



Submission on the exposure draft of the Road Transport (Drug Driving) Bill 2010

This submission is from the Alcohol Tobacco and Other Drug Association ACT (ATODA), the peak body for the alcohol, tobacco and other drug (ATOD) sector in the ACT. We thank the ACT Government for the opportunity to comment on the exposure draft of the *Road Transport (Drug Driving) Bill 2010* (the Bill).

ATODA strongly support the ACT Government's commitment to evidence based drug policies, as stated in the *ACT Alcohol Tobacco and Other Drug Strategy 2010 – 2014*.

The ACT Government has stated that the purpose of implementing roadside drug testing should be about road safety:

*"I needed to be certain that **the testing was about road safety** and not about catching drug users and punishing them for using drugs rather than endangering other road users. As a Minister, I will do whatever I can **to improve road safety** but I am not going to be involved in punishing ACT drug users for their addiction."*

- Mr John Hargreaves, Minister for Territory and Municipal Services (8 April 2008)

ATODA has significant concerns with the Bill because the evidence states that roadside drug testing does not improve road safety.

1. The evidence states that the Bill will not achieve its road safety goals

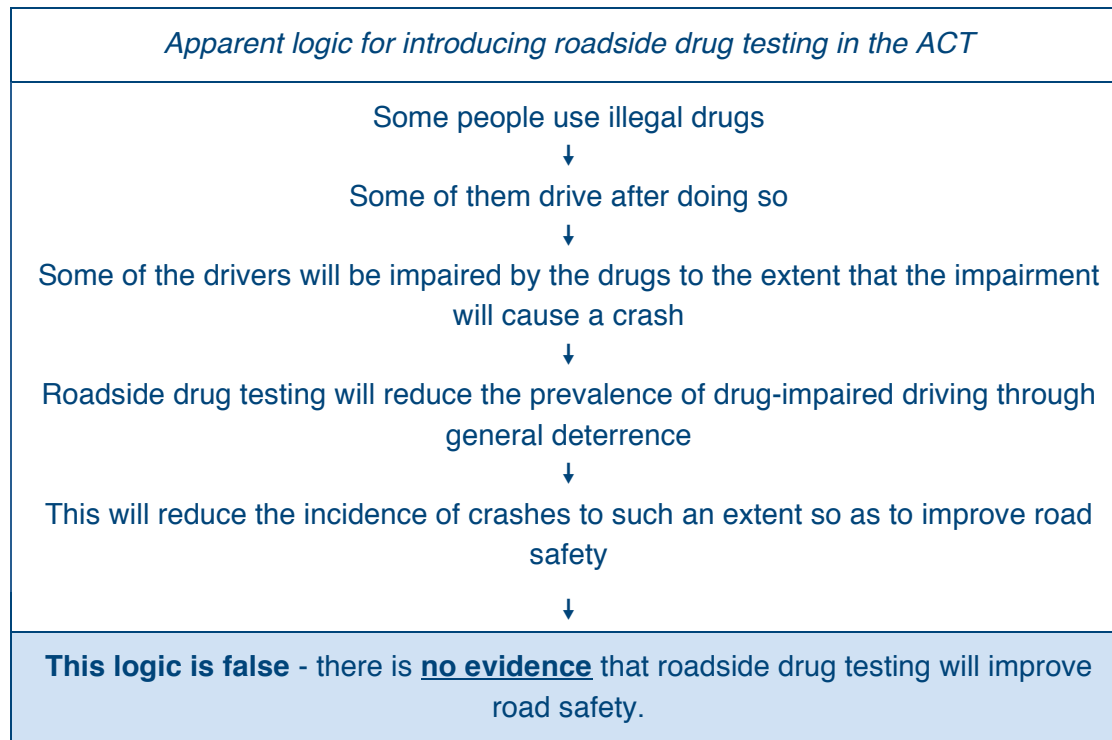
The ACT Government has stated that the purpose of this legislative initiative is to make the roads safer for everyone.

This implies that its objective is to reduce the incidence of traffic fatalities, crashes and injuries. It is not intended to be an extension of legislation that criminalises the use of certain psychoactive substances.

The approach to this legislation is flawed as there is no Australian or international evidence that adopting roadside drug testing has any impact on the incidence of traffic fatalities, crashes and injuries.

This applies both to targeted roadside drug testing (the approach used in other jurisdictions) and to random roadside drug testing (an approach that has not been attempted anywhere in the world).

The apparent logic (described below) to justify introducing roadside drug testing in the ACT is false as there is not evidence to support it.



2. Human rights implications – drug driving is not the same as drink driving

The core issue is the need to balance the right to life (which can be enhanced through effective road safety legislation and its enforcement) and human rights.

These human rights include the right to liberty, the right to legal advice and the right not to be required to self-incriminate.

This is where the core human rights issue of proportionality comes into play.

The courts have held that mandatory roadside blood alcohol concentration testing, based upon *per se* legislation, is acceptable on the grounds that the relationships between elevated levels of blood alcohol concentration and road crash risk are very clear.

However, since there is no corresponding evidence relating to most of the drugs and medicines covered in the Bill, the initiative fails the tests of proportionality.

This is not to deny that some of the drugs covered by the legislation have the potential to impair driving.

The issue is that we have no convincing body of epidemiological evidence about what level of intoxication, in what kind of individuals, in what circumstances, create what types of changes in the risk of a road traffic crash.

3. Drugs or medicines in the body don't equate to elevated risk of road traffic incidences

The Bill appears to be based on the assumption that any measurable level of the targeted drugs and medicines in the body can be equated with an elevated risk of road traffic crash.

This is false and brings into questions the whole approach to the legislation.

On one hand the Canberra community is confronted with significant impositions on people's rights to liberty, etc. – and on the other hand a set of false assumptions about why these rights can be infringed upon.

4. Comments and concerns regarding specific provisions of the Bill

4.1 Concerns regarding custody and arrest

At a number of places in the Bill police are authorised to take a person into custody for testing for the presence of drugs or medicines in the body.

The Bill does not appear to place any limitations on the length of time for which people can be held in custody. If there is no provision that a person must be released from custody as soon as the testing is completed, there is a risk that police powers are open to abuse under road traffic legislation.

Similarly, s. 47 talks about police 'arresting' a person for an offence but this seems to be the first use of the term 'arrest'.

Difference between 'arresting' a person and 'taking the person into custody' for the purposes of oral fluid or blood testing is unclear. Does arresting mean that the police have further powers in certain circumstances? For example, holding people in custody even when this is not necessary for the purposes of blood or oral fluid testing. This requires clarification.

4.2 Concentrations of medicines

S. 22 (3) (c) introduces a provision that police officers may ask an analyst to work out the concentration of medicine in a blood sample. It is totally unclear, from the context, what the purpose of this may be. There is no justification provided.

Explanation and justification need to be provided or the provisions need to be removed.

If the intention is that information on the concentration of substances can be used for prosecuting offences under the Act (e.g. s. 31 regarding 'the person's ability to drive safely is impaired by the effect of the medicine on the person') then this needs to be clarified.

On the basis of current pharmacological knowledge, it is very challenging to demonstrate that a particular concentration of medicine in a particular individual at a particular time produces any quantifiable level of driving impairment.

It is not clear why there is a provision for assessing the concentration of medicines in body fluids but not assessing the targeted illicit drugs.

This comes back to an underlying flaw of the legislation – the absence of knowledge about links between concentrations of substances in bodily fluids and elevated road safety risks.

4.3 Concerns regarding police powers

The title of the Bill, and in a number of places in its body, refer to people being 'affected' by drugs. It is not clear what is meant by 'affected' and the word is not found in the Bill's dictionary. This needs to be addressed.

S. 19 appears to provide that a police officer only has to form a belief that the person 'may be affected' by a controlled drug or medicine in order for the police officer to have power to order a blood test.

There is a significant body of research evidence demonstrating that police have very limited capacity to identify whether or not a person is affected by a drug or medicine.

These provisions are concerning could constitute a slippery-slope towards providing police with powers that could be readily abused.

4.4 The reverse onus of proof

ATODA is very concerned about the reverse onus of proof provisions within the Bill.

For example, within the draft Bill the details what a prosecutor would need to present to court to get a conviction on the offence of medicine-induced impaired driving could not be identified. The pharmacological evidence of the presence of a drug or medicine in the body is, of itself, insufficient to prove the offence - and the lack of knowledge about the relationship between concentrations of medicine and impairment adds to the difficulty.

In terms of how the Act is likely to be applied, it appears that all the prosecutor needs to do to get a conviction is advise the court that a police officer 'believed' a driver to be impaired, and that medicines were found in the body.

But defendants have to prove that they were not impaired. This is an unacceptable balance of onus of proof.

ATODA suggests the Bill should include provisions where the prosecutor should have to:

(1) give evidence to the court as to the basis of the police officer's 'belief' that the person was impaired by medicine, and

(2) prove beyond reasonable doubt that the person was impaired by the detected medicine.

Doing so would provide a fairer degree of balance between prosecution and defence and introduce a higher degree of justice in to what is already a flawed piece of policy and legislation.

4.5 The use of samples for research and evaluation

ATODA supports specifying limitations on the use of the oral fluid and blood samples, particularly prohibiting their use to prosecute drug offences (a problem with the Tasmanian legislation) and for contributing to DNA databases.

However, ATODA suggests that the drafting of s. 32 is too restrictive in that the body fluid data cannot be used for research purposes "if identifying information about the tested person can be ascertained from the sample".

This is because, to have sound criminological, epidemiological and evaluation research into the impacts of the drug driving legislation and its implementation, it will be crucial to have available information that links the identity of the person tested and the results of the body fluid tests.

This will be essential, for example, to study repeat offending.

The ethical, privacy and confidentiality issues involved are dealt with satisfactorily under the provisions of the ACT *Epidemiological Studies (Confidentiality) Act 1992*, the Commonwealth *Privacy Act*, and the NHMRC's *National Statement On Ethical Conduct In Human Research*.

It will be highly problematic to seek to override these established legislative and procedural approaches to dealing with the issues by means of the blanket prohibition envisaged in s. 32.

5. Recent developments that could make the Bill high risk - 1 in 5 false positives

We urgently draw your attention to the recent drug driving false positives in Western Australia. Here is an excerpt of a news article from 21 May 2010:

"One in five drivers who this year tested positive to drugs in police roadside analysis was later exonerated, according to figures that show the accuracy of drug-driver testing has fallen dramatically each year since its launch.

The WA Law Society called yesterday for the immediate suspension of drug-driver testing

after figures obtained by The West Australian revealed that of the 141 confirmed positive roadside drug tests to May 21 this year, 28 were found to be negative once analysed by a laboratory.

Although a review of WA's drug-driving regime in February last year by Adelaide University's Centre for Automotive Research recommended that police closely monitor the accuracy of their roadside analysis, the rate of false positives has increased from one in nine in 2008 to one in seven last year and one in five this year. Police gave no explanation why testing was becoming more unreliable, saying only that they would continue to monitor the technology.

Law Society president Hylton Quail said he was shocked by the increasing unreliability of roadside testing. He said it should be suspended until police improved its accuracy."

Source: O'Connell, R 2010, 'Drug-driver testing "inaccurate"', *The West Australian*, 29 May, <http://au.news.yahoo.com/thewest/a/-/breaking/7311225/drug-driver-testing-inaccurate/> .

If the inconsistencies experienced in Western Australia occurred in the ACT, the negative implications for the Canberra community could be significant. It could also effect community support for the legislation and risk of a loss of community confidence in the legitimacy of law enforcement.

ATODA therefore urges the ACT Government to re-consider drug driving legislation in the ACT in light of the evidence, the limitations of the technology, the human rights implications and the recent false positives in Western Australia.

Again, we thank the ACT Government for the opportunity to comment on the Bill and look forward to working with you to develop strategies to promote health and improve road safety in the ACT.

This submission is an adapted excerpt of the work of David McDonald, Visiting Fellow, National Centre for Epidemiology and Population Health, Australian National University & Director, Social Research and Evaluation, including:

- *Submission on the exposure draft of the Road Transport (Drug Driving) Bill 2010 and related regulations* (June 2010)
- McDonald, D 2009, 'The policy context of roadside drug testing, *Journal of the Australasian College of Road Safety*, vol. 20, no. 1, pp. 37-43.
- *Policy Content of Drug Driving Countermeasures* - Presentation from the drug driving forum hosted by the University of Canberra on Friday 6 June 2008.

For further information regarding this submission or ATODA please contact:

Carrie Fowlie
Interim Executive Officer
Alcohol Tobacco and Other Drug Association ACT
carrie@aodsector.org.au

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