style-type: none"> • As per level 4 	<ul style="list-style-type: none"> • As per level 3
Repeat Offender	<ul style="list-style-type: none"> • Max \$2200 • Min licence disqual 6 months, default 12 months 	<ul style="list-style-type: none"> • As per level 1 	<ul style="list-style-type: none"> • Max \$3300 or 18 months gaol or both • Min licence disqual 12 months, default 3 years • Immediate licence suspension 	<ul style="list-style-type: none"> • Max \$5500 or 18 months gaol or both • Min licence disqual 2 years, default 5 years • Immediate licence suspension 	<ul style="list-style-type: none"> • As per level 4 	<ul style="list-style-type: none"> • Max \$3300 or 12 months gaol or both • Min licence disqual 12 months, default 3 years

Have your say

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

- a. Should penalties be increased to mirror those in NSW?
- b. Should the penalties for repeat offenders be increased?
- c. Should any other penalties be amended?

5.2 Drink Driver Rehabilitation and Education in the ACT

Instead of ordering the payment of a fine or period in custody, the court may release a person on a good behaviour bond for a period up to 2 years.⁵⁷ While on a good behaviour bond, a person may be required to:

- pay the fine that may have been imposed had the person been convicted to the court in instalments;
- attend a rehabilitation program; or
- comply with any other condition imposed by the court.

There is currently only one approved drink driving rehabilitation program operating in the ACT - the *Sober Driver Program*. The Sober Driver Program targets recidivist drink drivers (repeat offenders) and is delivered by the Alcohol and Drug Foundation of the ACT (ADFACT) under licence from the NSW Road Transport Authority. The standard program runs for 18 hours extending over 9 weeks, and is intended to help participants to understand the effects of drink driving on themselves and the community. The cost of the course is \$500 (\$350 concessional rate) and is paid by the offender.

A 2005 report by ADFACT evaluated the Sober Driver Program, using a series of questionnaires to participants to determine how useful the program was in improving their knowledge base, and changing their drinking and driving behaviour. The evaluation found that participation in the Sober Driver Program generally increased participants' knowledge of the effects on alcohol on driving ability, and that the program may have reduced drink driving behaviour (rather than drinking behaviour per se).⁵⁸

5.3 Voluntary Pre-sentencing Diversionary Schemes

In NSW offenders have the opportunity to attend one of a one range of traffic offender programs available in that state under a pre-sentence diversionary scheme. Participation is voluntary and referral is at the magistrate's discretion. If an offender accepts the program their court case is deferred until completion of the program and if they complete the program satisfactorily no other penalty or conviction is recorded.

Deferred sentence orders may also be made in the ACT under the *Crimes (Sentencing) Act 2005*, although they are not specifically aimed at offences under road transport

legislation. Under Section 27 of the Crimes (Sentencing) Act, the court may make a deferred sentence order to give the defendant an opportunity to demonstrate their prospects of rehabilitation, including attending an alcohol and/or drug education or treatment program for example. When making a deferred sentence order, the court must state what penalty will be received if the person does or does not comply with the order (e.g. they could be placed on a good behaviour bond if they attend an alcohol program, or face a gaol term if not).

5.4 Compulsory Re-licensing Scheme for Under-25s

In Victoria VicRoads must not issue a driver licence or permit to a person who has been disqualified from driving and who is under the age of 25 years unless satisfied that they have completed an accredited driver education program. If a person is released on an undertaking under the Victorian legislation the court must attach to the undertaking a requirement that the person complete an accredited driver education program.⁵⁹

VicRoads has discretion to exempt a person from a requirement to complete a driver education program. The cost of the program is generally borne by the offender. The program assumes that drink driving offenders place a high value on holding a valid drivers licence. Some offenders may be discouraged from applying for reinstatement of their licence because they think the requirement to attend a rehabilitation or driver education program is too onerous.

5.5 Court-based Re-licensing Scheme

Victoria also departs from the ACT by having a court based re-licensing scheme following suspension for a drink driving offence. Victoria requires some offenders to apply to the Magistrates Court for a licence restoration order before they can apply to VicRoads to get their licence back following suspension for a drink driving offence.

In considering the application for a licence return order the court is required to have regard to various matters including the conduct of the applicant with respect to alcohol and drugs during the period of suspension, and the effect which making the order may have on the safety of the applicant or the public.

A similar program in the ACT would need to respond to the significant issue of unlicensed driving. Some offenders may be discouraged from applying for reinstatement of their licence because they think the associated requirements are too onerous.

Have your say

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?

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?

5.6 Vehicle Confiscation and Impoundment

Cancelling or suspending an offender's driver licence is the most common penalty used by jurisdictions for traffic offences. Despite this, many offenders continue to drive while their licence is suspended, and receive additional traffic infringements or are involved in road crashes. To counter this problem, some countries have introduced penalties that target the offender's vehicle. There are four different forms of vehicle sanctions:

- (1) Vehicle impoundment, where a vehicle is temporarily impounded for a set period, (e.g. 30 days, or until a court hearing). Storage and administrative fees may be charged;
- (2) Vehicle confiscation, which often involves seizure of a vehicle by the courts, sale of the vehicle, taking the sale costs less any outstanding fines or monies owed to third parties and returning the money to the offender;
- (3) Vehicle forfeiture, which involves the seizure of the vehicle with no provision to return any funds to the offender; and
- (4) Vehicle immobilisation, which is similar to vehicle impoundment but avoids the storage costs otherwise incurred by requiring the offender to store the vehicle. The most common method of immobilisation is wheel clamping,

Vehicle sanctions are used in relatively few countries around the world as a penalty for drink driving, being limited only to some states in the United States, New Zealand and a number of Canadian provinces.

In New Zealand the police may confiscate the vehicle of a person caught for a drink driving offence where the driver has two previous drink driving convictions in the last four years.⁶⁰

Evaluations of the programs in New Zealand, the United States and Canada would suggest that the introduction of a similar program here in the ACT may have some merit.⁶¹ However, there also significant barriers and costs associated with the use of such a program. Some of the issues that would need to be addressed in the ACT context include:

- potential conflict with provisions of the Human Rights Act;
- issues of social equity (including unintended effects on family members, joint owners etc);
- the possibility of inconsistent application of the law (some offenders may not be able to be subject to this penalty because they do not own a vehicle);

- logistical and administrative problems (i.e. with the storage of vehicles);
- costs associated with administering such a scheme; and
- low retrieval of vehicles (the New Zealand experience shows that many vehicles impounded are often very old and are never collected. The authorities are left with numerous old cars they must either store or dispose of at additional cost.)

The success of the scheme is also limited by the fact that offenders may still borrow, rent or steal a different vehicle during the term of impoundment.

Have your say

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?

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

6. Alcohol interlocks

6.1 What is an Alcohol Interlock?

An Alcohol Interlock is a breath testing device wired to the ignition of an offender's vehicle that is intended to prevent the vehicle from being started until it registers a breath sample below the driver's prescribed BAC limit (for example 0.02). Some models activate an alarm which alerts other drivers on the road. The interlock electronically records the test results if the person has a reading over the BAC limit and immobilises the car engine. The recorded information can be downloaded during regular maintenance and calibration checks.

Alcohol interlock programs have been introduced in South Australia, Victoria and New South Wales, as well as various states in the USA and Canada. Queensland has conducted a three year trial of alcohol interlocks and is expected to introduce a program along with Western Australia in the near future.

Alcohol interlocks are said to not only minimise the risk of re-offending through incapacitation and behavioural control, but provide drivers with the opportunity to develop and practice strategies to avoid drink driving.

Most jurisdictions require installation of an alcohol interlock to be coupled with attendance at a remedial program, which can be a brief clinical intervention (such as a doctors appointment), driver education or treatment for alcohol dependence. Research evidence suggests that a high proportion of recidivist drink driving offenders exhibit serious alcohol problems.⁶²

The installation of an alcohol interlock device in a vehicle also serves as a constant reminder to the driver of the difficulties that have arisen from drink driving.

6.2 Effectiveness of Interlocks in Reducing Drink Driving

Prior to the introduction of the legislation in South Australia and NSW a small trial was conducted in each jurisdiction using a sample of volunteer participants. The results of the trial showed that alcohol interlocks could be an effective tool in preventing drink driving. Aggregate results of studies in the US and Canada have shown a reduction of between 40-95%⁶³ in re-offending while the interlock was fitted. However, this effect appeared to be short lived, as once the device was removed, the drivers returned to a re-offence rate similar to that among drink driving offenders who did not participate in an interlock program.⁶⁴ A further issue may also be that there is no monitoring of who provides the breath sample.

While this latter result may show that alcohol interlock programs have limited value, supporters have argued that interlocks still serve their primary purpose, which is to prevent re-offending, and allow the offender an opportunity to attend a rehabilitation program or treatment. It is widely accepted amongst road safety researchers that the

combination of alcohol interlocks and support programs provide the most promising results in reducing re-offending amongst drink drivers.

6.3 Challenges for the ACT in Introducing an Interlock Program

The development and implementation of a successful interlock program in the ACT faces several key challenges, including:

- encouraging participation by eligible offenders;
- maintaining the effect once the interlock is removed; and
- equality and inclusiveness of offenders in the program.

Other key issues that would need to be determined include:

- which offenders would be targeted by the program;
- whether participation in the program would be mandatory or voluntary;
- whether offenders would be required to serve a period of suspension before becoming eligible for the program; and
- how long participants would be required to participate in the program.

6.4 Low Participation Rates

Low participation rates have been a key issue for programs in Australia and overseas. Many offenders drive whilst disqualified, and may think it simpler to continue to do so rather than participate in an interlock program, particularly when the likelihood of detection is quite low.

The cost of participating in the program can also be a barrier. As the interlock program is often offered as an alternative to a fine or sentencing, the offender is required to meet the costs for the interlock device. The price of an interlock device is currently between \$1500 and \$1700.⁶⁵ Some manufacturers offer lease arrangements, at a cost of \$95-\$120 a month, depending on the type of device. There are also costs associated with installation and removal of the device, and regular servicing / calibration (which can be required anywhere between 2-12 times a year). This means the interlock programs may only be able to be taken up by high-income offenders.

Participation in the course is also often coupled with a requirement to attend a driver rehabilitation or education course.

Other jurisdictions

NSW tries to encourage participation by enabling a person to serve a reduced period of licence suspension if they enrol in a program. South Australia and Victoria have interlock usage as a mandatory requirement for repeat offenders.

6.5 Which Offenders Should be Targeted?

Some programs focus on repeat offenders. However, there are advocates for interlocks being extended to first time offenders on the basis that many first time offenders are genuinely surprised that their level of drinking had put them over the limit. Attendance at a drink driver rehabilitation course while continuing to drive under interlock condition may address this lack of awareness.

6.6 Interlocks Instead of Licence Suspension?

As discussed above, many offenders continue to drive after their licence is suspended. As interlocks have the potential to reduce the risk of re-offending (and thereby protect public safety), views are sought on whether an offender should be able to avoid serving a period of licence suspension by enrolling in an interlock program.

6.7 Participation Periods

In NSW the length of time a participant is required to participate in the interlock program is twice the disqualification period for the relevant offence. For example, if an offender is subject to a disqualification period of 12 months, s/he will be subject to a two year interlock participation period (after serving a reduced licence disqualification period).⁶⁶

The interlock program proposed for WA has a minimum participation period of six months but never less than the original licence disqualification period. The maximum period will be performance based and dependent on evidence of a driver's changed behaviour.⁶⁷

6.8 Equality and Inclusiveness

Although alcohol interlocks are not intended to be a free pass to continue to drive following conviction for a drink driving offence, there is the potential for them to be seen as such, particularly if access is limited to those with the financial means to meet the cost of participating in the program. NSW, South Australia and Victoria provide a subsidy to low income participants in the scheme.

Have your say

25. *Should the ACT introduce an alcohol interlock program?*

a. If yes, how could the ACT encourage participation in the program?

b. Which offenders should be targeted?

c. Should offenders using an interlock device be able to avoid serving a period of licence suspension?

d. How should the period for participation in the program be calculated?

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

7. Granting restricted licences to drink drivers

In the ACT, drivers convicted of a drink driving offence and disqualified from driving may apply to the court for a restricted licence, permitting them to continue to drive during specified times or for a specified purpose. Restricted licences may be issued in respect of a range of road transport offences, but are most commonly sought following conviction for a drink driving offence. Mandatory minimum periods of licence disqualification apply to drivers convicted of a drink driving offence.

7.1 Circumstances in which a Restricted Licence may be Granted

Disqualification from driving can severely impact on a person's ability to earn income and/or fulfil family duties, and can impact heavily on family members. A restricted licence is available to applicants who can satisfy the court that there are exceptional circumstances justifying the issue of the licence. The reason most commonly cited to the court by applicants is that they will lose their job, or be unable to adequately care for another person if their licence is suspended. The court has only a short period of time in which to consider applications, but will have regard to whether the person or anyone else will suffer hardship or inconvenience if a restricted licence is not issued.

A restricted licence is not available to "repeat offenders", but could potentially be granted to an offender who has registered a high range blood alcohol concentration or who holds a provisional licence.

7.2 Restricted License Programs in Other Jurisdictions

The ACT appears to have the least restrictive restricted licence provisions of any Australian jurisdiction that issues restricted licences. Victoria and NSW make no provision for the issue of restricted licences to offenders disqualified from driving. Queensland and Tasmania limit their availability to low range "first offenders" only. In those jurisdictions that do not operate a restricted licence scheme, a driver may still have an opportunity to serve a reduced period of disqualification by opting to participate in an alcohol interlock program (see chapter 5).

7.3 Public Safety as Test for Restricted Licence?

In the ACT, the relative ease of obtaining a restricted licence may reduce the deterrent effect of licence disqualification. Rather than removing the courts' discretion to issue restricted licences, the legislation could be amended to make it more difficult to obtain a restricted licence. The main reason for taking away a licence is to improve road safety; as such, courts could be required to make safety their paramount consideration when considering an application for a restricted licence.

7.4 Arguments Against the Issue of Restricted Licences

It has been argued that the granting of restricted licences sends the wrong message to offenders and the general community about drink driving. Effective deterrence of drink driving depends on convincing potential offenders that offences are very likely to be detected and punished. This perception is arguably more difficult to maintain while offenders are avoiding a period of disqualification from driving by obtaining a restricted licence.

Have your say

26. *Should restricted licences continue to be issued to convicted drink drivers?*

a. If so, in what circumstances should restricted licences be issued (e.g. to first offenders only)?

b. Should the courts be required to take public safety as the primary consideration when making decisions in relation to granting of restricted licences?

8. Glossary

ACT legislation	In this paper, the <i>Road Transport (Alcohol and Drugs) Act 1977</i> .
Alcohol Interlock	A breath testing device wired to the ignition of an offender’s vehicle that prevents the vehicle from being started if the driver has a blood alcohol concentration in excess of a preset limit.
Blood Alcohol Concentration (BAC)	A number representing the milligrams of alcohol in 100ml of blood, referred to when setting the prescribed limit . For example, a BAC of 0.05 equates to 5mg of alcohol per 100ml of blood.
Cannabis	<p>Cannabis (marijuana) has two components when it enters the blood stream – an active component (THC) that produces psychoactive effects and is present only for a number of hours immediately after use, and a metabolite (THCA), which can remain present in the body for many months after use. The testing devices used in random roadside drug testing programs across Australia target only THC.</p> <p>Cannabis is the second most common drug involved in drug driving after alcohol. Recent evidence suggests driving under the influence of cannabis poses significant road safety risks, particularly when combined with alcohol.</p>
Ecstasy (or MDMA)	An illicit party drug, and one of the most common drugs reported on drug use and drug driving surveys. One of the three drugs included in most random roadside drug testing programs across Australia.
Human Rights Act 2001 (Human Rights Act)	The ACT’s Bill of Rights, which sets out basic rights for all ACT citizens.
Illicit drug	A drug the use of which is controlled or prohibited in the ACT under the <i>Criminal Code 2002</i> .

Methamphetamine	Commonly known as speed or ice. An illicit drug with higher use levels among long-haul heavy vehicle drivers than in the general population. One of the three drugs included in most <i>random roadside drug testing</i> programs across Australia.
Prescribed limit	The <i>blood alcohol concentration</i> permitted in a driver under the <i>ACT legislation</i> (0.02 or 0.05).
Random breath testing (RBT)	Random test conducted by police at the roadside to determine whether a driver has a <i>blood alcohol concentration</i> level at or below the <i>prescribed limit</i> . Generally entails an initial screening test using a breath analysis device, followed by a confirmatory breath or blood sample should the person show a BAC over the prescribed limit.
Random roadside drug testing (RDT)	Random test conducted by police at the roadside to detect drivers travelling while affected by drugs (in most Australian jurisdictions, these include <i>cannabis</i> , <i>methamphetamine</i> and <i>ecstasy</i>). Usually an initial screening test using a saliva sample, followed by a longer test to obtain a confirmatory saliva or blood sample should the driver show a positive result on the initial screening test.

Endnotes

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Road Traffic Act 1961 (South Australia), s 47E.
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- ³¹ ACT (Alcohol and Drugs): Dictionary.
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- ³³ Victoria, s 55.
- ³⁴ ACT, ss 15, 15AA, 16.
- ³⁵ ACT: ss 16 and 16A
- ³⁶ Vic: s58B, NSW: s 18H, SA: Schedule 1, pt 4, s 8
- ³⁷ ACT: s 48
- ³⁸ In NSW, the police may not retain the keys for longer than is necessary in the circumstances and in the interest of public or the interest of the person driving (or about to drive). If the keys are not returned with 24 hours after a request is made for their return, an application may be made to the court for their return. (NSW: s 30)
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Victoria: s 63.
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