Review of NSW Roadside drug testing

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Abstract

The Road Transport Legislation Amendment (Drug Testing) Act 2006 commenced in December 2006 and authorised roadside drug testing in NSW, and the drug testing of any driver, motorcycle rider or supervising licence holder involved in a fatal crash. A review of the drug testing legislation was undertaken in 2008 to determine whether or not the new laws were meeting their policy objectives of detecting and deterring drug drivers. The review includes data on the number of tests conducted since commencement, the number of drivers who tested positive, the drugs which are commonly identified and summarises the court outcomes for drivers charged with one of the new drug driving offences. Attitudinal research commissioned by the RTA on drug drivers in 2008 indicates that the introduction of roadside drug testing has resulted in some change in drug driving attitudes and self reported behaviour since the introduction of the new laws. This review found that the new roadside drug testing regime has been implemented effectively and is operating as intended in detecting drug drivers and deterring drug drivers and potential drug drivers.

Keywords

drug driving, roadside drug testing, enforcement, legislation, post-crash drug testing.

Introduction

Legislation permitting roadside drug testing in NSW commenced on 15 December 2006. The aim of the legislation was to authorise the introduction of roadside drug testing in NSW, and the drug testing of any driver, motorcycle rider or supervising licence holder involved in a fatal crash.

Roadside Drug Testing

The Act authorises Police to require any driver of a motor vehicle, person occupying the driver seat of a motor vehicle and attempting to put the vehicle into motion, or supervising licence holder to submit to oral fluid testing for the presence of a ‘prescribed illicit drug’.

A ‘prescribed illicit drug’ is defined as

- Delta-9-tetrahydrocannabinol (THC), the active component of cannabis.
- Methylamphetamine, also known as speed, ice, crystal meth or base.
- Methylenedioxymethylamphetamine (MDMA), also known as ecstasy.

The Act created a new offence of drive or attempt to drive while one or more prescribed illicit drugs is present in the person’s oral fluid, blood or urine. The penalty for the new offence is a maximum fine of $1100 and three to six months licence disqualification for a first offence (higher penalties apply for a second or subsequent offence). The only evidence required to prove the offence of drive with the presence of a prescribed illicit drug is the detection of the relevant drug in oral fluid, blood or urine by the state’s prescribed laboratory.
Post-Crash Drug Testing

The Act also authorises Police to require a blood and urine sample from any driver, rider or supervising licence holder involved in a fatal crash. Police can arrest drivers for the purpose of having a blood and urine sample taken at a hospital. The results of blood and urine testing are able to be submitted as evidence to:

- support a charge for the existing offence of driving under the influence of drugs, provided there is sufficient supporting primary evidence relating to the nature and circumstances of the fatal crash. The penalty for driving under the influence of drugs is a maximum fine $2200, unlimited maximum licence disqualification and 9 months jail.

- prove the mere presence of an illicit drug, provided one of the following five drugs are present: active THC, methylamphetamine, ecstasy, morphine or cocaine. All that is needed to prove this presence offence is that the person had present in their blood or urine active THC, ecstasy, methylamphetamine, cocaine or morphine. These are new offences, with penalties including a fine of up to $1100 and three to six months licence disqualification.

The review process

The review of NSW roadside drug testing involved consultation with the key stakeholders involved in the implementation of the legislation, namely the NSW Police Force and NSW Health. Discussions concerned the implementation of roadside drug testing from the initial roadside test through to the court outcome for each driver charged with one of the new drug driving offences. Consultation sought to identify any implementation issues which may be impacting on the policy objectives of the Act.

The data from drivers who were drug tested following a roadside drug test or following the involvement of a driver in a fatal crash were also examined to identify trends in drug driving patterns and determine sentencing patterns for the new drug driving offences at court.

The review covers the period from commencement in December 2006 to 31 May 2008. This end date allowed sufficient time for all of drug driving cases to be heard at court and the results to be summarised for the review report.

Implementation of the new laws

The introduction of roadside drug testing was supported by a limited public information campaign. An RTA brochure titled Roadside Drug Testing was disseminated in motor registries and by Police to drivers tested in the roadside. This brochure outlines the dangers of drug driving, the roadside drug testing procedure and the penalties for drug driving. This brochure has also been distributed through the road safety education program to high schools in NSW.

Detailed information about roadside drug testing was also placed on the RTA website including a list of frequently asked questions about the roadside drug testing procedures and the effects of drugs on driving.

The first roadside drug testing police operation was conducted at Mount White heavy vehicle checking station on 22 January 2007. In the period 22 January 2007 to 31 May 2008, there were 82 roadside drug testing operations targeting both heavy and light vehicle drivers. Of these 82 operations, 26 specifically targeted heavy vehicle drivers and 56 specifically targeted light vehicle drivers.

Roadside drug testing operations were conducted at 31 country locations, 21 metropolitan locations and 6 heavy vehicle checking stations. Roadside drug testing operations were subjected to prior
approval by the Roads and Traffic Authority with Police providing a detailed description of the operation and estimated costing.

In the period 22 January 2007 to 31 May 2008, NSW Police conducted 13,195 roadside drug tests of which 4,726 were heavy vehicle drivers and 8,469 were light vehicle drivers.

Drug Results for RDT operations

A total of 365 drivers in NSW tested positive for drugs at the roadside during roadside drug testing operations in this period. Drug positive samples were sent to the Division of Analytical Laboratories at Lidcombe, which is the prescribed laboratory in NSW for the analysis of oral fluid, blood or urine samples. Of these drivers, around one quarter were heavy vehicle drivers and around three quarters were light vehicle drivers.

Overall, the number of drivers testing positive compared to the total number of drivers tested is equivalent to a 1 in 36 ratio.

The Division of Analytical Laboratories has confirmed the results for all of the 365 drug samples that they have received from Police testing drivers at the roadside. The results are as follows:

- 223 of the samples received tested positive to methylamphetamine.
- 132 of the samples received tested positive to cannabis.
- 77 of the samples received tested positive to ecstasy.
- 41 of the samples received tested negative.

Please note: some of the samples were positive to more than one drug so the figures will total more than 365.

The 41 samples that the laboratory confirmed to be negative indicate that in those cases a screening device registered a “false positive” result at the roadside. This is not a surprising result as it has been well established that the roadside screening devices have a percentage of “false positive” readings. This can occur for a number of reasons including operational use, storage temperature of the device and because the screening devices which operate using immunoassay technology can register positive results to similar and co-occurring non-active ingredients of drugs such as THC acid. A positive THC result can only be prosecuted if the test identifies active THC (not the THC acid) in the person’s oral fluid.

However, it should be noted that drug driving charges are only laid on the basis of the confirmatory results on the oral fluid sample by the state’s prescribed laboratory. None of the 41 drivers whose samples tested positive in the roadside were given a court attendance notice or charged with drug driving offences.

The 324 drivers who returned positive test results have all had their matters heard at Court. The following is a breakdown of the court results:

- 235 (73 per cent) of matters dealt with via fine &/or licence disqualification
- 75 (23 per cent) of matters being dealt with via Section 10
- 7 (2 per cent) warrants for failing to appear at Court.
- 5 (1 per cent) of matters dealt with via bond or community service order.

1 Clause 129 of the Road Transport (Safety and Traffic Management) Regulation 1999 prescribes the laboratory at Lidcombe of the Division of Analytical Laboratories, ICPMR, Western Sydney Area Health Service as the prescribed laboratory for the analysis of oral fluid, blood and urine samples—prescribed laboratory for the purposes of sections 18, 18D, 18E, 23, 24B and 27 of the Act.

2 Section 10 of the Crime (Sentencing Procedure) Act 1999 allows a court that finds a person guilty of an offence to direct that the relevant charge be dismissed.

3 Section 32 of the Mental Health (Criminal Procedure) Act 1990
1 matter dismissed under Section 32 of the Mental Health Act\textsuperscript{3}.
1 matter withdrawn due to identification issues. (The driver produced a fake driver’s licence when drug tested).

The finding that 73 per cent of cases have resulted in the appropriate penalty (fines and licence disqualification) demonstrate that the evidentiary processes supporting the new drug driving offences are well accepted by the judiciary and the penalties viewed as appropriate by magistrates.

While the proportion of section 10s for drive with the presence of a drug may seem high at 23 per cent, it should be noted that this is still around half that of the rate of section 10s given for low range prescribed concentration of alcohol offences.

Standard operating procedures for roadside drug testing include conducting a breath test for alcohol prior to the drug test, which has delivered additional and unanticipated benefits for drink driving enforcement. In the period 22 January 2007 to 31 May 2008, 255 drivers were caught drink driving during roadside drug testing operations.

During the course of roadside drug testing operations, Police have also had the opportunity to detect other traffic related matters (see below) and therefore deter a range of other road user behaviours that impact on road safety.

- 137 traffic charges
- 76 unregistered vehicles
- 54 unlicensed drivers
- 20 criminal charges
- 10 warrants executed
- 918 other traffic infringement notices

**Drug Results for Post-Fatal Crash Drug Testing**

In the period 13 December 2006 to 31 May 2008, 304 drivers involved in a fatal traffic crash were tested for drugs. Around 59 per cent of these or 180 drivers had neither alcohol nor drugs present in their blood or urine.

The remaining 124 of these drivers (41 per cent) were found to have blood samples positive for drugs and/or alcohol.

This result demonstrates that the new legislation is clearly meeting its policy objective of allowing the detection of drivers involved in fatal crashes with drugs in their system.

There were many variables and a great deal of complexity about what the presence of a drug is indicative of in these drivers. Fortunately, only a small number of the drug positive drivers had to be charged with one of the relevant drug driving offences. However, the Act is clearly successful in allowing the detection and prosecution of drivers who pose a genuine risk to road safety as a result drug driving.

The number of drivers positive to different drug classes are outlined in **Table 1**.
### Table 1. Drug results from drivers involved in fatal crashes

<table>
<thead>
<tr>
<th>Drug class</th>
<th>Number positive</th>
<th>Drug class includes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol</td>
<td>24</td>
<td>alcohol below the legal limit for the driver</td>
</tr>
<tr>
<td>Cannabis</td>
<td>35</td>
<td>delta-9-tetrahydrocannabinol* and delta-9-THC acid</td>
</tr>
<tr>
<td>Amphetamines</td>
<td>23</td>
<td>amphetamine, methylamphetamine*, ephedrine, pseudoephedrine, phentermine, MDA, MDMA (ecstasy)*.</td>
</tr>
<tr>
<td>Cocaine</td>
<td>1</td>
<td>cocaine*, benzoylecggonine</td>
</tr>
<tr>
<td>Opiates **</td>
<td>48</td>
<td>morphine*, codeine, oxycodone, methadone.</td>
</tr>
<tr>
<td>Benzodiazepines **</td>
<td>20</td>
<td>diazepam, nordiazepam, oxazepam, temazepam, clonazepam, nitrazepam, flunitrazepam, alprazolam, midazolam.</td>
</tr>
<tr>
<td>Others</td>
<td>4</td>
<td></td>
</tr>
</tbody>
</table>

*Presence offence can apply*

Refers to those drugs for which the *drive with the presence* offence is possible.

**Medically administered drugs**

It should be noted that the majority of the drivers positive to either morphine and/or midazolam were administered these drugs by either ambulance staff at the crash scene or medical staff upon arrival at hospital for their injuries. Midazolam (which is a mild hypnotic, anti-anxiety medication) and morphine (which is a well known analgesic) are both commonly administered to crash patients to manage the pain and shock associated with their injuries. Therefore, no further legal action was taken regarding these drivers unless other illegal drugs were found to also be present in their blood.

*NB: Some drivers were positive to more than one drug class.*

*NB Includes drug positive drivers who later died as a result of the crash.*

It should be noted that these drug positive cases include both uninjured drivers and injured drivers and that a number of the injured drivers who tested positive to drugs later died as a result of injuries sustained in the crash and therefore could not be charged with drug driving offences. Drivers that were killed as a result if the crash were not drug tested under this regime.

Other cases where drugs were identified were either not of a sufficient level to equate to impairment or were not one of the five illicit drugs that could be used for a presence offence.

In addition, most of the opiate and benzodiazepine positive cases were the result of post-crash medical administration of these drugs by medical staff.

As a result only a small number of these drivers had committed one of the legislated drug driving offences. Three drivers were charged with drive with the presence of a drug, four drivers were charged with drive under the influence of a drug, two were charged with prescribed concentration of alcohol offences, three were charged with dangerous driving occasioning death (related to drug
driving) and one was charged with aggravated dangerous driving occasioning death (related to drug driving).

Of these drivers, six were given jail terms and a licence disqualification period and 4 drivers were given monetary fines and a disqualification period. The drugs used by drivers involved in these fatal crashes were mostly cannabis or methylamphetamine with combinations of both drugs in some cases.

New data collection systems are currently being developed by NSW Police Forensic Services to permit ongoing monitoring of drug trends from drivers involved in fatal crashes including a detailed breakdown of offences by drug compound used and level detected.

The data available suggest that the new fatal crash provisions of the Drug Testing Act are operating as intended and enabling NSW Police to more readily detect and prosecute drug drivers involved in fatal crashes. The severe penalties handed down to those drug drivers convicted of offences also suggest that the evidentiary procedures supporting the new offences are well accepted by NSW courts and seriousness of the offences are acknowledged by magistrates.

**Effectiveness of Police Procedures for roadside drug testing**
The standard operating procedures developed and used by NSW Police have proven to be very effective, reliable and resource efficient. The drug testing equipment is controlled and coordinated by the Traffic Technology Section. This section comprises of 20 staff specifically trained in the operation of the drug testing equipment. They attend all drug testing operations, assisted by local Police in the area where the operation is conducted. This mode of operation has allowed consistent results due to the rigorous guidelines adopted and the highly trained personnel. Whilst the equipment used has been effective in screening for the presence of illicit drugs in drivers, having it controlled by this small section of staff has ensured the equipment is used correctly.

The use of centralised subject matter experts will continue until a generational change in the collection devices allows a measured expansion of the operational capabilities of roadside drug testing to generalist police in an unsupervised environment.

**Attitudes to drug driving and enforcement perceptions**
The RTA commissioned Taverner Research to conduct a drug driving telephone survey of knowledge, attitudinal and self-reported behaviours in 2008. The aim of this study was to assess how the legislation and resulting Police roadside drug testing operations impacted on drug user’s knowledge, attitudes and behaviours relating to drug driving. This study sought to provide comparative data with an earlier study conducted on drug driving behaviours in 2003. The study also provided a means to observe changes in prevalence of drug driving since the implementation of the new drug testing laws.

In total 10,391 NSW residents who were licensed drivers agreed to participate in the survey from March to May 2008 and were asked the initial screening questions. Of the 10,391 residents, 501 admitted to having taken recreational drugs in the last three months. Of the 501 drug users interviewed, 240 admitted to driving after taking recreational drugs. The full results of this study were reported at the Road safety Conference last year.

**Perceptions of Police enforcement**
The majority of drug users surveyed (80 per cent) were aware that the NSW Police have the ability to conduct roadside drug testing. Drug users who were aware of the existence of roadside drug testing were asked what types of drugs they believed were able to be tested for at the roadside. The majority of respondents correctly identified that marijuana (88 per cent), ecstasy (71 per cent) and speed (72 per cent) were detectable at the roadside. Respondents were less confident about cocaine and heroin, with 24 per cent unsure about whether cocaine was detectable and 35 per cent unsure about whether heroin was detectable. However, only 16 per cent correctly indicated that cocaine was not detectable and 23 per cent indicated heroin was not detectable at the roadside.
The majority of drug users who were aware of the introduction of roadside drug testing (61 per cent) indicated that it had decreased the likelihood they would drug drive. The high awareness of roadside drug testing may explain the increased belief amongst drug drivers in 2008 (29 per cent) that they would be likely to get caught if they drug drove compared with drug drivers in 2003 (15 per cent).

Drug users who were aware of roadside drug testing were asked if they or anyone they knew had been tested at the roadside for drugs. Four percent of drug users indicated that they had personally been tested for drugs. A further 12 per cent had not personally been tested but knew of someone who had. Four per cent of drug users interviewed knew of someone who had returned a positive drug test at the roadside.

Attitudinal changes of drug drivers since 2003 were mainly that of an increasing sense of social disapproval for drug driving and an increasing level of anxiety about drug driving.

The majority of drug drivers indicated that they felt completely (40 per cent) or generally (29 per cent) comfortable about driving after taking recreational drugs. While the percentage who said they felt completely comfortable had not changed at all since 2003, the percentage who said they were a bit worried in 2008 (27 per cent) doubled compared with 2003 (14 per cent).

The largest attitudinal change between drug drivers in 2008 and 2003 was the agreement levels with the statement that they would feel ashamed and embarrassed if they were caught for drug driving, with drug drivers in 2008 (78 per cent) significantly more likely than drug drivers in 2003 (56 per cent) agreeing or strongly agreeing that they would feel ashamed and embarrassed if caught drug driving.

**Conclusion**

The research commissioned by the RTA indicates that the introduction of roadside drug testing has resulted in some change to community attitudes to drug driving. The rate of self-reported drug driving has decreased from 4 per cent in 2003 to 3.6 per cent in 2008. This may seem to be a small decrease but it represents a 10 per cent decrease in self-reported drug driving.

The majority of drug users (80 per cent) surveyed were aware that Police have the ability to conduct roadside drug testing and over 60 per cent of drug users indicated that it had decreased the likelihood they would drug drive. This is an impressive result given the scale of Police operations and relatively small scale public education (website and brochure) campaign.

In addition to the increasing belief in the likelihood of getting caught for drug driving, there also appears to be an increasing sense of social disapproval or unacceptability for drug driving and an increasing level of anxiety about drug driving. This suggests a shift in the social acceptability of drug driving just as drink driving became socially unacceptable after the introduction of random breath testing in 1982. While in the case of drug driving the shift is small, a stronger effect may occur with a broader public education campaign targeting those most at risk of drug driving.

Of concern, however, was the increase in incidence of cocaine use before driving, and the belief among these drivers that they are unlikely to be caught. This result needs further investigation to determine if this is representative of a trend in drug use, or whether this change in behaviour is related to drug drivers awareness of the drugs that can be tested for at the roadside and the fact that the legislation does not currently permit Police to test in oral fluid for cocaine at the roadside.

The higher rate of drug use and driving in Sydney indicates that there are more opportunities for drug use and resulting drug driving in Sydney in comparison to regional areas. In areas outside Sydney drug use is generally lower and is more likely to occur close to, or at home, where driving is less likely to occur. This finding supports an increased focus of Police roadside drug testing operations in Sydney metropolitan area rather than rural regions.
Judicial testing of the new drug driving offences at court demonstrate that the new Police powers, the evidentiary chain and the offences and penalties themselves are seen as appropriate by the judiciary and are therefore resulting in appropriate convictions.

The policy objectives of the amending act were to authorise the introduction of roadside drug testing in NSW, and the post fatal crash drug testing of drivers. This report clearly demonstrates that these policy objectives remain valid and the terms of securing those objectives are also appropriate and highly effective. In the last two years, a number of drug drivers have been detected as a result of the new Police powers and have been convicted of appropriate drug driving offences. Similarly, the penalties received by these drug drivers at court are consistent with the legislated penalty structure and are therefore also generally appropriate.

In summary, it is apparent that the *Road Transport Legislation Amendment (Drug Testing) Act 2006* has been implemented effectively and is operating as intended. The implementation of this legislation should continue to deter drug drivers and potential drug drivers and make NSW roads safer for all road users.

There is however, evidence to suggest that greater deterrence of drug driving could be achieved from a targeted public education strategy in support of Police roadside drug driving enforcement activities, particularly for drivers aged 17-29 years of age.