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Drink Driving and Drug Driving

by

Rowena Johns

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Rowena Johns

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EXECUTIVE SUMMARY

This briefing paper examines current laws, recent developments, and planned reforms in New South Wales relating to driving a motor vehicle after consuming alcohol or drugs. Reference is also made to some developments in interstate jurisdictions.

Drink driving in NSW (pages 2-9)

Statistics are presented to show rates of alcohol-related road accidents in recent years. Preliminary concepts that are important for an understanding of drink driving laws are explained, such as categories of drivers; blood alcohol ranges from novice range to high range; and the power of police to randomly breath test drivers for alcohol. Key offences are outlined, including driving under the influence of alcohol and driving with the prescribed concentration of alcohol (PCA) under the *Road Transport (Safety and Traffic Management) Act 1999*.

Sentencing of drink driving offenders in NSW (pages 10-19)

Recent sentencing studies have highlighted the disparity between sentences imposed by different courts for drink driving offences. There has also been frequent use among sentencing judges of the power to find an offender guilty without proceeding to a conviction. Imprisonment rates, even for drivers in the high range of blood alcohol content, have been very low unless the offender has two or more prior PCA convictions. In addressing some of these issues, the Court of Criminal Appeal delivered a guideline judgment in September 2004 on high range PCA offences. Educational programs for convicted drink drivers also feature in this chapter, particularly the Sober Driver program which commenced in July 2003 and targets recidivist offenders.

Alcohol interlocks (pages 20-32)

An alcohol interlock is an electronic breath-testing device that is connected to the ignition of a motor vehicle and prevents it being started if the driver fails to provide a suitable breath sample. The *Road Transport Legislation Amendment (Interlock Devices) Act 2002*, which commenced in September 2003, made interlocks available to New South Wales courts as a sentencing component. Eligible drink driving offenders can reduce their period of licence disqualification if they participate in the program. The alcohol interlock schemes of South Australia (the first in Australia) and Victoria are also described.

Drug driving (pages 33-56)

Current drug driving offences and detection in NSW: Driving under the influence of a drug is an offence against the *Road Transport (Safety and Traffic Management) Act 1999*, while the indictable offence of dangerous driving occasioning death or grievous bodily harm, under the *Crimes Act 1900*, can apply if the driver is under the influence of a drug. Statutory powers to obtain blood or urine samples from drivers for drug testing currently require a police officer to form the reasonable belief that the person is under the influence of drugs, or the person to attend hospital after a road accident.

Extent of drug driving in the community: Research studies and occupational evidence suggest that drug driving is more likely to be committed by certain groups within the population, such as regular users of illicit drugs, dance party attendees, and long-distance truck drivers.

Drug testing methods and challenges: Drug use by drivers may be identified by saliva, sweat, urine, blood or behavioural tests. Saliva testing is the favoured method of preliminary screening in Victoria and those other States that are planning to conduct roadside drug testing. Some of the challenges and choices involved in implementing a driver testing program are the accuracy, convenience and cost of the tests, and whether an offence is constituted by the presence of *any* concentration of drug in the driver's system, or whether evidence of driving impairment is required.

Drug driving proposals in NSW: In November 2004 the Minister for Roads, Hon Carl Scully MP, announced that legislation will be introduced in 2005 to empower police to conduct random drug testing of drivers, using saliva tests to detect cannabis, ecstasy and speed. Testing will operate on a 12 month trial basis and concentrate on the functioning of the technology and police operations, rather than prosecuting drivers caught during that time. The Government also plans to introduce legislation in 2005 to authorise blood testing of all drivers involved in fatal road accidents.

Interstate developments: All jurisdictions in Australia have laws that prohibit drug driving, but Victoria was the first State to introduce random drug testing legislation and to conduct trials of testing devices. The *Road Safety (Drug Driving) Act 2003 (Vic)* commenced on 1 December 2004, making it an offence to drive a motor vehicle with *any* concentration of cannabis or methylamphetamine in the blood or oral fluid. Police began random roadside operations in Melbourne on 13 December 2004, employing a 'Drugwipe' device to obtain a saliva sample. Positive results must recur in two tests on site and a third laboratory test before an infringement notice is issued. The South Australian and Tasmanian Governments have also announced plans to introduce random drug testing legislation in 2005.

1. INTRODUCTION

Driving a motor vehicle after drinking alcohol or taking drugs has the potential to detrimentally affect any member of the community, including drivers, passengers and pedestrians. There have been numerous developments in 2003-2004 to laws, programs and practices aimed at discouraging and combating this type of conduct in New South Wales. Some of the strategies adopted have been influenced or supported by the NSW Summit on Alcohol Abuse, held at Parliament House in August 2003, and the Country Road Safety Summit at Port Macquarie in May 2004.

A significant statutory change to legal blood alcohol limits occurred with the introduction of a zero blood alcohol concentration for novice drivers (learner and provisional licence holders) in May 2004, replacing the previous limit of 0.02. The Court of Criminal Appeal delivered a guideline judgment in September 2004 on the offence of driving with a high range prescribed concentration of alcohol (0.15 or more), addressing criticisms about the inconsistency of sentences imposed for this offence. Alcohol interlocks became available to courts as a sentencing option for certain drink driving offenders when legislation commenced in September 2003. Eligible drivers may receive a reduced licence disqualification period if they have the electronic breath-testing device installed in their motor vehicle. The interlock is connected to the ignition system of the vehicle and prevents it from being started if the driver's alcohol reading exceeds the pre-set limit. The Sober Driver Program, which aims to facilitate the rehabilitation of repeat drink driving offenders, was instigated in July 2003 and can be coupled with sentences such as good behaviour bonds or community service orders.

On the subject of laws to target drug driving, major developments are taking place. Victorian police started random roadside drug testing on 13 December 2004, after the *Road Safety (Drug Driving) Act 2003* (Vic) became effective on 1 December 2004. The legislation created a new offence of driving or being in charge of a motor vehicle while any concentration of cannabis or methylamphetamine is present in the blood or saliva. New South Wales appears to be heading in a similar direction. In November 2004, the Minister for Roads, Hon Carl Scully MP, announced that legislation and a trial program for the random drug testing of drivers will be introduced in 2005. Other States including South Australia and Tasmania have also expressed interest in roadside drug testing.

The broad terms 'drink driving' and 'drug driving' are used in this briefing paper in preference to 'driving under the influence of alcohol or drugs', which is a particular type of offence in the road legislation of New South Wales and other States. Information presented in the paper was current at 16 December 2004.

2. DRINK DRIVING IN NEW SOUTH WALES

2.1 Incidence of drink driving

There has been a growing awareness in New South Wales over recent decades of the dangers of drink driving, especially since Random Breath Testing (RBT) was introduced in 1982. RBT operations brought about an immediate reduction in drink driving crashes of at least 25%.¹

However, many thousands of people are still processed by the courts each year for drink driving offences. For example, statistics maintained by the Judicial Commission of New South Wales show that the Local Courts sentenced 18,818 cases of driving with a high range prescribed content of alcohol (PCA) from April 2000 to March 2004.² During the same period, 19,619 cases of driving with a low range PCA were sentenced.³ Bearing in mind that on many other occasions drivers are 'over the limit' without being apprehended, it cannot be said that drink driving has ceased to be a problem in our society.

According to the Roads and Traffic Authority's *Drink Driving Action Plan 2002-2004*, some of the trends in drinking and driving in New South Wales in recent years were:⁴

- Around 20,000 drink driving offences were committed every year.
- Half of all fatal drink driving crashes occurred from Friday to Saturday night.
- Two out of five drink driving offenders already had a drink driving record. 30% of third-time offenders were unlicensed at the time of the third offence.
- 86% of drink drivers in fatal crashes were male.
- 63% of drink drivers in fatal crashes had a blood alcohol concentration of at least 0.15 (triple the legal limit of 0.05 for fully licensed drivers).

The Roads and Traffic Authority (RTA) estimates that an average of 18% of all fatal road crashes in the period 1996-2001 were alcohol-related, ranging from a high of 20% in 1997 to a low of 16% in 1998.⁵

¹ Roads and Traffic Authority, *Road Safety 2010: Drink Driving Action Plan 2002-2004*, p 4, accessed at <<http://www.rta.nsw.gov.au/roadsafety/downloads/drinkdriving.pdf>>

² Pursuant to s 9(4)(a) of the *Road Transport (Safety and Traffic Management) Act 1999*. A high range is 0.15 gm or more of alcohol in 100 ml of blood. Sentencing statistics were obtained from the Judicial Information Research Service, an online database that is available on a subscription basis.

³ Low range is from 0.05 to under 0.08.

⁴ Roads and Traffic Authority, *Road Safety 2010: Drink Driving Action Plan 2002-2004*, p 3.

⁵ *Ibid*, p 2 and Table 1 on p 3.

Year	Number of fatalities	Number of fatalities where crash was alcohol-related	Alcohol-related fatalities as % of total fatalities
1996	581	102	18%
1997	576	115	20%
1998	556	91	16%
1999	577	98	17%
2000	603	107	18%
2001	524	99	19%
Average (1996-2001)	570	102	18%

The latest RTA accident statistics reveal that alcohol was involved in 16.7% of fatal crashes for the 12 months ending September 2004. Comparison with the previous few years indicates that the contribution of alcohol to road fatalities appears to be declining at present in New South Wales:⁶

Fatal crashes for 12 months ending September 2004 – alcohol involvement

Was alcohol involved?	To September 2004	2001-2003 average	Increase or decrease
Yes (number)	82 fatal crashes	95.7 fatal crashes	- 14.3%
Yes (%)	16.7% fatal crashes	19.5% fatal crashes	
No (number)	332 fatal crashes	323 fatal crashes	+ 2.8%
No (%)	67.5% fatal crashes	65.9% fatal crashes	
Unknown (number)	78 fatal crashes	71.7 fatal crashes	+ 8.8%
Unknown (%)	15.9% fatal crashes	14.6% fatal crashes	
TOTAL	492	490.3	+ 0.3%

2.2 Some guiding principles of NSW drink driving laws

(i) Meaning of ‘driver’ and ‘vehicle’

The road transport legislation defines a ‘driver’ as any person driving a vehicle or riding a cycle.⁷ ‘Vehicle’ means any vehicle on wheels, not including those used on a railway or tramway. ‘Drive’ encompasses: being in control of the steering, movement or propulsion of a vehicle; drawing or towing a trailer; and riding a vehicle.

(ii) Blood alcohol ranges

⁶ Roads and Traffic Authority, *Monthly Bulletin*, November 2004, adapted from Table 3.2.3. The bulletin is available on the RTA website at <www.rta.nsw.gov.au/roadsafety/downloads/dynamic/monthly-accident-data.pdf>

⁷ Section 3 of the *Road Transport (General) Act 1999* and the Dictionary at the end of the *Road Transport (Safety and Traffic Management) Act 1999*.

The levels of prescribed concentration of alcohol in New South Wales are:⁸

- *high range* - 0.15 grams or more of alcohol in 100 millilitres of blood;
- *middle range* - 0.08 gm or more, but less than 0.15 gm;
- *low range* - 0.05 gm or more, but less than 0.08 gm;
- *special range* - 0.02 gm or more, but less than 0.05 gm;
- *novice range* - more than zero gm, but less than 0.02 gm.

(iii) Introduction of zero alcohol limit for novice drivers

The novice range of blood alcohol content applies to holders of a learner licence or a provisional licence: s 9(1A) of the *Road Transport (Safety and Traffic Management) Act 1999*.

One of the recommendations of the NSW Summit on Alcohol Abuse, held at Parliament House in August 2003, was that consideration be given to establishing a zero blood alcohol limit for all learner drivers and P-platers.⁹ The recommendation influenced the Government to introduce the reform,¹⁰ which took effect when the *Road Transport (Safety and Traffic Management) Amendment (Alcohol) Act 2004* commenced on 3 May 2004.¹¹

The susceptibility of young drivers to alcohol-related crashes was the motivation for introducing the zero limit:

Drivers aged 17 to 20 years are overrepresented in drink-driving crashes in New South Wales. This group comprises only 6 per cent of New South Wales licence holders, but, unfortunately, represents 17 per cent of all drink-drivers who are involved in fatal crashes... Their less-developed skills make novice drivers more susceptible to alcohol-impairing effects of even lower levels of alcohol, and they are more likely than older, more experienced drivers to take risks when driving.¹²

⁸ Dictionary at the end of the *Road Transport (Safety and Traffic Management) Act 1999*.

⁹ NSW Summit on Alcohol Abuse 2003, *Communique*, 29 August 2003, Recommendation 5.9: 'The Roads and Traffic Authority and the Police should establish a taskforce, with appropriate consultation with young people, i.e. under 25 to consider the appropriateness of a 0.00 blood alcohol concentration (BAC) for Learner (L) and Provisional (P) plate drivers and report to the Minister for Roads as soon as possible.'

¹⁰ Outcomes of the NSW Summit on Alcohol Abuse 2003, *Changing the Culture of Alcohol Use in New South Wales*, May 2004. The Government response to Recommendation 5.9 is on p 108.

¹¹ *Government Gazette*, No 77 of 30 April 2004, p 2215.

¹² Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill, Second Reading Speech, Tony Stewart MP, *NSWPD*, 3 December 2003, p 5759.

The previous limit of 0.02 had apparently caused uncertainty:

[C]omment has been made from some members of the community, including some magistrates, that young people are confused by the 0.02 limit. They believe they can drink small amounts of alcohol, still be under the limit, and not have their driving impaired. Many novice drivers are unsure about exactly how much alcohol they can consume safely and still stay under the limit. This confusion may have contributed to the large numbers of novice drivers convicted of drink-driving.¹³

However, a zero alcohol content does not allow for innocent consumption of alcohol in the form of medicines or other products. Therefore, a limited defence is available with the novice PCA range:

It will be a defence if the novice driver who has an alcohol level of between 0.00 per cent and 0.02 can prove to the court that the alcohol present at the time the person was alleged to have committed the offence was not caused by any consumption of an alcoholic beverage, other than for the purposes of religious observance—for example, the taking of holy Communion—or by any consumption and use of any other substance for the purpose of consuming alcohol, for example, medicines.¹⁴

(iv) Learner drivers

To obtain a learner licence an applicant needs to be at least 16 years of age and to pass a Driver Knowledge Test.¹⁵ At the time of writing, the conditions of the learner licence included logging at least 50 hours of driving; being supervised at all times by the holder of a full licence; and not exceeding a maximum speed limit of 80 km/h. The learner licence must also be held for at least six months before applying for a provisional licence.

Note: the requirements for learner and provisional drivers are under review, with the release of a discussion paper by the New South Wales Government in November 2004.¹⁶

(v) Provisional drivers

There are two categories of provisional drivers.¹⁷ To obtain a P1 licence at present, the

¹³ Ibid, p 5759.

¹⁴ Ibid, p 5759.

¹⁵ Licensing information was obtained from the RTA website at <www.rta.nsw.gov.au/licensing/gettingallicence/car>

¹⁶ NSW Government and RTA, *Improving safety for young drivers: An options paper for community comment*, November 2004. The paper can be downloaded at <www.youngdrivers.com.au> Public comment is being invited until 28 February 2005.

¹⁷ Information from RTA website at <www.rta.nsw.gov.au/licensing/gettingallicence/car>

applicant must be aged 17 years or older and pass the Driving Ability Road Test, as well as having fulfilled the conditions of the learner licence. P1 licence holders must display red P plates for at least 12 months, and pass the Hazard Perception Test before progressing further. Conditions of the P1 licence include an absolute maximum speed of 90 km/h, not accumulating more than three demerit points, and not supervising a learner driver.

A driver who advances to the P2 licence, signified by green P plates, must hold that licence for at least 24 months. The licence conditions include an absolute speed limit of 100 km/h, not accumulating more than six demerit points, and not supervising a learner driver. P2 licence holders must pass the Driver Qualification Test before progressing to a full licence.

(vi) Special category drivers

The concept of a ‘special category driver’ is explained by s 8(3) of the *Road Transport (Safety and Traffic Management) Act 1999*.¹⁸ These drivers include people whose licences have been suspended, cancelled, or disqualified; holders of learner licences and provisional licences; and drivers of heavy vehicles, public passenger vehicles and vehicles carrying dangerous goods.

(vii) Licence disqualification

Section 24 of the *Road Transport (General) Act 1999* confirms that, subject to other provisions, a court that convicts a person of an offence under the road transport legislation may order the disqualification of the person from holding a driver’s licence for a specified period, in addition to any penalty imposed for the offence.

Disqualification periods for major offences¹⁹ appear at s 25 of the *Road Transport (General) Act 1999*. There are minimum periods of disqualification and automatic periods of disqualification. The automatic period applies if the court does not make a specific order. Across both categories, the length of disqualification depends on previous offences.

(viii) Power to conduct random alcohol breath testing

The power of police to conduct random breath testing of motor vehicle drivers for alcohol is found at s 13 of the *Road Transport (Safety and Traffic Management) Act 1999*.²⁰

¹⁸ See also the Explanatory Note to the Road Transport (Safety and Traffic Management) Bill 1999.

¹⁹ Examples of major offences include driving a motor vehicle negligently, furiously or recklessly, or in a speed or manner dangerous to the public, pursuant to s 42 of the *Road Transport (Safety and Traffic Management) Act 1999*, or menacing driving pursuant to s 43.

²⁰ Boat drivers are governed by the provisions of the *Marine Safety Act 1988*. A person must not operate a vessel that is underway in any waters while under the influence of alcohol or a drug. On 8 December 2004, the *Marine Safety Amendment (Random Breath Testing) Bill* was introduced to empower police to conduct random breath testing of vessel operators in NSW navigable waters. ‘To ensure consistency with the Road Transport (Safety and Traffic Management) Act 1999, the bill brings the drink-driving provisions applying on the water into line with those currently applying on the roads’: Second Reading Speech, Graham West

A police officer may require a person to undergo a breath test if the person: is driving a motor vehicle on a road or road-related area; or is occupying the driving seat and attempting to put the motor vehicle in motion; or is a licence holder and is occupying the seat next to a learner driver who is driving the motor vehicle. A police officer may, for the purposes of s 13, request or signal the driver of a motor vehicle to stop the vehicle.

The Dictionary at the end of the *Road Transport (Safety and Traffic Management) Act 1999* clarifies that:

- ‘*breath test*’ means a test for the purpose of indicating the concentration of alcohol present in a person’s blood. Drugs other than alcohol are therefore not covered.
- ‘*motor vehicle*’ means a vehicle built to be propelled by a motor that forms part of the vehicle. Consequently, the provisions would not apply to an ordinary bicycle.
- ‘*road*’ means an area that is developed for, or one of its main uses is, the driving or riding of motor vehicles, and is open to or used by the public.
- ‘*road-related area*’ includes: an area that divides a road; a shoulder of a road; a footpath or nature strip adjacent to a road; an area open to the public and designated for use by cyclists; an area that is not a road but is open to the public for driving, riding or parking vehicles.

The maximum penalty for refusing to undergo the breath test in accordance with the directions of the police is a fine of 10 penalty units (\$1100).

2.3 Key drink driving offences

Most of the laws specifying drink driving offences are located in road transport legislation. There are also dangerous driving offences under the *Crimes Act 1900* that may involve the consumption of alcohol.

Presence of prescribed concentration of alcohol – s 9 of the *Road Transport (Safety and Traffic Management) Act 1999*

s 9(1A) **Novice** range PCA – The holder of a learner licence or a provisional licence must not, while the novice range prescribed concentration of alcohol is present in his or her blood: (a) drive the motor vehicle, or (b) occupy the driving seat and attempt to put the vehicle in motion. The maximum penalty is a fine of 10 penalty units (\$1100) in the case of a first offence, or 20 penalty units (\$2200) in the case of a second or subsequent offence.

s 9(1) **Special** range PCA – A special category driver must not, while the special range prescribed concentration of alcohol is present in his/her blood: (a) drive the vehicle, (b) occupy the driving seat and attempt to put the vehicle in motion, or (c) if the person is a

special category supervisor²¹ and holder of a driver's licence (other than a provisional or learner licence) must not occupy the seat in a vehicle next to a learner driver. The maximum penalty is 10 penalty units in the case of a first offence, or 20 penalty units for a second or subsequent offence.

s 9(2) **Low** range PCA – A person must not, while the low range prescribed concentration of alcohol is present in his/her blood: (a) drive a motor vehicle, or (b) occupy the driving seat and attempt to put the vehicle in motion, or (c) if the person is the holder of a driver licence other than a provisional licence or a learner licence, occupy the seat next to a learner driver. The maximum fines are the same as for the novice and special range categories.

s 9(3) **Middle** range PCA – A person must not, while having the mid range prescribed concentration of alcohol in his/her blood, engage in the conduct outlined for low range PCA. The maximum penalty is 20 penalty units (\$2200) and/or 9 months imprisonment for a first offence, or 30 penalty units (\$3300) and/or 12 months imprisonment for a second or subsequent offence.

s 9(4) **High** range PCA – The same conduct applies, while having a high range prescribed concentration of alcohol in the blood. The maximum penalty is 30 penalty units and/or 18 months imprisonment for a first offence, or 50 penalty units (\$5500) and/or two years imprisonment for a second or subsequent offence.

Driving under the influence of alcohol or other drug – s 12 of the *Road Transport (Safety and Traffic Management) Act 1999*

A person must not, while under the influence of alcohol or any other drug: (a) drive a vehicle; or (b) occupy the driving seat and attempt to put the vehicle in motion; or (c) being the holder of a driver licence (other than a provisional licence or a learner licence) occupy the seat next to a learner licence holder who is driving the vehicle.

The maximum penalties are:

- (i) in the case of a first offence to which paragraph (a) or (b) relates, a fine of 20 penalty units and/or imprisonment for 9 months;
- (ii) in the case of a second or subsequent offence to which paragraph (a) or (b) relates, a fine of 30 penalty units and/or 12 months imprisonment;
- (iii) in the case of an offence to which paragraph (c) relates, a fine of 20 penalty units.

Dangerous driving occasioning death – s 52A of the *Crimes Act 1900*

A person is guilty of the offence of dangerous driving occasioning death under s 52A(1) if

²¹ The concept of being a supervisor is not defined. Section 8(4) states only that 'a person is a special category supervisor in respect of a motor vehicle if, were the person driving the motor vehicle, the person would be a special category driver in respect of the motor vehicle.'

the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle:

- (a) under the influence of intoxicating liquor or of a drug, or
- (b) at a speed dangerous to another person, or
- (c) in a manner dangerous to another person. (Emphasis added)

The offence of dangerous driving occasioning death must be prosecuted on indictment (ie. in the District Court), and the maximum penalty is imprisonment for 10 years.

There is an aggravated version of dangerous driving occasioning death under s 52A(2), carrying a maximum penalty of 14 years imprisonment. The circumstances of aggravation are outlined by s 52A(7) and include that, at the time of the impact:

- the prescribed concentration of alcohol (0.15) was present in the accused's blood; or
- the accused's ability to drive was 'very substantially impaired' by the fact that the accused was under the influence of a drug (other than intoxicating liquor) or a combination of drugs (whether or not intoxicating liquor was part of that combination).

Dangerous driving occasioning grievous bodily harm – s 52A Crimes Act 1900

The offence of dangerous driving occasioning grievous bodily harm under s 52A(3) is committed if the driver is involved in an impact occasioning grievous bodily harm (GBH) to another person, and the driver is under the influence of liquor or a drug, or is driving at a dangerous speed or in a dangerous manner.

The maximum penalty on indictment is 7 years imprisonment. Aggravated dangerous driving occasioning GBH under s 52A(4) carries a maximum penalty of 11 years imprisonment. The same circumstances of aggravation apply as for dangerous driving occasioning death.

Offences of dangerous driving occasioning GBH can be prosecuted summarily (ie. in the Local Court), unless an election to proceed on indictment is made by the prosecution or the person charged: Table 1 in Schedule 1 of the *Criminal Procedure Act 1986*. The maximum penalty which can be imposed by the Local Court is 18 months imprisonment: s 267(4)(a) of the *Criminal Procedure Act*.

There have been two guideline judgments on sentencing dangerous driving occasioning death or GBH: for further information see '**3.2 Relevant guideline judgments**'.

3. SENTENCING OF DRINK DRIVING OFFENDERS IN NSW

3.1 Studies showing sentencing trends

Use of dismissals and conditional discharges in sentencing drink drivers (2004)

Under the *Road Transport (General) Act 1999*, a conviction for a prescribed concentration of alcohol (PCA) offence carries an automatic period of licence disqualification in addition to any penalty imposed by the court. However, the compulsory disqualification provisions do not apply when a judge, despite finding the defendant guilty, decides to dismiss a charge, or discharge the offender on condition of entering into a bond or program under section 10 of the *Crimes (Sentencing Procedure) Act 1999*.

A recent study has found that over the last decade there has been a rise in the use of dismissals and conditional discharges in sentencing drink drivers.²² From 1993 to 2002, the number of persons found guilty of a PCA offence in NSW Local Courts remained quite stable at an average of 19,000 cases per year, whereas the overall percentage of PCA cases granted a dismissal or conditional discharge rose by 22% for low range PCA offences, 12% for middle range PCA offences, and 5% for high range PCA. Predictably, low range PCA attracts the greatest percentage of dismissals and discharges. In 2002, Local Courts found 4,825 persons guilty of low range PCA. About 43% of the persons whose principal offence was low range PCA received a dismissal or conditional discharge.

There has been a corresponding decrease in licence disqualifications over the same period. The percentage of cases in which an offender's licence was disqualified fell by about 18% for low range PCA offences, 12% for middle range PCA offences, and 5% for high range PCA.

A significant variation was found in the use of dismissals and conditional discharges between different courts. For example, no high range PCA offenders received a dismissal or conditional discharge in 2002 in Kempsey, Windsor, Nowra or Wollongong Local Courts, compared to over 45% of such cases in Newcastle Local Court.

The study also examined five factors that are relevant to sentencing: offence seriousness, offender's age, gender, prior PCA record, and whether or not the court had access to a Traffic Offenders Program. As would be expected, offenders with a prior conviction for a PCA offence were far less likely to be discharged than those with no PCA conviction in the previous five years. If the court had access to a Traffic Offenders Program, the offender was slightly more likely to receive a dismissal or conditional discharge than if no program was available. However, even allowing for these factors, there was still evidence that section 10 was used by some courts much more than others.

²² Steve Moffatt, Don Weatherburn and Jacqueline Fitzgerald, 'Sentencing drink-drivers: the use of dismissals and conditional discharges', *Crime and Justice Bulletin*, Number 81, February 2004, NSW Bureau of Crime Statistics and Research.

The authors suggest that: ‘One obvious solution to the problem would be to provide magistrates with greater guidance on the appropriate use of dismissals and conditional discharges, either through specific education programs, more specific legislative guidance and/or through the issuing of a sentencing guideline judgement by the NSW Court of Criminal Appeal.’²³

Impact of increased penalties on recidivism rates in NSW (2004)

Pursuant to the *Traffic Amendment (Penalties and Disqualifications) Act 1998*, the maximum penalties for drink driving offences, including licence disqualification periods, were substantially increased and some were doubled.²⁴ The NSW Bureau of Crime Statistics and Research examined the impact of the increased penalties for drink driving offences upon recidivism rates.²⁵ To assess the impact, the re-offending rates of two groups of offenders convicted of PCA offences were compared. The first group committed their offences in 1997, before the legislative changes of 1998 occurred, and the second group committed their offences during 1999. Re-offending was measured in a follow-up period lasting three years after conviction.

The overwhelming majority (around 90%) of drink drivers did not reappear in the Local Court for a drink-driving offence within three years of the initial conviction. There was very little difference between Sydney offenders convicted in 1997 (90.9% did not reappear) and Sydney offenders convicted in 1999 (91%), or between non-Sydney offenders convicted in 1997 (89.3% did not reappear) and 1999 (89.8%).²⁶

The authors, pointing to the small effect of increasing the statutory penalties, considered that ‘the efficiency of this strategy in controlling crime remains questionable. In comparison, strategies that have increased the perceived risk of apprehension, such as RBT, have had substantial and enduring influences on offending rates. For example, in NSW the introduction of RBT coincided with a 19 per cent reduction in all serious accidents, a 48 per cent reduction in fatalities and a 26 per cent decline in single-vehicle night-time accidents.’²⁷

The 1998 legislation also introduced mandatory minimum licence disqualifications for special range and low range PCA offences. (Minimum disqualification periods already

²³ Ibid, p 10.

²⁴ Traffic Amendment (Penalties and Disqualifications) Bill, Second Reading Speech, *NSWPD*, 21 May 1998, pp 5047-5049.

²⁵ Suzanne Briscoe, ‘The impact of increased drink-driving penalties on recidivism rates in NSW’, *Alcohol Studies Bulletin*, Number 5, May 2004, NSW Bureau of Crime Statistics and Research in conjunction with the National Drug Research Institute, Curtin University of Technology, Western Australia.

²⁶ Ibid, Table 5 on p 5.

²⁷ Ibid, pp 8-9, citing J Henstridge et al, *The long term effects of RBT in 4 Australian states: A time series analysis*, CR 162, Federal Office of Road Safety, Canberra, 1997.

existed for all other drink-driving offences.) The authors found that the amendments *did* cause the increase of the average licence disqualification for drink-driving offences across NSW, but the impact of these amendments could have been greater if licence disqualifications were more systematically applied. 20% of guilty offenders still escaped licence disqualification because they received a discharge or dismissal of charges pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999*.

Sentencing high range PCA drink drivers in NSW (2003)

The NSW Bureau of Crimes Statistics and Research examined the influence of prior PCA offending on sentencing for high range PCA offences.²⁸ The relevant blood alcohol concentration is 0.15 or more, being three times the standard legal limit. The data represented high range PCA offenders dealt with by the courts between July 1996 and June 2001, totalling 28,666 cases. On average, about 5700 people were convicted of high range PCA offences each year. More than 77% had no prior conviction for a PCA offence within the previous five years. Therefore, almost 23% had been convicted of a PCA offence in the previous five years. Of those, around 15% had two or more high range PCA convictions in that period.

The type of penalty imposed on high range PCA offenders was connected to the rate of prior PCA offending. A sentence of imprisonment was the most common penalty imposed on offenders with two or more prior PCAs, while a fine was more likely to be the penalty for offenders with less than two prior PCAs. Very few offenders without a prior PCA record were imprisoned for a high PCA offence. Around 9% of offenders with a single prior PCA conviction were imprisoned, whereas the imprisonment rate for offenders with two prior PCA convictions was 31.4% and for offenders with three or more convictions was 67.1%.

Males convicted of high range PCA offences were far more likely than females to be imprisoned, and convicted persons aged 25-49 years were more likely to be imprisoned than other age groups. The probability of imprisonment for a male aged 25-49 years with no prior or concurrent drink-driving conviction was less than 1%, compared to 76% when he had three or more prior drink-driving convictions and a concurrent drink-driving conviction.

3.2 Relevant guideline judgments

Guideline judgments have been a feature of sentencing in New South Wales since 1998. Their objective is to provide guidance to judges in sentencing particular offences, or taking into account particular factors in sentencing, and judges retain the discretion to depart from the guideline.²⁹ The Court of Criminal Appeal (part of the Supreme Court of NSW)

²⁸ David Saffron and Marilyn Chilvers, 'Sentencing high-range PCA drink-drivers in NSW', *Crime and Justice Bulletin*, Number 77, August 2003, NSW Bureau of Crime Statistics and Research.

²⁹ For a recent review and analysis of guideline judgments see: John Anderson, 'Leading steps aright: Judicial guideline judgments in New South Wales', *Current Issues in Criminal Justice*, Volume 16, Number 2, November 2004, p 140. For background information see:

pronounces the guideline judgments, which were initially issued on the court's own motion. Legislation was passed in 2001 to confirm the status of guideline judgments and the participation of the Attorney General, Senior Public Defender, and Director of Public Prosecutions: ss 36-42A of the *Crimes (Sentencing Procedure) Act 1999*.

(i) Dangerous driving occasioning death or grievous bodily harm

Four categories of dangerous driving offences appear at s 52A of the *Crimes Act 1900*. These are outlined in detail under '**2.3 Key drink driving offences**'. In summary, the offences are committed when, at the time of the impact that occasions death or grievous bodily harm to another person, the offender is driving under the influence of alcohol or a drug, or at a dangerous speed, or in a dangerous manner.

The maximum penalties for the offences are:

- dangerous driving occasioning death - 10 years imprisonment;
- aggravated dangerous driving occasioning death - 14 years imprisonment;
- dangerous driving occasioning grievous bodily harm - 7 years imprisonment;
- aggravated dangerous driving occasioning GBH - 11 years imprisonment.

The circumstances of aggravation, outlined under s 52A(7), include two factors directly related to driving under the influence of alcohol or drugs: the prescribed concentration of alcohol (0.15) is present in the accused's blood; or the accused's ability to drive is very substantially impaired by the fact that the accused is under the influence of a drug other than alcohol, or a combination of drugs.

Dangerous driving was the subject of the first guideline judgment in New South Wales, delivered by the Court of Criminal Appeal in *R v Jurisic* (1998) 45 NSWLR 209. The reason for introducing a sentencing guideline for offences under s 52A was explained by Chief Justice Spigelman (with whom Wood CJ at CL, Sully, James and Adams JJ agreed) at 223:

As in England, it appears that trial judges in New South Wales have not reflected in their sentences the seriousness with which society regards the offence of occasioning death or serious injury by dangerous driving. The existence of such disparity constitutes an appropriate occasion for the promulgation of a guideline judgment...

The Court of Criminal Appeal reformulated the dangerous driving guideline in *R v Whyte* (2002) 55 NSWLR 252.³⁰ In deciding to retain a numerical guideline, Spigelman CJ (with whom Mason P, Barr, Bell, and McClellan JJ agreed) stated at 275-276:

Mandatory and Guideline Sentencing: Recent Developments by Honor Figgis, NSW Parliamentary Library Briefing Paper No 18/1998.

³⁰ The guideline was updated primarily because the High Court in *Wong v The Queen* (2001) 207 CLR 584 overturned a guideline judgment and some of the court's reasoning impinged on the other guidelines. Consequently, the NSW Parliament passed legislation in 2001 making provision for guideline judgments in the *Crimes (Sentencing Procedure) Act 1999*.

In my opinion, the numerical guideline contained in *R v Jurisic* has proven to be significant in ensuring both the adequacy of sentences and consistency in sentencing for this offence in New South Wales. If the numerical guideline were removed then the pattern of inadequacy and inconsistency would, in my opinion, quickly re-emerge... As I emphasised in *R v Jurisic* (eg, at 216B-C; 220C) there is tension between maintaining the discretion essential for individualised justice, on the one hand, and guidance to ensure consistency in sentencing decisions, on the other hand. The basic principle is that of equality of justice. Like cases must be treated alike. Unlike cases must be treated differently. The first statement requires consistency. The second statement requires individualised justice. In my opinion, numerical guideline judgments have a role to play in achieving the ultimate goal of equality of justice in circumstances where, as a matter of practical reality, there is tension between the principle of individualised justice and the principle of consistency.

The court identified a recurring type of case under s 52A with the following characteristics:

- (i) a young offender;
- (ii) the offender is of good character with no or limited prior convictions;
- (iii) death or permanent injury occurs to a single person;
- (iv) the victim is a stranger;
- (v) no or limited injury occurs to the driver or the driver's intimates;
- (vi) genuine remorse is shown;
- (vii) a plea of guilty is entered, of limited utilitarian value.

Aggravating factors of relevance to the sentencing process were identified:

- (i) extent and nature of the injuries inflicted;
- (ii) number of people put at risk;
- (iii) degree of speed;
- (iv) degree of intoxication or of substance abuse;
- (v) erratic or aggressive driving;
- (vi) competitive driving or showing off;
- (vii) length of the journey during which others were exposed to risk;
- (viii) ignoring of warnings;
- (ix) escaping police pursuit;
- (x) degree of sleep deprivation;
- (xi) failing to stop.

Items (iii) to (xi) are 'frequently recurring elements which directly impinge on the moral culpability of the offender at the time of the offence. Individually, but more often in some combination, they may indicate that the moral culpability is high': at 287.

Generally, the court considered that a custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgment: at 286.

A numerical guideline for the typical case identified of dangerous driving occasioning death under s 52A(1) and dangerous driving occasioning grievous bodily harm under s

52A(3) was issued (at 287):

Where the offender's moral culpability is high, a full time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm) would not generally be appropriate.

(It should be noted that the head sentence is the total sentence, including a non-parole period and a parole period. Therefore, the offender will not usually spend the entire sentence in custody.)

In the case of an aggravated version of each offence: 'an appropriate increment to reflect the higher maximum penalty, and what will generally be a higher level of moral culpability, is required. Other factors, such as the number of victims, will also require an appropriate increment.'

The court also confirmed the status of guideline judgments in the sentencing process (at 288):

The guideline is, to reiterate, a "guide" or "check". The sentence imposed in a particular case will be determined by the exercise of a broad discretion taking into account all of the factors required to be taken into account by s 21A of the *Crimes (Sentencing Procedure) Act*. This guideline focuses attention on the objective circumstances of the offence. The subjective circumstances of the offender also require consideration.³¹

(ii) High range prescribed concentration of alcohol

On 8 September 2004, the Court of Criminal Appeal delivered a guideline judgment on the offence of high range prescribed concentration of alcohol under s 9(4) of the *Road Transport (Safety and Traffic Management) Act 1999*, pursuant to an application by the Attorney General.³²

High range PCA is defined in the Dictionary to the *Road Transport (Safety and Traffic Management) Act 1999* as a concentration of 0.15 grams or more of alcohol in 100 millilitres of blood. The maximum penalty for a first offence is 30 penalty units (currently \$3300) and/or 18 months imprisonment. For a second or subsequent offence, the maximum penalty is 50 penalty units (currently \$5500) and/or two years imprisonment.³³

³¹ Section 21A sets out the aggravating and mitigating factors that are to be taken into account in determining the appropriate sentence for an offence.

³² The full name of the case is: *Application by the Attorney General under section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999* (No.3 of 2002) [2004] NSWCCA 303. The guideline judgment was not attached to any particular defendant's case.

³³ The Dictionary clarifies that an offence is counted as a second or subsequent offence 'only if, within the period of 5 years immediately before a person is convicted of the offence, the person was convicted of another offence against the same provision or of a major offence.'

An additional issue is the disqualification of the offender's licence. Section 25 of the *Road Transport (General) Act 1999* outlines the relevant disqualification periods, which depend on whether the driver has committed previous driving offences. The disqualification periods for high range PCA are:

Type of high range PCA offender	Automatic disqualification (applies without a specific order from the court)	Minimum disqualification (ordered by court)
No previous major offence ³⁴	3 years	12 months
Previous major offence within 5 years	5 years	2 years

Counsel for the Attorney General submitted that there was a systemic leniency in sentencing for high range PCA offences, both for offenders with and without a relevant prior offence, and that s 10 of the *Crimes (Sentencing Procedure) Act 1999* was being used too frequently in high range PCA cases, to find the offender guilty but not to proceed to a conviction. The result of such an order is arguably that the offender is not punished for the offence and the minimum disqualification period is also avoided.

Justice Howie, in the course of considering whether a guideline was warranted for the offence, stated (at paras 97-98):

It is clear that the offence of high range PCA is a prevalent one, in that it is a commonly occurring offence, and I have already expressed the view that this fact alone suggests that a guideline might be warranted...Parliament, by increasing the penalties for drink-driving offences and by determining on a scheme involving automatic and minimum disqualification periods, has sent a clear message to the courts that it believes that a penal regime is the appropriate method for addressing this social problem. It is not open to the courts to second-guess Parliament by attempting to subvert its will by inappropriately ameliorating the penalties chosen by it. Nor are the social and economic ramifications of increased sentences or longer periods of disqualification matters of concern to the court if these are the consequences arising from an insistence that the courts dealing with these offences comply with the spirit and policy of the legislation.

Consequently, a sentencing guideline was outlined by Howie J (with whom Spigelman CJ, Wood CJ at CL, Grove and Dunford JJ agreed) at para 145:

- (1) An ordinary case of high range PCA is one where:
- (i) the offender drove to avoid personal inconvenience or because the offender did not believe that he or she was sufficiently affected by alcohol;
 - (ii) the offender was detected by a random breath test;

³⁴ Major offences are listed at s 25(1) of the *Road Transport (General) Act 1999*, as part of the definition of 'convicted person', and include: negligent, furious or reckless driving under s 42 of the *Road Transport (Safety and Traffic Management) Act 1999*; menacing driving under s 43; driving with the prescribed concentration of alcohol pursuant to s 9; or driving under the influence of drugs or alcohol pursuant to s 12.

- (iii) the offender has prior good character;
- (iv) the offender has nil, or a minor, traffic record;
- (v) the offender's licence was suspended on detection;
- (vi) the offender pleaded guilty;
- (vii) there is little or no risk of re-offending;
- (viii) the offender would be significantly inconvenienced by loss of licence.

(2) In an ordinary case of high range PCA:

- (i) an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* will rarely be appropriate [ie. finding the offender guilty but not proceeding to a conviction, with the option of discharging the offender on condition that they enter into a good behaviour bond];
- (ii) a conviction cannot be avoided only because the offender has attended, or will attend, a driver's education or awareness course;
- (iii) the automatic disqualification period will be appropriate unless there is a good reason to reduce the period of disqualification;
- (iv) a good reason under (iii) may include:
 - (a) the nature of the offender's employment;
 - (b) the absence of any viable alternative transport;
 - (c) sickness or infirmity of the offender or another person.

(3) In an ordinary case of a second or subsequent high range PCA offence:

- (i) an order under s 9 of the *Crimes (Sentencing Procedure) Act 1999* will rarely be appropriate [ie. a good behaviour bond];
- (ii) an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* would very rarely be appropriate [see above];
- (iii) where the prior offence was a high range PCA, any sentence of less severity than a community service order would generally be inappropriate.

(4) The moral culpability of a high range PCA offender is increased by:

- (i) the degree of intoxication above 0.15;
- (ii) erratic or aggressive driving;
- (iii) a collision between the vehicle and any other object;
- (iv) competitive driving or showing off;
- (v) the length of the journey at which others are exposed to risk;
- (vi) the number of persons actually put at risk by the driving.

(5) In a case where the moral culpability of a high range PCA offender is increased:

- (i) an order under s 9 or s 10 of the *Crimes (Sentencing Procedure) Act* would very rarely be appropriate;
- (ii) where a number of factors of aggravation are present to a significant degree, a sentence of any less severity than imprisonment of some kind, including a suspended sentence, would generally be inappropriate.

(6) In a case where the moral culpability of the offender of a second or subsequent high range PCA offence is increased:

- (i) a sentence of any less severity than imprisonment of some kind would generally be inappropriate;

- (ii) where any number of aggravating factors are present to a significant degree or where the prior offence is a high range PCA offence, a sentence of less severity than full-time imprisonment would generally be inappropriate.

The guideline judgment was requested by the Attorney General and was supported by the Director of Public Prosecutions. It may also assist Police Prosecutors, as high range PCA offences are prosecuted summarily in the Local Court. But it has not been regarded positively by all sectors of the legal profession. The Senior Public Defender opposed the issuing of the guideline, and recently a Public Defender, John Stratton SC, stated: 'Unfortunately it is likely that the guideline judgment will lead to an increase in the level of severity of sentencing for offences of high range PCA. Whether this will have an impact on the road toll is extremely debatable.'³⁵

3.3 Driving offender programs

Two programs that may be available to drink drivers, as a pre-sentencing option or as part of their sentence, are considered here. The Sober Driver Program is a relatively recent development and specifically targets drink driving offenders. The Traffic Offenders Program caters to a broader group of offenders, but has helped many drink drivers.

The alcohol interlock scheme may be considered a 'program' but does not focus on educational instruction. It is therefore considered separately in **Chapter 4** of this briefing paper.

(i) *Sober Driver Program*

In 2001 the Minister for Roads established a Road Safety Task Force.³⁶ The Task Force's recommendations included the creation of a statewide educational and rehabilitative program for serious traffic offenders. In response to the recommendations, an inter-agency Steering Committee was established and then a Working Party. As a result, the Sober Driver Program was developed, targeting recidivist drink drivers. It is managed and delivered by the Probation and Parole Service of the Department of Corrective Services, and commenced in July 2003. It is jointly funded by the Roads and Traffic Authority and the Motor Accidents Authority for a three year period to June 2006.

The Sober Driver Program is a court-based, post-conviction, educational program for adult offenders (over 18 years) convicted of a drink driving offence, and who have been convicted of a previous drink driving offence in the past five years.

³⁵ John Stratton, 'Guideline Judgment on High Range PCA', *Directlink* (NSW District and Local Courts Practice Newsletter), Volume 6, Number 6, 2004, p 7.

³⁶ Sources of information for the Sober Driver Program were: 'New road safety program targets recidivist drink-driving offenders', *Law Society Journal*, Volume 42, Number 1, February 2004, p 20; 'NSW Sober Driver Program', *InforMAAtion*, Motor Accidents Authority, Number 6, September 2003, p 1; and the Roads and Traffic Authority, *Annual Report 2004*, p 21.

The standard program runs for 18 hours, extending over 9 weeks. A more condensed version of the program has been developed for remote or rural areas where small numbers make weekly visits less feasible. It contains the same number of hours, delivered over three days. The content of the program is intended to help participants understand the effects of drink driving on themselves and the community.

Entry to the Sober Driver Program is directed by a Magistrate, through a good behaviour bond (under ss 9, 10 or 12 of the *Crimes (Sentencing Procedure) Act 1999*), a deferral of sentencing for rehabilitation purposes (s 11), or a community service order (s 8). Participants can also be referred by their Probation and Parole Officer.

(ii) Traffic Offenders Program

The Traffic Offenders Program (TOP) was developed as a community initiative.³⁷ It is used by Magistrates and Judges once a defendant has pleaded guilty to a traffic offence but prior to sentencing. The offender attends the 8 week program and returns to court to receive his or her sentence. Sessions feature different topics and guest speakers, including representatives from the police, ambulance service, legal profession, and Roads and Traffic Authority. Participants are required to complete an assignment for each session.

TOP has been operating in the Blacktown area since 1992, with the cooperation of Blacktown and Parramatta Local Courts. It is conducted from the Seven Hills Community Centre and the Co-ordinator is Graham Symes, an ambulance officer. Participants come from as far afield as Newcastle in the north, Nowra in the south, and Bathurst in the west. By early 2004, 47 Local and District Courts were involved in sending offenders to the program. Between March 1992 and March 2004 over 5832 persons completed TOP.

³⁷ Information was obtained from the website of the Traffic Offenders Program at <www.trafficoffenders.com.au>

4. ALCOHOL INTERLOCK SYSTEMS

4.1 General information

(i) What is an alcohol interlock system?

It is a breath-testing device wired to the ignition of a motor vehicle, for the purpose of measuring the blood alcohol concentration (BAC) of the driver and preventing the vehicle from being started if the BAC exceeds a pre-set limit.³⁸ The driver blows into a mouthpiece on the handset, which is attached to a control module featuring a message display. Interlocks can be fitted to cars, trucks and motorcycles.

(ii) What benefits do alcohol interlocks have for drivers?

They deter a driving offender from drinking and driving, due to the tests that they require drivers to undertake, the tamper-resistant features they offer, and the penalties provided for contravening the system. Interlocks therefore reduce the temptation to drive while intoxicated and, consequently, the prospect of re-offending. Allowing the offender to continue to drive, but with the restrictions of an interlock device, can also avert the negative consequences of licence disqualification, such as loss of employment.

(iii) How is the driver monitored through the interlock system?

Data logging in the device's computer memory provides a detailed record of the use of the interlock and the vehicle, including any violations of the program. Events recorded include: the dates and times of use of the vehicle; success or failure of all breath tests; the BAC level of the breath sample; attempts to deactivate or circumvent the device; compliance with re-test requirements; and incidents of emergency override use. The authorised interlock service provider who installed the approved interlock system carries out regular checks to verify calibration accuracy and proper functioning of the interlock system. During monitoring, the internal memory of the interlock is downloaded and a compliance report generated for administering authorities.

(iv) Are there any further tests once the driver successfully starts the car?

In addition to providing a breath sample to start the vehicle, the interlock is programmed to require subsequent tests at random intervals. This is referred to as a 'running re-test' and assesses whether a driver is still alcohol free. The re-test requires the driver to pull over, leave the engine running and blow into the device. If the driver does not perform the re-test, or their alcohol level is too high, the horn and lights will be activated until the vehicle is turned off and the missed/failed re-test will be recorded as a violation in the events log. This feature discourages behaviour such as leaving the vehicle idling while alcohol is

³⁸ General information on alcohol interlocks was drawn from a variety of sources including: Guardian Interlock Systems website at www.guardianinterlock.com.au, the RTA website at www.rta.nsw.gov.au, and Philip Harvey, 'Alcohol interlock: Helping drivers keep drink off the road', *Law Society Journal*, May 2004, Volume 42, Number 4, p 46.

consumed, then continuing driving.

(v) Guardian WR2 model

Guardian Interlock Systems, a company that originated in Canada, has supplied alcohol interlocks to various countries including the USA and Sweden, and was the first company approved to supply interlocks in Australia (in South Australia). The Guardian WR2 interlock was also the first interlock approved by the Roads and Traffic Authority in New South Wales.



Some of the WR2's characteristics are:

- A 'breath signature' feature, which requires a 'deep lung' sample of adult, human breath. This is designed to thwart attempts to filter, disguise or substitute the breath source. Therefore, creative attempts to use a child, family pet, or air pump to blow into the device would be unsuccessful.
- A 'hum tone' feature, requiring the subject to hum while taking the breath test. This further minimises the use of bogus air samples or the involvement of an untrained user.
- An optional emergency override feature, designed to restrict the use of override to true emergency situations.
- Up to 10,000 events are recorded in the device's memory, including over 50 different event types associated with the use of the vehicle and the device. This is sufficient to enable normal use over a period of 67 days. If the memory capacity is used within a shorter period of time, the device will signal an early recall in order to download data and clear the events log.
- Events log data is recorded in an encrypted form, so that downloading requires

specialised equipment and proprietary software. The software is able to detect corrupted or altered data, thereby ensuring that illicit attempts to circumvent program rules by altering or erasing data will be identified.

- Language selection capabilities enable a choice of the language in which messages and/or log reports or other program data will be displayed.

4.2 NSW scheme

(i) *Introduction*

The NSW Alcohol Interlock Program is a court-based penalty for drink drivers that commenced on 8 September 2003. The program enables drivers convicted of certain alcohol-related offences on or after that date to continue driving after a reduced disqualification period if they obtain an interlock driver licence. Regional New South Wales is also covered by the program.

The interlock statutory provisions are found at ss 25C-25H of the *Road Transport (General) Act 1999*. The *Road Transport (Driver Licensing) Regulation 1999* also outlines procedures for obtaining an interlock driver licence; conditions of the licence; and criteria for becoming an approved interlock installer or service provider: especially regs 16, 19A, 19B and Part 7.

(ii) *Background and development*

In 1999 the RTA conducted an eight month trial of alcohol interlocks with volunteer drink-driving offenders. It was found that the interlocks had a positive impact on the behaviour of the drivers. A survey undertaken by the NRMA in July 2001 demonstrated that 91% of the public supported the requirement for drink-drivers to use interlocks. The devices had already been introduced in South Australia and Victoria.³⁹

The Road Transport Legislation Amendment Interlock Devices Bill was introduced by the Government in the Legislative Assembly in June 2002. The Second Reading Speech stated:

The purpose of this bill is to implement a new, flexible penalty, which provides those drivers convicted of certain drink-driving offences with an opportunity to rehabilitate themselves and learn to drive without drinking...Interlock devices will enhance the safety of all people on the roads by addressing in a practical way the problem of drink-drivers.⁴⁰

The *Road Transport Legislation Amendment (Interlock Devices) Act 2002* received assent on 25 September 2002 but did not commence until 8 September 2003.⁴¹

³⁹ Road Transport Legislation Amendment Interlock Devices Bill, Second Reading Speech, Bryce Gaudry MP, *NSWPD*, 28 June 2002, p 4165.

⁴⁰ *Ibid*, p 4164.

⁴¹ *Government Gazette*, No 132 of 29 August 2003, p 8246.

The NSW Summit on Alcohol Abuse was held at Parliament House in August 2003. The recommendations and Government responses relating to alcohol interlocks were:⁴²

Recommendation	Government response
<p>Mandatory alcohol interlocks on all new vehicles 5.10 The introduction of a requirement for mandatory alcohol interlocks in all new vehicles should be referred to the Australian Transport Council for investigation.</p>	<ul style="list-style-type: none"> • The Minister for Roads referred the proposal to the Australian Transport Commission. This concept would require an amendment of the relevant Australian Design rule by the Commonwealth Government. The RTA has commenced a feasibility study of interlocks for all new vehicles. • The Minister for Roads also placed the issue of mandatory alcohol interlocks in all new imported or Australian made vehicles on the agenda of the Australian Transport Council of Ministers in 2004. • The new Alcohol Interlock Program began, with commencement of the legislation, on 8 September 2003.
<p>Mandatory interlock for repeat drink driving offences 5.11 RTA should investigate a mandatory requirement of an alcohol interlock device for all repeat drink drive offenders as a prerequisite for obtaining an unconditional licence.</p>	<p>The proposal will be examined by the new Working Party on Drink Driving Offences, to be convened by the Criminal Law Review Division of the Attorney General's Department. The Working Party comprises representatives from NSW Police, Attorney General's Department and the RTA, and reports to the Government on various drink driving issues.⁴³</p>
<p>Intervention programs for offenders before licence reinstatement 5.13 RTA, NSW Police, and Attorney General's Dept should investigate whether drink drivers convicted of middle or high range PCA should be required to undertake an alcohol-related intervention program before licence reinstatement.</p>	<ul style="list-style-type: none"> • Drink driving offenders who wish to obtain an interlock driver licence must complete a brief medical consultation, to discuss their alcohol use with a doctor. Proof of this consultation, known as the Drink-less Program, is a mandatory prerequisite for the issue of an interlock device. • In addition, the NSW Sober Driver Program, a court based, post conviction, educational program, targets repeat drink drivers. • RTA will commence development of a state-wide drink driving education and rehabilitation program for young, high range offenders during 2004/2005.

The first interlock driver licence was issued on 20 November 2003.⁴⁴ At the end of the 2003-2004 financial year, 15 interlock licences had been issued. The program will be evaluated after two years.⁴⁵

⁴² Outcomes of the NSW Summit on Alcohol Abuse 2003, *Changing the Culture of Alcohol Use in New South Wales*, May 2004, pp 108-110.

⁴³ Ibid, p 107.

⁴⁴ Ibid, p 109.

⁴⁵ Roads and Traffic Authority, *Annual Report 2004*, p 22.

(iii) Eligibility

A person will be eligible to participate in the program and have an interlock driver licence issued where:⁴⁶

- their most recent major alcohol-related conviction has occurred on or after 8 September 2003;
- the court has issued a disqualification suspension order, which has been recorded by the RTA;
- the person has completed the disqualification compliance period and any other unserved suspension periods, and is free of any other restriction – candidates will not be able to actually apply for their licence until after the expiry of the disqualification compliance period;
- the mandatory interlock documentation has been submitted to and recorded by the RTA at a motor registry.

(iv) Disqualification compliance period

A court that convicts a person of a major alcohol-related offence⁴⁷ may disqualify the person from holding a driver licence under section 25(2) or (3) of the *Road Transport (General) Act 1999*. If the court considers it appropriate, the court may issue a disqualification suspension order, enabling an eligible offender to serve a reduced period of disqualification ('disqualification compliance period') if the person participates in the interlock program. Therefore, the period on an interlock driver licence ('interlock participation period') is an alternative to the full disqualification.

(v) Steps in obtaining an interlock driver licence

During the interlock participation period the participant will hold an interlock driver licence which is a conditional driver licence that restricts the holder to driving a car fitted with an approved interlock device. The interlock driver licence applies only to a Class C (car) licence, which includes the categories of provisional, unrestricted and unrestricted with good behaviour condition.

Up to 28 days before the expiry of the disqualification compliance period, a person can commence the process required to qualify for an interlock driver licence. The three key steps to obtaining an interlock driver licence are:

1. Have an RTA approved interlock device installed in the car by an RTA approved interlock installer. At the completion of installation, the installer will issue a certificate which must be submitted when applying for an interlock driver licence.

⁴⁶ Information on the operation of the program was derived from the legislation itself and the RTA website, especially 'NSW Alcohol Interlock Program' document, dated 1 July 2004, available at <www.rta.nsw.gov.au/roadsafety/downloads/alcohol_interlock_dl1.html>

⁴⁷ PCA offences under s 9, DUI offences under s 12(1)(a)&(b), and failure to submit to breath test under s 15(4): *Road Transport (Safety and Traffic Management) Act 1999*.

2. Complete the ‘Drink-less’ medical intervention. This is a brief medical consultation which applicants must attend no earlier than 28 days before the end of the disqualification period. The consultation must be with a doctor who has been trained to provide the Drink-less program. This involves a survey about alcohol use and a discussion with the doctor. The doctor signs a certificate at the completion of the consultation.

3. Submit at the RTA motor registry the interlock installation certificate, and the medical intervention certificate. Complete the interlock driver licence declaration and satisfy all the usual RTA licensing requirements.

Conditions governing the interlock driver licence are outlined by reg 19A of the *Road Transport (Driver Licensing) Regulation 1999*. These conditions include that the licence holder must not drive with a blood concentration of 0.02 or more; must not interfere with the operation of the device; and must permit a police officer to inspect the device upon request.

(vi) Interlock participation periods

The legislation prescribes minimum interlock participation periods. However a magistrate may order any maximum period. On completion of the interlock participation period, the convicted person will be taken to have completed the original full disqualification ordered by the court. The following table lists the offences for which courts may issue an interlock driver licence order and the disqualification compliance periods and minimum interlock participation periods.

Interlock participation and disqualification compliance periods
(Schedule 1A of the *Road Transport (General) Act 1999*)⁴⁸

Offence	Disqualification compliance period	Minimum interlock participation period
Drive/attempt drive with a high range PCA (0.15 or more) where there is a previous conviction for any alcohol-related major offence within the previous 5 years.	12 months	48 months
High range PCA, but no previous conviction for an alcohol-related major offence within the previous 5 years.	6 months	24 months
Drive/attempt drive with a mid range PCA (0.08 to under 0.15) where there is a previous conviction for an alcohol-related major offence within the previous 5 years.	6 months	24 months
Mid range PCA, but no previous conviction for an alcohol-related major offence within the previous 5 years.	6 months	24 months
Drive/attempt drive with a low range PCA (0.05 to under 0.08) where there is a previous conviction for an alcohol-	3 months	12 months

⁴⁸ The format of this table was adapted from “NSW Alcohol Interlock Program”, 1 July 2004, document on RTA website at <www.rta.nsw.gov.au/roadsafety/downloads/alcohol_interlock_dl1.html>

related major offence within the previous 5 years.		
Drive/attempt drive with a special range PCA (0.02 to under 0.05) where there is a previous conviction for an alcohol-related major offence within the previous 5 years.	3 months	12 months
Drive/attempt drive with a novice range PCA (zero to 0.02) where there is a previous conviction for an alcohol-related major offence within the previous 5 years.	3 months	12 months
Drive/attempt drive under the influence of alcohol (DUI) where there is a previous conviction for an alcohol-related major offence within the previous 5 years.	12 months	48 months
DUI but no previous conviction for an alcohol-related major offence within the previous 5 years.	6 months	24 months
Refuse or fail to submit to breath analysis test where there is a previous conviction for an alcohol-related major offence within the previous 5 years.	12 months	48 months
Same, but no previous conviction for an alcohol-related major offence within the previous 5 years.	6 months	24 months

(vii) Maintenance

The interlock licence holder must submit the car at regular intervals (initially monthly) so that the interlock device can be inspected and undergo maintenance. As part of the maintenance all electronic information captured and stored in the interlock device is downloaded and securely transferred to the RTA for monitoring.

(viii) Completion or non-completion

In the event the data indicates that the licence holder is not complying with the conditions of the interlock driver licence, the RTA may require the participant to undergo a further medical consultation to address alcohol use. Repeated non-compliance may result in licence cancellation and re-instatement of the remainder of the full disqualification period.

When the interlock participation period is completed, the interlock licence will expire. Interlock licence holders will be notified in writing by the RTA that their participation in the program has ended and that their full disqualification period is also deemed to have been completed. The device is removed by an approved interlock installer and the licence holder is no longer subject to the conditions of the interlock driver licence.

(ix) What happens if other people drive the car?

Anyone using a car fitted with an interlock device will be subject to all the requirements of the device. The installer will provide training to regular users of the car. If another driver commits a violation it is recorded and the driver will be held responsible, in the absence of proof to the contrary.

(x) Cost factors

The driver bears all financial costs associated with participating in the program. When the interlock legislation was introduced, it was estimated that the costs of installing and leasing

the interlock would be in the range of \$1800-2500 per annum.⁴⁹

To assist low income earners to participate in the program, the RTA provides a subsidy for holders of a valid concession card issued by the Australian Government. The financial assistance scheme ensures holders are charged a reduced fee for: installation of an approved interlock device by an approved interlock installer; scheduled service visits for maintenance of the interlock device by an approved interlock service provider; and removal of the interlock device on program completion.

(xi) Summary of interlock provisions in Road Transport (General) Act 1999

Section	Subject	Provision
s 25C	Disqualification period may be suspended for participation in interlock program	If a court convicts a person of an 'alcohol-related major offence' and the person is disqualified from holding a driver licence, the court may order that the licence disqualification be suspended if the person participates in an interlock program.
s 25A	Meaning of <i>alcohol-related major offence</i>	PCA offences under s 9; DUI offences under ss 12(1)(a) or (b); or failure to submit to breath test under s 15 (4) of the <i>Road Transport (Safety and Traffic Management) Act 1999</i> .
s 25E	Entitlement to apply for interlock driver licence	A convicted person who has obtained a disqualification suspension order is entitled to apply for an interlock driver licence: (a) no earlier than 28 days before the expiry of the disqualification compliance period; or (b) at any time after the expiry of the disqualification compliance period but before the expiry of the actual licence disqualification period.
s 25F	When disqualification suspension order has effect	A disqualification suspension order operates to suspend a disqualification while the person in respect of whom the order was made participates in an interlock program.
s 25D	When person may participate in interlock program	When a disqualification suspension order is made, the person is entitled to participate in the interlock program if: (a) the disqualification compliance period has expired, and (b) the person is issued with an interlock driver licence by the RTA.
s 25G	Participation in an interlock program	A person commences to participate in an interlock program on the date on which the person is issued with an interlock driver licence. (The interlock participation period also commences on that date.)
s 25A	Meaning of <i>interlock driver</i>	Conditional licence issued under the <i>Road</i>

⁴⁹

Mr Bryce Gaudry MP, Road Transport Legislation Amendment (Interlock Devices) Bill, Second Reading Speech, *NSWPD*, 28 June 2002, p 4165.

	<i>licence</i>	<i>Transport (Driver Licensing) Act 1998</i> that restricts the holder of the licence to driving a motor vehicle fitted with an approved interlock device.
s 25A	Meaning of <i>interlock participation period</i>	The period during which the person must participate in an interlock program for the purposes of a disqualification suspension order.
s 25B	Habitual traffic offenders not eligible	The interlock program is not available to a person convicted of an alcohol-related major offence who is declared to be an habitual traffic offender by operation of s 28.
s 25G	Early cessation of participation	A person ceases to participate in an interlock program: (a) if convicted of a major offence during the interlock participation period (and the court does not order that the disqualification suspension order continue despite the conviction); or (b) if the person ceases to hold an interlock driver licence (whether by reason of cancellation or otherwise).
s 25H	Effect of successful participation in interlock program	The disqualification suspension order ceases to have effect on the expiry of the interlock participation period. The original licence disqualification is taken to expire at the end of the interlock participation period.

4.3 South Australia

South Australia was the first jurisdiction in Australia to establish an alcohol interlock scheme for persons convicted of drink driving.⁵⁰

(i) Legislation

The *Road Traffic (Alcohol Interlock Scheme) Amendment Act 2000* (SA) inserted ‘Division 5A – Alcohol interlock scheme’ into Part 3 of the *Road Traffic Act 1961*. The scheme applies to licence disqualifications by a court for drink driving offences on or after 16 July 2001.

(ii) Eligibility

The alcohol interlock scheme is available to drivers who:

- are convicted of a relevant drink driving offence (see below);
- are disqualified from holding or obtaining a driver’s licence for 6 months or more; and
- have reached the halfway point in the period of their disqualification: ss 49&50 of the *Road Traffic Act 1961*.

⁵⁰ Sources of South Australian material include: the interlock legislation; the website of Transport SA at <http://www.transport.sa.gov.au/licences_certification/drivers/al_interlock_scheme.asp> and the website of Guardian Interlock Systems at <<http://www.guardianinterlock.com.au>>

At any time after the halfway point in the disqualification, the driver may apply to the Registrar of Motor Vehicles for an alcohol interlock licence.

‘Relevant offence’ is defined by s 49(2) of the *Road Traffic Act 1961* as:

- driving under the influence of liquor or drugs – s 47(1);
- driving while having the prescribed concentration of alcohol in the blood (usually 0.05) – s 47B(1);
- refusing to submit to an alcotest or breath analysis (where a police officer believes on reasonable grounds that the driver has committed an offence, or has behaved in a manner that indicates his or her ability is impaired, or the driver has been involved in an accident) – s 47E(3).
- refusing to submit to the taking of a blood sample (in the same circumstances as refusing to submit to an alcotest or breath analysis) – s 47I(14).

Drivers are not eligible for the scheme in certain situations including if they:

- committed an offence while holding only a learner’s permit;
- have been disqualified, other than for the current drink driving offence, and the disqualification remains in force at the date of their application for the interlock scheme;
- are assessed by the Drug and Alcohol Services Council as being dependent on alcohol or drugs.

(iii) Participation period

The length of time a participant’s licence is subjected to the conditions of the alcohol interlock scheme is twice the number of days remaining in the period of disqualification for the relevant drink driving offence prior to issuing the interlock licence: s 50(4). For example, if a driver is disqualified for 12 months and enters the alcohol interlock scheme after serving 6 months of the disqualification period, the licence issued will be subject to the scheme conditions for 12 months.

(iv) Procedure

In summary, the procedural steps are:

- the driver submits an application;
- the Registrar of Motor Vehicles checks the driver’s eligibility for the scheme and the low-income subsidy;
- the driver is issued with a temporary licence, subject to other scheme conditions;
- the driver attends an ‘entry’ counselling session with the Drug and Alcohol Services Council;
- the driver consults with an approved interlock installer;
- if the nominated vehicle is suitable, the installer fits the interlock device, advises the Registrar, and trains the driver in the use of the interlock;
- the Registrar sends the photo interlock licence to the driver, once the entry counselling session is completed and the interlock has been installed;
- the driver uses the nominated vehicle in accordance with the interlock scheme and

- conditions – set out at s 51 of the *Road Traffic Act 1961*;
- the installer periodically downloads data, inspects the interlock and vehicle, and forwards summary reports to the driver and Registrar;
 - the driver attends required servicing appointments;
 - when the interlock period is completed, the driver attends an ‘exit’ counselling session;
 - the installer removes the interlock and advises the Registrar.

(v) Alcohol and drug assessment

A person who has been convicted of two or more drink driving offences within a three year period is required to undertake an alcohol and drug assessment by the Driver Assessment Clinic at the Drug and Alcohol Services Council (DASC), before applying to participate in the interlock scheme. If the person is assessed as being dependent on alcohol and/or drugs, they cannot be issued with an interlock licence.

(vi) Counselling sessions

Participants must attend a minimum of two counselling sessions with the DASC, at the stages of entering and exiting the scheme. The sessions are intended to assist participants in correcting their drinking and driving behaviour.

(vii) Vehicles and drivers

The ‘nominated vehicle’ is the vehicle which has an interlock device fitted and is the only vehicle that the participant is permitted to drive under the conditions of the alcohol interlock licence. The interlock can be fitted to most vehicles. The approved installer inspects the nominated vehicle to ensure that it is capable of supporting the interlock before installing it.

A person may nominate more than one vehicle, for example, a private vehicle and a company vehicle, but an alcohol interlock device must be fitted to each vehicle, the details of each vehicle must be supplied to the Registrar, and the driver must pay all costs associated with the interlocks.

Other drivers, such as a spouse, may drive the nominated vehicle(s), but they must comply with the scheme’s conditions, including undertaking breath samples when prompted by the device.

(viii) Role of approved installers

The approved interlock installers provide personal training to drivers in using the interlock and dealing with difficult situations such as being locked out by the system. The approved installer monitors the device at regular intervals. At each service, the device is inspected, wiring is checked to ensure that no tampering has occurred, and the recorded information is downloaded.

(ix) Costs

The driver is charged fees for: the issue of the alcohol interlock licence; ongoing monthly administration; installation, rental, servicing and removal of the interlock; and the two counselling sessions. Additional fees are charged by the installer for incidents such as misuse of the equipment, failure to attend service appointments, and lockouts. Applicants should consult with approved installers of interlocks to compare their charges and services. Charges also vary depending on the type of car having the device fitted and the length of the licence period.

A subsidy was established for low-income participants in the scheme. Under the subsidy, low income earners may be eligible for a reduced fee on the monthly rental and servicing of the interlock device, as well as a reduced monthly administration fee.

4.4 Victoria

(i) Legislation

The Victorian scheme was introduced by the *Road Safety (Alcohol Interlocks) Act 2002*, and applies to certain drink drivers whose offences occurred on or after 13 May 2002.⁵¹ The relevant provisions were inserted at ss 50AAA-50AAJ of the *Road Safety Act 1986*.

(ii) Eligibility

Alcohol interlocks are available to repeat drink drivers and some serious first time offenders:

Category of offender	Duration of interlock condition on licence
First time offenders who have committed: <ul style="list-style-type: none"> • one offence where the blood alcohol concentration (BAC) was at least 0.15; or • one offence which is a non-BAC offence, including driving under the influence of alcohol (DUI); refusing to provide a breath or blood sample; and refusing to stop at a random breath test station. 	The court may impose an interlock condition on the licence for at least 6 months: s 50AAB(2).
A driver has committed only one drink driving offence, and their BAC reading was less than 0.15.	The driver will <u>not</u> need to have an interlock.
Repeat offenders who have committed: <ul style="list-style-type: none"> • three or more drink driving offences; or • two drink driving offences where the most recent offence was a BAC of at least 0.15, or a non-BAC offence. 	The driver will be required to have an interlock condition on their licence for at least 3 years from when they apply to get their licence back: s 50AAB(3).
If the driver has committed two offences and their most recent offence was a BAC of less than	When the driver applies to get their licence back they will be required to have an interlock

⁵¹ *Government Gazette*, No G18, 2 May 2002, p 789. Information on Victoria was also obtained from the VicRoads website at <www.vicroads.vic.gov.au> eg. 'Getting tougher on drink drivers', pamphlet issued by VicRoads as part of the Arrive Alive! campaign.

0.15 or a non-BAC offence.	condition on the licence for at least 6 months.
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(iii) Procedural requirements

Offenders must:

- complete the period of disqualification;
- obtain a licence restoration order from the court;
- visit VicRoads to obtain a licence with an interlock condition;
- only drive a vehicle fitted with an interlock.

(iv) Removal of interlock condition from licence

Existing requirements for drink drivers such as clinical assessments and education courses still apply before the interlock condition can be removed from the licence. Furthermore, the driver must obtain an interlock condition removal order (ICRO) from the court.

5. DRUG DRIVING

All jurisdictions in Australia have laws that make it an offence to drive when under the influence of drugs, usually as part of a provision that covers both alcohol and drugs, rather than a provision focusing solely on drugs.⁵² In addition, every jurisdiction has the legislative capacity to test drivers for illicit drugs, although the scope and circumstances of the provisions vary.

A more radical concept is to introduce random drug testing of motorists, on a similar basis to the operation of random breath testing for alcohol. Some workplaces already authorise the random drug testing of employees. For example, railway employees whose work involves the operation or movement of trains or maintenance of the railway infrastructure can be randomly tested: *Rail Safety Act 2002* (Schedule 1) and the *Rail Safety (Drug and Alcohol Testing) Regulation 2003*. Police and correctional officers are among the other occupations that may be subjected to drug testing on a random or targeted basis.

5.1 Current laws on drug driving and related testing in NSW

(i) Drug driving

The laws that create offences of driving under the influence of drugs in New South Wales are largely the same as those that apply to alcohol:

- ***Driving under the influence of alcohol or other drug*** – s 12(1) of the *Road Transport (Safety and Traffic Management) Act 1999*. The maximum penalties for driving the vehicle, or occupying the driver's seat and attempting to put the vehicle in motion are: for a first offence, a fine of 20 penalty units (\$2200) and/or 9 months imprisonment; for a second or subsequent offence, a fine of 30 penalty units (\$3300) and/or 12 months imprisonment. A maximum fine of 20 penalty units (\$2200) applies to being under the influence of a drug or alcohol, if the person is the holder of a driver's licence (not provisional or learner) and is occupying the seat next to a learner licence holder who is driving the vehicle.
- ***Dangerous driving occasioning death*** – s 52A(1) of the *Crimes Act 1900*, where the driver was, at the time of the impact, driving the vehicle under the influence of a drug or intoxicating liquor. The maximum penalty is imprisonment for 10 years.
- ***Aggravated dangerous driving occasioning death*** – s 52A(2)&(7) of the *Crimes Act 1900*, in circumstances including where the accused's ability to drive was very substantially impaired by the fact that the accused was under the influence of a drug (other than intoxicating liquor) or a combination of drugs. The maximum penalty is 14 years imprisonment.

⁵² Victoria does have a specific offence of driving or being in charge of a motor vehicle while impaired by a drug: s 49(1)(ba) of the *Road Safety Act 1986* (Vic).

- ***Dangerous driving occasioning grievous bodily harm*** – s 52A(3) of the *Crimes Act 1900*, where the driver was, at the time of the impact, driving the vehicle under the influence of a drug or intoxicating liquor. The maximum penalty is 7 years imprisonment.
- ***Aggravated dangerous driving occasioning grievous bodily harm*** – s 52A(4)&(7) of the *Crimes Act 1900*, with the same aggravating circumstances as for occasioning death. The maximum penalty is 11 years imprisonment.

(ii) Drug testing of drivers

The power to conduct random breath testing, pursuant to s 13 of the *Road Transport (Safety and Traffic Management) Act 1999*, does not apply to drug testing because the definition of ‘breath testing’ refers only to the blood concentration of alcohol. As at December 2004, there was no statutory provision for the random drug testing of motorists on public roads.

A sobriety assessment may be undertaken if a police officer forms a reasonable belief that, by the way in which the person is driving or attempting to drive a motor vehicle, the person may be under the influence of a drug: s 25 of the *Road Transport (Safety and Traffic Management) Act 1999*. If the police officer’s belief is confirmed by the sobriety assessment, or the driver refuses to submit to an assessment, the police may arrest the person and require him or her to provide samples of blood and urine: ss 26, 27.

The taking of blood samples in a hospital after a road accident is authorised by s 20. A medical practitioner has a duty to take a sample of an accident patient’s blood for analysis, whether or not the patient consents. An ‘accident patient’ means a person at least 15 years of age who attends or is admitted to hospital for examination or treatment as a consequence of a road accident involving a vehicle.

Therefore, under current laws, there is no statutory requirement for a blood sample to be taken to test for the presence of drugs in the blood of drivers involved in a crash, unless the driver attends a hospital, or the police have reasonable grounds to suspect the driver is under the influence of drugs.

Support for making blood tests compulsory for all drivers involved in fatal accidents intensified in 2004 with the death of Barbara Cheadle and her two grand-daughters in March. Mrs Cheadle’s sedan was hit by a semi-trailer on the Pacific Highway near Bulahdelah. The truck driver was charged with negligent driving occasioning death but his blood was not tested for the presence of drugs. Mrs Cheadle’s son and daughter-in-law campaigned for the law to be changed. In November 2004 it was reported that the Minister for Roads, Hon Carl Scully MP, had agreed that the legislation should be amended. A bill is expected to be introduced in Parliament early in 2005.⁵³

5.2 Extent of drug driving in the community

⁵³ Frances O’Shea, ‘They Didn’t Die in Vain’, *The Daily Telegraph*, 23 November 2004, p 3.

(i) Recent studies on drug driving

Several recent studies suggest that drug driving is not a common, widespread practice but tends to be committed by certain sub-groups of the population.

Australian Institute of Health and Welfare (2001) – National Drug Strategy Household Survey

The National Drug Strategy Household Survey was conducted between July and October 2001. Almost 27,000 Australians aged 14 years and over participated in the survey. They were asked about their knowledge and attitudes towards drugs, their drug consumption histories, and related behaviour.⁵⁴

Survey respondents were asked how many times in the past 12 months they had undertaken potentially harmful activities while under the influence of alcohol or other drugs. 3.9% of respondents said they had driven a motor vehicle while under the influence of drugs other than alcohol. This was the highest rated response among the activities surveyed (eg. operating hazardous machinery; causing damage to property; or creating a public disturbance).⁵⁵ The percentage of respondents who admitted to driving under the influence of drugs, like those who drove under the influence of alcohol, was less than in the 1998 survey:

Percentage of respondents who drove under the influence of alcohol or drugs in the previous 12 months⁵⁶

Conduct	Males 1998	Males 2001	Females 1998	Females 2001	Persons 1998	Persons 2001
Drove motor vehicle under influence of alcohol	23.8	18.0	11.4	7.7	17.5	12.8
Drove motor vehicle under influence of other drugs	8.3	5.7	4.0	2.2	6.1	3.9

Case study of Central Coast (2001) – Cannabis use and driver deaths

Douglas Tutt and others studied the coronial records held at Gosford Court for all motor vehicle ‘controllers’ (drivers and riders) under 45 years of age who were killed in the Gosford and Wyong local government areas between 1 January 1996 and 31 December 1999.⁵⁷ The total number of fatalities was 24, comprising 16 car drivers and 8 motorcycle riders. 22 of the fatalities were male and 2 were female.

⁵⁴ Australian Institute of Health and Welfare, *2001 National Drug Strategy Household Survey, Drug Statistics Series No. 9*, May 2002, Canberra.

⁵⁵ Ibid, p 38.

⁵⁶ Ibid, adapted from Table 5.1 on p 37.

⁵⁷ Douglas Tutt, Lyndon Bauer, John Arms, Chandima Perera, ‘Cannabis and Road Death: An Emerging Injury Prevention Concern’, *Health Promotion Journal of Australia*, Volume 12, Number 2, August 2001.

Two thirds of controllers (16 out of 24) tested positive for drugs, alcohol or both. 10 tested positive for delta-9-tetrahydrocannabinol ('free THC'), the active ingredient in cannabis. Its presence in post-mortem blood indicates that cannabis was used no more than a few hours before death. Both of the female driver fatalities were over the limit for alcohol (0.05) and one tested positive for free THC. The study found that drugs were as significant a problem as alcohol, with the same number of positive results for free THC and alcohol (10 each). The authors concluded that: 'The results suggest that drugs other than alcohol play a major part in road deaths. The apparent increase in prevalence of cannabis use in the community in recent years, especially among young males, is thus of increasing concern.'

NSW Bureau of Crime Statistics and Research (2003) – Driving under the influence of cannabis

To explore whether driving under the influence of cannabis is pronounced in geographical locations which are reputed to have high rates of cannabis use, the study examined the north coast of New South Wales.⁵⁸ A telephone survey was conducted among 502 young people aged 18 to 29 years in the Lismore Local Government Area in December 2001. This area includes the town of Nimbin, which is renowned for its cannabis law reform campaigning. Interviewees were asked to report the frequency of driving within an hour of using cannabis.

58.4% of the sample reported that they had used cannabis at least once in their lifetime and 25.9% indicated that they had used cannabis at least once in the last 12 months. Overall, 11.2% of the sample reported having driven within an hour of consuming cannabis at least once in their lifetime and 7.4% had done so in the previous 12 months. Males were more likely than females to engage in this conduct. Of those who reported driving under the influence of cannabis in the previous 12 months, 37.8% had done so weekly or more frequently.

The results were consistent with other international and Australian studies in finding that driving under the influence of cannabis is quite low among the population as a whole but relatively high among those who regularly use cannabis. The authors concluded:

Although the results of the present study do not suggest that driving under the influence of cannabis is widespread, even in a geographical location with very high rates of cannabis use, they do support previous research in showing that heavy cannabis users regularly drive while intoxicated by cannabis...The present findings also suggest that the prevalence of DUIC is sufficiently widespread among certain populations to encourage continued research into the causal relationship between cannabis use and road accidents.

National Drug and Alcohol Research Centre (2004) – Review of drug use and driving

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Craig Jones, Karen Freeman and Don Weatherburn, 'Driving under the influence of cannabis in a New South Wales rural area', *Crime and Justice Bulletin*, Number 75, May 2003, NSW Bureau of Crime Statistics and Research.

Academics and researchers from the National Drug and Alcohol Research Centre at the University of New South Wales reviewed existing literature on the subject of drug driving and made the following observations:⁵⁹

- ***Cannabis***: At present, cannabis is generally the most commonly detected drug in drivers involved in motor vehicle accidents. The authors state that there is evidence from laboratory, simulator and driving studies that the principal psychoactive component of cannabis, delta-9-tetrahydrocannabinol (THC) significantly impairs driving performance.
- ***Benzodiazepines*** (eg. Rohypnol, Valium, Mogadon, Serepax): Laboratory studies have generally found that benzodiazepines decrease performance in visual and speed perception, information processing, coordination, reaction time, memory and attention.
- ***Opioids*** (eg. heroin): Experiments involving both opioid-dependent and non-dependent patients have generally shown evidence of mood effects after administration of opioids, including mental clouding, calmness and drowsiness. However, there is inconsistent evidence as to whether opioids produce psychomotor impairment, which can depend on the type of opioid administered, the route of administration, tolerance, and so on.
- ***Stimulants*** (eg. speed, ecstasy, cocaine): There are inconclusive results regarding stimulants and driving impairment. Low doses of amphetamines produce few deleterious effects on cognitive functioning, while there is some evidence of impairment of attention, perception and memory after taking MDMA (ecstasy). Cocaine studies have produced inconsistent results.
- ***Alcohol and drugs***: Impairment of driving has been shown to increase when alcohol is combined with other drugs.
- ***High risk drivers***: Driving soon after using drugs is more prevalent among illicit drug users. Drug driving is also a common behaviour in other groups associated with substance abuse such as dance party attendees and university students. Age is one of the risk factors associated with drug driving, as is gender. Studies have found males to be over-represented among illicit drug users and more likely to engage in risk-taking driving behaviour. However, there is some evidence that drug driving among females has increased in recent years. For example, studies have found female drivers more likely to test positive for benzodiazepines.
- ***Risk perception***: ‘The general perception that one is unlikely to be caught for drug driving undoubtedly contributes to the problem. Another contributing factor is the perception of illicit drug users that drugs do not significantly impair driving performance.’⁶⁰

The authors conclude that, ‘As drug driving is not common in the general population of drivers, it would seem appropriate to focus research, and ultimately interventions, on high-risk populations such as illicit drug users. Particular areas in need of further research

⁵⁹ Erin Kelly, Shane Darke and Joanne Ross (National Drug and Alcohol Research Centre, University of New South Wales) ‘A review of drug use and driving: epidemiology, impairment, risk factors and risk perceptions’, *Drug and Alcohol Review*, Volume 23, Number 3, September 2004, p 319.

⁶⁰ *Ibid*, p 338.

include clarification of drug-induced driving impairment and risk perceptions related to drug driving.⁶¹

Australian Associated Motor Insurers Ltd (2004) – Young Drivers Index

AAMI produces a yearly report on issues relating to young drivers, aged 18-24 years.⁶² The data is based on the analysis of car accident insurance claims lodged by policyholders across Australia (except for Western Australia and the Northern Territory, where AAMI does not operate) and telephone interviews conducted in the same jurisdictions with 1880 licensed drivers of all ages.

The main findings on drug driving in the *Young Drivers Index 2004* were:⁶³

- 25% of young male drivers admit to having driven after taking recreational drugs, three times more than young female drivers (8%).
- Twice as many young drivers as older drivers believe that driving after taking recreational drugs is safer than driving after drinking (16% compared with 7%).
- Support for random drug testing was generally high among all age groups. 85% of young drivers expressed support, compared to 90% overall.
- Driving under the influence of drugs (not age specific) was most prevalent in South Australia (15%) and Queensland (14%), and least prevalent in Tasmania (7%).
- Drivers who admit to driving after using recreational drugs are more likely to exhibit other careless driving behaviour, such as driving over the blood alcohol limit (71% compared to 33% of other drivers), driving after taking medicinal drugs that may affect driving (48% compared to 22%), using a hand held mobile phone while driving (69% compared to 48%), or running a red light if no other cars are coming (58% compared to 32%).

(ii) Drug use by truck drivers

It is widely acknowledged that drug driving is a problem in the trucking industry. Stimulant drugs are taken in an effort to keep awake for long distances and to comply with demanding schedules. Therefore, truck drivers are one of the sub-groups of the population with a heightened risk of drug driving, and the same may apply to long-distance drivers of passenger transport vehicles.

The issue of drug use by drivers of long-distance freight and passenger vehicles gained prominence in 1989 when two of the worst road accidents in New South Wales history occurred. On 20 October 1989, at around 4.00 am, a semi-trailer collided with a passenger coach on the Pacific Highway north of Grafton, killing 19 of the passengers. The truck driver, who also died, had 80 times the 'normal therapeutic level' of the drug ephedrine in

⁶¹ Ibid, p 338.

⁶² AAMI, *Young Drivers Index*, November 2004. Accessed from the AAMI website at <www.aami.com.au>

⁶³ Ibid, pp 2-3.

his blood. Only two months later, at 3.30 am on 22 December 1989, 35 people were killed when two coaches collided on the Pacific Highway near Kempsey. Forensic analysis showed that the driver of the McCafferty's coach had taken a moderate amount of ephedrine shortly before the crash, suggesting that he had been feeling tired. The State Coroner, Kevin Waller, concluded that the driver had fallen asleep at the wheel. One of the Coroner's recommendations was that ephedrine be added to the list of drugs banned under the *Motor Traffic Act* (as it then was).⁶⁴ Ephedrine (including pseudoephedrine) currently appears in the list of substances prescribed as drugs, under reg 127 and Schedule 4 of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999*.

A recent case in the Industrial Relations Commission focused attention on fatigue and drug use in the long-haul trucking industry and the importance of employers encouraging a safe workplace for truck drivers: *Inspector Campbell v James Gordon Hitchcock* [2004] NSWIRComm 87 (21 October 2004). The case concerned the death of Darri Haynes, whose semi-trailer collided with another semi on the Pacific Highway at Tyndale in September 1999. It was established that Mr Haynes took methamphetamine (speed) to combat fatigue, and expert evidence was given that this practice is widespread in the long-haul trucking industry in Australia. However, Justice Walton accepted that drivers commencing employment with the defendant's road freight transport company were advised that drug-taking or the use of stimulants was against company policy. Nevertheless, Justice Walton found the company guilty of workplace health and safety breaches: '...the Company's failures to ensure that its drivers (including Mr Haynes) took sufficient rest-stops; to record and audit driving hours properly; to provide a safe system of work; and to take fatigue into account when preparing driving rosters caused the risk to Mr Haynes's health and safety of driving when fatigued...'⁶⁵

On numerous occasions in 2004, the Minister for Roads, Hon Carl Scully MP, has expressed concern about drug and safety issues affecting heavy vehicle drivers, and referred to further strategies that are being investigated:

The use of drugs and alcohol, fatigue and excessive speed are all reasons why heavy vehicles, in particular, on the Pacific Highway, are figuring far too often in traffic accidents....At the moment Victoria is conducting a trial to establish how many drivers are taking drugs. This Government is monitoring that trial. I have been told by the Transport Workers Union that it believes, anecdotally, that a lot of drivers are taking drugs to stay awake. When they come off those drugs their effects can have catastrophic consequences because of fatigue and the onset of sleep. This Government is doing a lot of things to combat fatigue, the use of drugs and tampering with speed limiters and logbooks. For example, I have established a logbook task force...A lot of people have said to me that speeding, the use of drugs, tampering with logbooks and speed limiters are the things that we should worry about.⁶⁶

⁶⁴ Derrick Hand and Janet Fife-Yeomans, *The Coroner*, ABC Books, 2004, pp 60-63. Derrick Hand was the Deputy State Coroner at the time of the bus tragedies.

⁶⁵ Paragraph 291 of the judgment.

⁶⁶ General Purpose Standing Committee No. 4, *Examination of proposed expenditure for the portfolio areas Roads and Housing*, 15 September 2004, p 21.

5.3 Different methods of testing drivers for drugs

A range of potential drug tests are briefly considered here, with comments on their suitability for detecting the use of illicit drugs by motor vehicle drivers.

(i) Behavioural tests

Behavioural tests can be useful for roadside or preliminary assessment, especially where legislation requires a police officer to form a reasonable belief that a person is under the influence of drugs before authorising the testing of a bodily sample. The United States Federal Department of Transport endorsed standard Field Sobriety Tests, including assessing the driver's ability to stand on one leg, and whether their eye involuntarily jumps when following a moving object from left to right ('horizontal gaze nystagmus'). These methods have been influential in various jurisdictions including Victoria, where the police developed a two stage process of Roadside Impairment Assessment, and Standard Impairment Assessment in a police station or other controlled environment.⁶⁷ The Los Angeles Police Department, recognising the importance of adopting a systematic approach to assessment and interpretation, developed a Drug Recognition Expert program, which involves the training and certification of police officers in drug recognition.⁶⁸ This has also influenced police training in other jurisdictions.

(ii) Breath testing

Breath testing is an effective method for detecting alcohol because alcohol vaporises and its level in the breath gives a reliable estimate of blood alcohol concentration. But breath tests are much less effective in measuring other drugs.⁶⁹ Nevertheless, when a breath test produces a negative result for alcohol, and the driver is obviously impaired, this may give a preliminary indication that another drug is involved. Therefore, to an extent, a breath test can fulfil the role of a drug screening exercise.⁷⁰

(iii) Saliva testing

⁶⁷ Australasian Centre for Policing Research, *Kerbside testing for drugs other than alcohol*, Discussion paper (for the Commissioners' Drugs Committee of the Conference of Police Commissioners of Australasia and the South West Pacific Region), January 2001, p 7.

⁶⁸ B A Murphy, *Drug driving – assessment of past and current technical developments and consequent legislative accommodation of roadside, and subsequent, drug driving detection*, Interim Report, Report Series No.56, Australasian Centre for Policing Research, 1988, p 11.

⁶⁹ Parliament of Victoria, Road Safety Committee, Inquiry into the Effects of Drugs (Other than Alcohol) on Road Safety in Victoria, *Final Report*, Volume 1, 1996, p 15.

⁷⁰ B A Murphy, *Drug driving – assessment of past and current technical developments and consequent legislative accommodation of roadside, and subsequent, drug driving detection*, Interim Report, Report Series No.56, Australasian Centre for Policing Research, 1988, p 9.

Some of the advantages of a saliva test are that it is relatively simple to administer in a roadside context, the substance is readily available, and it enables a good correlation with blood concentration and therefore with driving impairment.⁷¹ Obtaining saliva samples by using a swab on the inside of the mouth is also less invasive and less expensive than collecting urine or blood samples.⁷² However, a report on drug-impaired driving produced for the U.S. National Highway Traffic Safety Administration in 2003 noted that cannabinoids appear to be especially difficult to detect in oral fluids, as very little drug is excreted into the saliva.⁷³ A laboratory test is valuable to confirm an initial positive result in a saliva test.

Recently, Dr Kyle Dyer, a senior research fellow from the School of Medicine and Pharmacology at the University of Western Australia, remarked on the greater capacity of saliva to show recent drug use, compared to urine: 'Saliva gives you a very short window of detection...If you are a regular cannabis smoker your urine can be positive for a month or longer. With saliva, it will only pick up the parent drug itself, which has a two-to-four hour window period after use. A positive [saliva test] means you are under the influence of this drug; a urine test says you have used the drug.' Dr Dyer noted that methamphetamine can be detected in a saliva test up to 24 hours after ingestion, although heavy users may still have traces in their saliva up to 48 hours later.⁷⁴

Saliva testing is the preferred option among the States in Australia that have so far announced their intention to introduce, or to consider, roadside drug testing: Victoria, New South Wales, South Australia, Tasmania, and Western Australia.

(iv) Sweat testing

An obvious advantage with obtaining a sweat sample is that it is non-invasive, requiring even less co-operation than a person opening their mouth for a saliva sample. There may be problems with the 'low concentrations of drugs/analytes detectable in sweat, producing a high variability in detection capability across individuals.'⁷⁵ But experts from the Institute for Research in Safety and Transport in Western Australia have asserted that '...the drug concentrations in sweat and saliva have a much better correlation with blood drug

⁷¹ Sandra Buxton, Laurence Hartley and Max Sully, *Testing drivers for drugs: a review of methods and results*, Institute for Research in Safety & Transport, Murdoch University, 2001, p 45.

⁷² Parliament of Victoria, Road Safety Committee, Inquiry into the Effects of Drugs (Other than Alcohol) on Road Safety in Victoria, *Final Report*, Volume 1, 1996, p 8.

⁷³ R K Jones, D Shinar and J M Walsh, *State of Knowledge of Drug-Impaired Driving: Final Report*, United States Department of Transportation, National Highway Traffic Safety Administration, 2003, Chapter 3.

⁷⁴ Ruth Pollard, 'Teething troubles cloud roadside drugs tests', *The Sydney Morning Herald* online, 16 December 2004, 9:32am.

⁷⁵ R K Jones, D Shinar and J M Walsh, *State of Knowledge of Drug-Impaired Driving: Final Report*, United States Department of Transportation, National Highway Traffic Safety Administration, 2003, Chapter 3.

concentration than does urinary concentration.⁷⁶

A common type of sweat and saliva testing device is called 'Drugwipe'.⁷⁷ It consists of a test strip mounted in an applicator and can detect the presence of cocaine, opiates, amphetamines, and cannabis, showing a result after only a few minutes. Usually it is tested on the forehead or back of the neck, and can also be placed on the tongue to gather saliva. Drugwipe is used in countries such as Germany by customs officials and traffic police. The product has been reviewed by numerous studies and, while convenient to apply, has shown some weaknesses:

The device is quick to use with the appearance of a colour indicating a positive result. An important advantage was that the Drugwipe device does not need the collection of any saliva as the device can be simply wiped over the tongue to test the saliva. The disadvantages include that...only one drug type can be tested with each wipe, there is no control line available to indicate if a test is a valid test, and interpreting the result requires training and experience...The saliva test was considered unreliable for detecting cannabis. The analytical conclusions for Drugwipe when testing sweat was that it obtained similar good results for cocaine and amphetamines as saliva, but the results for the opiates were somewhat contradictory.⁷⁸

(v) *Urine and blood testing*

Sandra Buxton and Laurence Hartley from the Institute for Research in Safety and Transport at Murdoch University, Western Australia, stated in 2001 that urine tests 'by and large test for the metabolic break down products of the drug; they are thus even further removed from the drug's site of action and the results are mainly a historical record of what drugs have been taken in the past. Positive urine tests are no guarantee that the driver is presently impaired by the drug or even has much of the active drug in their blood.'⁷⁹

The Final Report of the *State of Knowledge of Drug-Impaired Driving* project, for the U.S. National Highway Traffic Safety Administration, concurred in 2003: 'Drugs and drug metabolites are detectable in urine for several days after the drug has been used...Therefore, while a positive urine test is solid proof of drug use within the last few

⁷⁶ Laurence Hartley and Sandra Buxton, *Testing drivers for drugs: yes, but not yet*, Institute for Research in Safety & Transport, Murdoch University, Paper for the 2001 Conference on Road Safety, 'Road Safety: Gearing up for the Future', 31 August 2001, Perth, p 4.

⁷⁷ Information was obtained from the website of Wilden, one of the companies involved in the production of the device, at <www.wilden.de>

⁷⁸ Sandra Buxton, Laurence Hartley and Max Sully, *Testing drivers for drugs: a review of methods and results*, Institute for Research in Safety & Transport, Murdoch University, 2001, p 51, citing a study by N Samyn et al, *Inventory of state-of-the-art road side drug testing equipment*, 1999, ROSITA (Roadside Testing and Assessment) project.

⁷⁹ Laurence Hartley and Sandra Buxton, *Testing drivers for drugs: yes, but not yet*, Institute for Research in Safety & Transport, Murdoch University, Paper for the 2001 Conference on Road Safety, 'Road Safety: Gearing up for the Future', 31 August 2001, Perth, p 4.

days, it cannot be used by itself to prove behavioral impairment during a focal event....⁸⁰

Urine samples may therefore be used for screening purposes to identify the drug or drugs that need to be analysed in a blood sample. The majority of experts seem to agree that, 'In terms of attempting to link drug concentrations to behavioral impairment, blood is probably the specimen of choice.'⁸¹ Most Australian jurisdictions require a blood sample to be provided for laboratory testing to substantiate suspected drug impairment, or when people are examined at hospital after a motor vehicle accident.

(vi) Hair sampling

Hair samples indicate in their molecular cell growth whether drugs have been consumed. The hair samples are measured to detect when the drugs were taken and assumptions can be made as to whether they are still present in a person's system.⁸² However, hair analysis is not suitable for the detection of very recent use, as hair grows at a slow rate.⁸³ The Australasian Centre for Policing Research concluded in 2001: 'Given the length of time that such analysis takes, it is unlikely that this approach has much to contribute to kerbside testing in the short term.'⁸⁴

5.4 Problems and challenges of roadside drug testing

The topic of roadside drug testing raises a number of controversial issues about the standards to adopt and the problems that can arise. Some of these are:⁸⁵

- ***Efficient devices*** – It is important to choose a testing device that is convenient to administer in a roadside context, and is as accurate as possible.
- ***Costs and resources*** – Drug testing can be expensive and time-consuming. Some on-

⁸⁰ R K Jones, D Shinar and J M Walsh, *State of Knowledge of Drug-Impaired Driving: Final Report*, United States Department of Transportation, National Highway Traffic Safety Administration, 2003, Chapter 3.

⁸¹ *Ibid*, Chapter 3.

⁸² Parliament of Victoria, Road Safety Committee, Inquiry into the Effects of Drugs (Other than Alcohol) on Road Safety in Victoria, *Final Report*, 1996, Volume 1, p 9.

⁸³ R K Jones, D Shinar and J M Walsh, *State of Knowledge of Drug-Impaired Driving: Final Report*, United States Department of Transportation, National Highway Traffic Safety Administration, 2003, Chapter 3.

⁸⁴ Australasian Centre for Policing Research, *Kerbside testing for drugs other than alcohol*, Discussion paper (for the Commissioners' Drugs Committee of the Conference of Police Commissioners of Australasia and the South West Pacific Region), January 2001, p 6.

⁸⁵ Several of the arguments outlined were drawn from: House of Lords, All Party Parliamentary Drug Misuse Group, *Drug Testing on Trial*, July 2003; and Australasian Centre for Policing Research, *Kerbside testing for drugs other than alcohol*, Discussion paper (for the Commissioners' Drugs Committee of the Conference of Police Commissioners of Australasia and the South West Pacific Region), January 2001.

site testing devices are relatively quick and inexpensive, but they may only be suitable for screening purposes and a positive result usually needs to be confirmed by a more reliable laboratory test.

- ***Drugs detected*** – The authorities may seek to identify a wide range of drugs used by drivers, or only some prohibited drugs that are perceived to be a problem. This may influence the testing devices and methods chosen. It is also important that prohibited drugs are isolated from other substances, and that medications do not prompt incorrect readings.
- ***Driver impairment*** – Some drugs, depending on the dosage, may actually improve driving. Prescription drugs can obviously help people with medical conditions to function. Even prohibited drugs like amphetamines can increase energy levels and alertness, but they can also encourage risk-taking behaviour. Similarly, not all people will be equally impaired by the same dose of a drug. Factors affecting impairment include a person's drug history, their level of tolerance or sensitivity, the dosage of drug, the interval between ingesting the drug and being tested, the combination of drugs in their system, and so on. Furthermore, even if drugs are detected in a person's system, the source of any driving impairment might be something else, such as fatigue, illness or lack of skill. However, these same variables apply to alcohol consumption and are disregarded by drink driving laws. Random breath testing has steadily gained popular acceptance and support in New South Wales. A driver who exceeds the blood alcohol limit commits an offence, irrespective of whether their driving ability was personally hampered.
- ***A 'zero tolerance' approach?*** – Zero tolerance would penalise driving with any amount of a prohibited drug (or certain prohibited drugs) present in the system. A justification of this approach is that it reflects the illegal status of the drugs. A criticism of this approach is that drugs may still be detected that were not consumed recently and had no impact on driving performance. This argument is often raised in relation to cannabis, which can be detected in a person's system for days or even weeks after it was taken. It could also be argued that the cannabis cautioning scheme in New South Wales, which enables offenders to be cautioned on two occasions for possessing a small amount of cannabis for personal use, should apply to drivers who test positive to cannabis.
- ***Supporting evidence*** – Where legislation creates an offence of driving under the influence of a drug so as to be incapable of having proper control of the vehicle, or driving while impaired by a drug, it may be easier to establish the offence if alcohol is eliminated as a factor and/or there is other evidence of affected driving performance. A positive drug test result may therefore need to be supported by evidence of the person's conduct, such as failing a behavioural test administered by the police. If evidence of drug concentration is necessary to substantiate the offence, quantitative tests will be required to determine the levels of the drugs present in the driver's body.

5.5 Drug driving proposals in NSW

In 1991 the New South Wales Parliament's Joint Standing Committee on Road Safety,

known as the STAYSAFE Committee, held an inquiry into the role of alcohol and other drugs in road accidents. The first volume of the report was published in 1992 and made numerous recommendations.⁸⁶ Two of the recommendations concerning drugs other than alcohol were:

- Establish a Drug-Drive Task Force to identify the extent of road trauma and risk factors associated with drug-driving. If needed, implement a program of measures aimed at reducing drug-driving.
- The RTA, Health Department and Police Service are to evaluate roadside chemical screening tests currently available to assess their suitability and accuracy in detecting drug-drivers.

In 1993 the second volume of the report was published.⁸⁷ The recommendations with regard to driving while affected by drugs included:

- The RTA should continue to conduct research into the effects of specific drugs, alone or in combination with alcohol, on driving performance, with particular attention to establishing the range of concentrations that result in the likely impairment of driving performance.
- The RTA is to assess the feasibility of monitoring approaches to drug-testing in industrial contexts to provide an indication of future developments in countermeasures to drug-driving.

The response of the Fahey Government to the recommendations of the inquiry was ‘non-committal’. But the RTA *Road Safety 2010* strategy subsequently supported many of the findings and recommendations.⁸⁸

By 2003-2004, the awareness of drugs and driving had intensified. It was an issue addressed by the Country Road Safety Summit, which was held on 27-28 May 2004 at Port Macquarie. In attendance were Members of NSW Parliament from various parties and both Houses, road safety experts, police, and representatives from industry groups, local government, and community groups. The Summit delivered 137 recommendations, some of which dealt with drug driving and drug testing.⁸⁹

⁸⁶ Parliament of New South Wales, Joint Standing Committee on Road Safety, *Staysafe 19, Alcohol and Other Drugs on New South Wales Roads: 1. The Problem and Countermeasures*, March 1992.

⁸⁷ Parliament of New South Wales, Joint Standing Committee on Road Safety, *Staysafe 20, Alcohol and Other Drugs on New South Wales Roads: 2. Offences, Penalties and the Management and Rehabilitation of Convicted Drivers*, October 1993.

⁸⁸ Parliament of New South Wales, Joint Standing Committee on Road Safety, *Staysafe 60, A Decade of the Staysafe Committee 1992-2002*, December 2002, p 27.

⁸⁹ Country Road Safety Summit, *Communique*, 28 May 2004, NSW Roads and Traffic Authority, pp 3-5.

1. Heavy Vehicles on Country Roads

1.1 The RTA and WorkCover, in cooperation with relevant industry organisations and the Transport Workers Union encourage and support companies and independent operators to develop and implement drug and alcohol policies in the work place.

1.2 Within the next 12 months the Government introduce a legislative regime to allow random drug testing and to support the trial of random drug testing for heavy vehicle drivers.

1.3 The Government introduce mandatory drug testing of all drivers after crashes, akin to mandatory breath testing.

...

2. Drink and Drug Driving in Country NSW

...

2.8 The Government consider roadside random testing for cannabis and other illicit drugs.

2.9 The Government develop social marketing programs for country areas to encourage the belief that any drink driving or drug driving is unacceptable.

...

2.13 The Government undertake an assessment of all existing research activity on country drink driving and drug driving. Further research be conducted where gaps are identified.

The Minister for Roads, Hon Carl Scully MP, consulted with the Minister for Police, Hon John Watkins MP, and monitored the progress in Victoria towards random roadside drug testing.⁹⁰ Then on 11 November 2004, the Minister for Roads announced that legislation would be introduced and a 12 month trial conducted in 2005. Mr Scully acknowledged the influence of developments in Victoria and the importance of addressing drug problems the trucking industry:

For some time there has been concern about drug-taking by heavy vehicle drivers, and the Government is responding to that concern. Unfortunately, an emerging number of heavy vehicle drivers are using speed to keep awake, cannabis to get to sleep and then speed to return to their shift. That is an enormous road safety problem. ...The Victorian Government has passed legislation in this area and indicated that it will conduct a trial. It appears to have balked because of technology concerns. But the technology is now emerging that will allow random roadside drug tests to be conducted with some degree of confidence.⁹¹

The features of the proposal, as outlined in November 2004, include:⁹²

⁹⁰ General Purpose Standing Committee No.4, *Examination of proposed expenditure for the portfolio areas Roads and Housing*, 15 September 2004. For example, when questioned by the Chair, Hon Jenny Gardiner MLC, about the Country Road Safety Summit's recommendation that a trial of random drug testing be conducted on heavy vehicle drivers, Hon Carl Scully MP stated: 'I am happy to say that the Minister for Police and I have had discussions about that and we are monitoring the situation in Victoria....They are reasonably well advanced, they have already passed legislation and have started the process of assessing equipment – things of that nature.' (p 22)

⁹¹ Questions Without Notice, Hon Carl Scully MP, 'Random Roadside Drug Testing', *NSWPD*, 11 November 2004, p 12744.

⁹² Hon Carl Scully MP, *ibid*, p 12745; and 'The State Government is proposing a 12-month roadside random drug testing trial', 12 November 2004, News Release on RTA website at

- Statutory provisions will empower police to pull drivers over and conduct random roadside drug tests.
- On-the-spot saliva tests will be conducted with portable drug machines that produce an initial result in minutes. Drivers who return a positive reading will be requested to supply a second sample for further analysis.
- The focus of testing will be primarily on the heavy vehicle industry, and elsewhere as police deem appropriate, such as attendees at rave parties.
- Testing is intended to detect cannabis, ecstasy and speed.
- No drug driving charges will be laid during the 12 month trial period. Rather, the objective is to ensure that the technology is effective so that future convictions are sustained, that the relevant training is provided, and the appropriate police protocols are in place.
- However, drivers who test positive for drugs will not be allowed to resume their journey, and charges will apply for refusing to co-operate with police or to provide a sample.
- Funding for the initiative is \$4.6 million over three years.
- The trial will be subjected to independent scientific evaluation.

It was reported that the legislation will be introduced by June 2005.⁹³ Some early responses to the drug testing proposal were:

- ***Transport Workers' Union*** – State Secretary of the TWU, Tony Sheldon, reportedly said that random drug testing of truck drivers does not address the pressure on drivers to meet clients' demands and therefore would not reduce the number of people being killed in truck accidents. He called for WorkCover to investigate the work practices surrounding every positive test result, and for a compulsory code of practice for the long-haul trucking industry.⁹⁴
- ***Cannabis campaigners*** – Andrew Kavasilas from the Nimbin HEMP Embassy called for cannabis to be excluded from the trial. He asserted there was a lack of evidence of cannabis users having car accidents and was concerned about the impact on medical cannabis users. He noted that people who take synthetic party drugs or hard drugs would be more likely to evade detection, as those drugs pass through the system much faster than cannabis.⁹⁵
- ***Civil liberties supporters*** – Some commentators have predicted there will be objections

www.rta.nsw.gov.au/newsevents/2004_11_drugdrivetesting.html

⁹³ 'Random roadside drug testing for NSW', AAP online news bulletin, 11 November 2004.

⁹⁴ 'Drug testing truckies won't solve problem: union', AAP online news bulletin, 11 November 2004.

⁹⁵ Quoted by Michael McDonald, 'Spit into the bag, please, sir', *Byron Shire Echo*, 16 November 2004, p 13.

to random drug testing on the basis that it is an invasion of privacy.⁹⁶ Indeed, the first driver to test positive to drugs in the roadside operation conducted by Victoria Police on 13 December 2004 sought legal advice on suing the police for defamation and breach of privacy after his identity became public.⁹⁷ The President of the NSW Council for Civil Liberties, Cameron Murphy, has expressed concern about the accuracy of the saliva tests being used in Victoria, and advocates that the NSW Government should delay conducting a trial until the technology is of a standard equivalent to breath testing for alcohol.⁹⁸

As stated previously under ‘**5.1 Current laws on drug driving and related testing in NSW**’, the Government also plans to introduce legislation in 2005 to make blood testing compulsory for all drivers involved in fatal road accidents. This will maximise the prospect of identifying the presence of drugs.

5.6 Interstate overview on drug driving laws

(i) Statutory provisions

All jurisdictions in Australia have laws that prohibit drug driving, many of which are common to drink driving. But most jurisdictions require driving impairment to be established for the commission of an offence. For example, the criterion of being under the influence of a drug to the extent of being incapable of exercising proper control of the vehicle applies in numerous jurisdictions. The following table summarises interstate drug driving offences and a selection of significant drug testing provisions:

State	Drug driving offences	Drug testing provisions ⁹⁹
VIC	<ul style="list-style-type: none"> Section 49(1)(a) of <i>Road Safety Act 1986</i>: driving or being in charge of a motor vehicle while under the influence of intoxicating liquor or any drug ‘to such an extent as to be incapable of having proper control of the motor vehicle.’ Section 49(1)(ba): specific drug driving offence of driving or being in charge of a motor vehicle ‘while impaired by a drug’. Section 318 of <i>Crimes Act 1958</i>: culpable driving causing death. The circumstances 	<ul style="list-style-type: none"> Section 55A of <i>Road Safety Act 1986</i> requires a driver to undergo assessment of drug impairment if, in a police officer’s opinion, the driver’s behaviour or appearance indicates they may be impaired for a reason other than alcohol. If assessment indicates they may be drug impaired, blood and urine samples can be taken: s 55B. Section 56 enables doctors to obtain

⁹⁶ Michael McDonald, *ibid.*

⁹⁷ Marc Moncrief, ‘Police defend roadside drugs test’, *The Age* online, 15 December 2004, 12:57pm.

⁹⁸ Ruth Pollard, ‘Teething troubles cloud roadside drugs tests’, *The Sydney Morning Herald* online, 16 December 2004, 9:32am.

⁹⁹ The list of provisions relevant to the drug testing of drivers is not exhaustive, as the procedural and evidentiary requirements in road legislation for screening, sampling and testing are detailed and complex.

	<p>of culpability include driving whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.</p>	<p>blood samples from persons aged 15 or over, who are treated or examined as a consequence of a motor accident.</p> <ul style="list-style-type: none"> • New legislation commenced on 1 December 2004 to allow police to require drivers to provide saliva samples at the roadside for drug testing, and to create an offence of driving when any prescribed illicit drug is present in the blood or oral fluid: see below at '5.7 Victoria'.
QLD	<ul style="list-style-type: none"> • Section 79 of <i>Transport Operations (Road Use Management) Act 1995</i>: driving, attempting to put in motion, or being in charge of, a motor vehicle whilst under the influence of liquor or a drug. • Section 328A of <i>Criminal Code Act 1899</i>: dangerous operation of a vehicle. An aggravating circumstance, attracting a higher penalty, is being 'adversely affected by an intoxicating substance': s 328A(2). There are separate offences under s 328A(4) of operating a vehicle dangerously and causing death or GBH. Again, being adversely affected by an intoxicating substance is an aggravating feature. 	<ul style="list-style-type: none"> • Section 80 of <i>Transport Operations (Road Use Management) Act 1995</i> outlines circumstances in which a person is required to provide a blood or urine specimen for a laboratory test, for example, when arrested for certain driving offences.
SA	<ul style="list-style-type: none"> • Section 47 of <i>Road Traffic Act 1961</i>: driving or attempting to put a vehicle in motion 'while so much under the influence of the liquor or a drug as to be incapable of exercising effective control of the vehicle'. A person is incapable if, owing to the influence of the liquor or drug, 'the use of any mental or physical faculty of that person is lost or appreciably impaired'. 	<ul style="list-style-type: none"> • Section 47I of <i>Road Traffic Act 1961</i> authorises a blood sample to be taken when a person apparently aged 14 years or over attends hospital after a motor accident.
WA	<ul style="list-style-type: none"> • Section 63 of <i>Road Traffic Act 1974</i>: driving or attempting to drive a motor vehicle while under the influence of alcohol and/or drugs 'to such an extent as to be incapable of having proper control of the vehicle.' 	<ul style="list-style-type: none"> • Section 66 of <i>Road Traffic Act 1974</i> outlines circumstances for obtaining blood or urine samples for analysis, for example, if a police officer has reasonable grounds to believe that a person has offended against s63 (driving under the influence); or when a person is breath tested and the percentage of alcohol does not reasonably explain their conduct or appearance.
TAS	<ul style="list-style-type: none"> • Section 4 of <i>Road Safety (Alcohol and Drugs) Act 1970</i>: driving a vehicle while under the influence of intoxicating liquor or a drug to the extent of being 'incapable of having proper control' of the vehicle. 	<ul style="list-style-type: none"> • Section 9 of <i>Road Safety (Alcohol and Drugs) Act 1970</i> may require a driver to undergo a medical examination and give blood or urine samples if a police officer

		reasonably believes that the driver was in such a condition as to be incapable of driving the vehicle without risk of danger to others, and is of the opinion (as the result of a breath test or otherwise) that the driver's condition did not arise from alcohol.
ACT	<ul style="list-style-type: none"> Section 24 of <i>Road Transport (Alcohol and Drugs) Act 1977</i>: driving a motor vehicle under the influence of intoxicating liquor or a drug to 'such an extent as to be incapable of having proper control' of the vehicle. Section 29 of <i>Crimes Act 1900</i>: culpable driving of a motor vehicle, causing death or GBH. Culpable driving includes driving while under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle. 	<ul style="list-style-type: none"> Section 16 of <i>Road Transport (Alcohol and Drugs) Act 1977</i> authorises a medical examination and body samples to be taken if the police have 'reasonable cause to suspect' the driver has a drug other than alcohol in their body.
NT	<ul style="list-style-type: none"> Section 19 of <i>Traffic Act 1987</i>: driving, starting the engine, or putting in motion a motor vehicle when under the influence of intoxicating liquor, a drug, or psychotropic substance to such an extent as to be incapable of having proper control of the vehicle. 	<ul style="list-style-type: none"> Section 25 of <i>Traffic Act 1987</i> authorises a sample of blood to be taken from a person aged apparently 15 years or over who enters hospital for examination or treatment after a motor vehicle accident.

(ii) *Parliamentary inquiries*

Parliaments in a number of States since the 1990s have conducted inquiries that explored the issue of drug driving. Several inquiries are summarised here, although it is beyond the scope of this paper to document the government responses to, and consequences of, each recommendation. The intention is merely to show the level of interest from the legislatures, the similar concerns that have arisen, and the types of strategies that have been suggested. States that are proceeding towards random roadside testing are updated in the next section.

State	Year	Committee / Inquiry	Some Recommendations
VIC	1996	Road Safety Committee: <i>Inquiry into the Effects of Drugs (Other than Alcohol) on Road Safety in Victoria</i> ¹⁰⁰	<ul style="list-style-type: none"> Investigate the role of drugs in injury crashes to define which driver groups are users of illegal and medicinal drugs, so as to facilitate developing countermeasures. Replace the offence of driving under the influence of a drug with the offence of driving while impaired. Amend the <i>Road Traffic Act 1986</i> to give police specific power to require drivers suspected of being impaired to undergo a roadside test of

¹⁰⁰

Parliament of Victoria, Road Safety Committee, Inquiry into the Effects of Drugs (Other than Alcohol) on Road Safety in Victoria, *Final Report*, Volume One and Volume Two, 1996.

			<p>impairment and, if necessary, a second detailed test. Where a driver fails the second test and police conclude that the impairment may be drug-related, a sample of blood and/or urine shall be provided.</p> <ul style="list-style-type: none"> • Authorise police to require driver impairment tests and body fluid samples from any driver involved in a crash where there is reasonable cause to suspect drug-related impairment.
WA	1996	Select Committee on Road Safety: <i>Alcohol, Drugs and Fatigue</i> ¹⁰¹	<ul style="list-style-type: none"> • Amend the <i>Road Traffic Act 1974</i> to require all drivers, cyclists and pedestrians who are hospitalised as a result of a crash to have their blood tested for alcohol and other drugs of impairment (at least for a 12 month trial). • Police Service to investigate the use of roadside saliva testing for drugs and determine the legislative processes for its introduction. • Police Service to increase officers' awareness of identifying drug-impaired drivers, including instruction by drug recognition experts. • Department of Transport, in association with Worksafe and the Road Safety Council, to consider how an alcohol and drug policy can be adopted in the road transport industry.
QLD	1999	Parliamentary Travelsafe Committee: <i>Drug Driving in Queensland</i> ¹⁰²	<ul style="list-style-type: none"> • Establish a drug driving prevention working group, including representatives from Qld Transport and Police Service, to coordinate and promote policies and programs to prevent drug driving. • The working group is to develop guidelines for impairment assessments by police. • If the working group develops a standard impairment test, amend <i>Traffic Act 1949</i> to allow police to detain drivers without arrest to conduct the standard test when they have reasonable cause to believe a driver is impaired.

5.7 Victoria

Victoria introduced legislation and conducted trials in preparation for the commencement of roadside drug testing in December 2004.

(i) Drug driving offences

¹⁰¹ Western Australia Legislative Assembly, Select Committee on Road Safety, Seventh Report, *Alcohol, Drugs and Fatigue*, 1996.

¹⁰² Legislative Assembly of Queensland, Parliamentary Travelsafe Committee, *Drug Driving in Queensland*, Report No. 29, October 1999.

It is an offence under s 49(1)(a) of the *Road Safety Act 1986* (Vic) to drive or be in charge of a motor vehicle while under the influence of any drug (or intoxicating liquor) to ‘such an extent as to be incapable of having proper control of the motor vehicle.’ Section 49(1)(ba) was added in 2000 to create a separate offence when a person drives or is in charge of a motor vehicle ‘while impaired by a drug’. This ‘driving while impaired’ provision was regarded by the legal profession as being easier to prove than a charge of driving under the influence.¹⁰³

The indictable offence of culpable driving causing death, under s 318 of the *Crimes Act 1958*, is also relevant. The conduct that gives rise to driving a motor vehicle culpably includes driving under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.

As of 1 December 2004, it is an offence to drive or be in charge of a motor vehicle while the prescribed concentration of drugs is present in the blood or oral fluid: s 49(1)(bb) of the *Road Safety Act 1986*. Prescribed concentration of drugs means, in the case of cannabis or methylamphetamine, any concentration of the drug. This provision was introduced as part of the random drug testing regime that is described immediately below.

(ii) *Random roadside drug testing legislation*

The Road Safety Committee of the Parliament of Victoria held an *Inquiry into the Effects of Drugs (Other than Alcohol) on Road Safety in Victoria*, and tabled the Final Report on 5 December 1996. The inquiry’s recommendations included implementation of a roadside program to assess drivers’ impairment by drugs other than alcohol. The Government Response supported fully or in principle all of the Final Report’s recommendations.¹⁰⁴

Random drug testing for drivers and new offences of failing a drug test or refusing to supply a sample were introduced by the *Road Safety (Drug Driving) Act 2003*, amending the *Road Safety Act 1986*. Introducing the legislation, the Minister for Transport, Hon Peter Batchelor MLA, stated that:

Drug-driving is now as much a factor in driver fatalities on Victoria’s roads as drink-driving. Research by the Victorian Institute of Forensic Medicine shows that in 2002, drugs other than alcohol were detected in the blood of 27 per cent of fatally injured drivers, almost as many as the 29 per cent who had a blood alcohol concentration above the legal limit of .05 grams per 100 millilitres.¹⁰⁵

The provisions came into operation on 1 December 2004, pursuant to s 2 of the *Road Safety*

¹⁰³ Warwick Walsh-Buckley and John Marquis, ‘Drug-driving: the new offences’, *Law Institute Journal*, March 2001, p 79.

¹⁰⁴ Ian Freckelton (ed), *Criminal Law Investigation and Procedure Victoria*, Law Book Company, Volume 3 (looseleaf), commentary on *Road Safety Act 1986*, ‘Overview Part 5 – Offences Involving Alcohol and Other Drugs’ at [3.8.2200].

¹⁰⁵ Road Safety (Drug Driving) Bill, Second Reading Speech, *VPD*, 30 October 2003, p 1418.

(*Drug Driving*) Act 2003, as they had not been proclaimed to commence at an earlier date. There is also a ‘sunset clause’ which repeals the provisions on 1 July 2005. The Minister for Transport explained that the sunset clause will ensure that ‘roadside drug screening can only continue after it has been scrutinised by this Parliament in the light of practical experience of the system.’¹⁰⁶

The main provisions of the legislation:

- allow police to require drivers to provide **oral fluid samples** (ie. saliva) at the roadside for the purposes of drug testing;
- create an offence of driving or being in charge of a motor vehicle **while the prescribed concentration of drugs is present in the blood or oral fluid** of the person;
- define a ‘prescribed concentration of drugs’ as **any concentration** of a prescribed illicit drug;
- define a ‘prescribed illicit drug’ as delta-9-tetrahydrocannabinol (THC), the active component of **cannabis**, and **methylamphetamine**;
- create an offence of **refusing** to provide an oral fluid sample or failing to comply with a requirement in relation to the provision of oral fluid;
- establish a presumption that if the prescribed illicit drug was present in the blood or oral fluid of a driver within **3 hours** after the offence is alleged to have been committed, it is presumed, until the contrary is proved, that the drug was present in the person at the time of the offence;
- extend to drug driving the existing **enforcement system** relating to drink driving offences, such as requirements for drivers to cooperate in tests, powers for police to prevent drivers who test positive to the targeted drugs from continuing their journey, and proof of offences through the use of certificate evidence;
- prohibit the analysis of samples for purposes other than drug and alcohol testing, such as deriving **DNA profiles** from the sample.

The Minister for Police and Emergency Services, Hon Andre Haermeyer MLA, indicated that random roadside testing would be directed towards times when there is a higher risk of drug impaired driving: ‘We are targeting recreational and habitual drug users, and will undertake testing at times and locations where police determine it most appropriate.’¹⁰⁷

The issue of selecting suitable drug-testing technology had to be resolved before roadside police operations could begin. The drug-testing equipment under consideration in Victoria was subjected to laboratory testing at the Victorian Institute of Forensic Medicine, based at Monash University, and human testing at Swinburne University.¹⁰⁸ The research conducted by the drugs and driving unit at Swinburne University involved volunteers taking

¹⁰⁶ Ibid, p 1420.

¹⁰⁷ Minister for Police and Emergency Services, and Minister for Transport, ‘Victoria leads the way on drug driving’, *Media Release*, 30 October 2003.

¹⁰⁸ Minister for Police and Emergency Services, ‘World first random drug testing to start’, *Media Release*, 30 November 2004.

recreational amounts of methamphetamine (speed) to assess a range of devices that all tested for active metabolites (ie. recent drug use) in saliva samples.¹⁰⁹ Cannabis trials were also carried out.

(iii) Latest developments

On 30 November 2004, the Minister for Police and Emergency Services, Hon Andre Haermeyer MLA, announced that random roadside testing would commence on Monday 13 December 2004.¹¹⁰

Mr Haermeyer confirmed that Victoria's random drug testing initiative adopts a zero tolerance approach. In other words, there will not be a legally acceptable level of illicit drugs for a driver to have in his or her system.

Further details about the testing procedures and consequences of positive results were also released:

- The device chosen for the roadside saliva analysis of drivers is the Securetec Drugwipe II Twin device.
- Obtaining a saliva sample will involve placing a small absorbent pad encased in plastic on the tongue for a few seconds. A result should be indicated in about five minutes.
- Drivers who return a positive initial test will be asked to accompany police into the 'drug bus' for further testing, using either the Securetec device again or the Cozart Rapiscan device.
- If the second test is also positive, the sample will be sent to a laboratory for verification.
- Motorists who return positive laboratory results for cannabis or methamphetamines will incur a \$307 infringement penalty and the loss of three demerit points.
- If the matter is contested in court, the maximum penalty for a first offence is \$614 and three months' licence cancellation. (If a previous offence was committed 10 years or earlier, prior to the commission of the current offence, the current offence is to be treated as a first offence.) Subsequent convictions could result in fines of up to \$1227 and up to six months' cancellation.

Mr Haermeyer anticipated that prescription drugs would not be detected: 'The testing agencies have confirmed that the roadside saliva tests will not detect the presence of prescription drugs or common over-the-counter medications, such as cold and flu tablets. However, drivers using legal and prescription drugs should always check with pharmacists whether it is safe to drive whilst using these drugs.'¹¹¹

Victoria Police started their first random testing operation at 11.00 am on 13 December

¹⁰⁹ Susan Browne, 'Volunteers take speed to test drug-driving devices', *The Age*, 18 July 2004.

¹¹⁰ Minister for Police and Emergency Services, 'World first random drug testing to start', *Media Release*, 30 November 2004.

¹¹¹ *Ibid.*

2004 at Yarraville, an inner western suburb of Melbourne. Fifteen minutes later, a van driver tested positive to methamphetamines in both a preliminary saliva swab and a more detailed test in the police 'drug bus'. However, no other driver out of the 32 motorists stopped by police returned positive results to both tests. Positive samples are sent for a comprehensive laboratory test, which takes 14 days, and an infringement notice is not issued until the results are confirmed by the laboratory analysis.¹¹²

5.8 Other States

Most other States in Australia are watching the progress of Victoria in formulating and implementing a random drug testing regime for drivers. The Minister for Transport in New South Wales, Hon Carl Scully MP, has referred to Victoria on numerous occasions in the lead-up to announcing that legislative reforms will be introduced in 2005. Developments were also being forecasted at the end of November 2004 in South Australia, Western Australia and Tasmania:

(i) *South Australia*¹¹³

The Liberal Member for Schubert, Ivan Venning, introduced a Private Member's Bill on 3 December 2003 and another on 24 November 2004 in support of roadside drug testing of drivers.¹¹⁴ The most recent bill, the *Road Traffic (Drug Tests) Amendment Bill*, would introduce a new offence of driving while a prescribed drug is present in the blood, and empower police to require a person to submit to 'oral fluid analysis' (a saliva swab test) instead of, or in addition to, breath analysis for alcohol already in force.

On 30 November 2004 the Minister for Transport, Hon Trish White MP, announced that legislation was being drafted and would be introduced in 2005 to give police the powers to conduct random drug testing. A saliva test would be used to detect cannabis and methamphetamines, with positive results justifying a second saliva test or a blood test.¹¹⁵ The Minister also referred to developments in Victoria and information-sharing arrangements: 'The Victorian Government is planning to begin a trial of drug drive testing within weeks and I have come to an agreement with the Victorian Government to swap information about their data. The test they intend to put in place will detect whether

¹¹² 'Roadside drug tests strike early', *The Sydney Morning Herald* online, 13 December 2004, 6:14pm. The van driver's identity became public, raising questions about privacy. The police maintained that they had followed the correct procedures: Marc Moncrief, 'Police defend roadside drugs test', *The Age* online, 15 December 2004, 12:57pm.

¹¹³ The author acknowledges the assistance of Guy Dickson, Research Officer at the South Australian Parliamentary Library, in clarifying aspects of the South Australian developments.

¹¹⁴ Previously, he moved a motion on 26 June 2003 and again on 25 September 2003 requesting the Government to examine the feasibility of adopting random drug testing of drivers.

¹¹⁵ Hon Trish White MP, 'State Government to get tough on drug drivers', *News Release*, 30 November 2004, accessed at <www.ministers.sa.gov.au> Also, Greg Kelton, 'Plan to test drivers for illegal drugs', *The Advertiser*, 26 November 2004, p 33.

marijuana has been used in the previous 2-3 hours, and whether methamphetamines have been used within the previous 12 hours or so.¹¹⁶

The draft legislation will be released for community consultation before the introduction of a 'comprehensive package of drug testing measures and an education campaign targeting various vulnerable groups.'

(ii) Tasmania

On 23 November 2004, the Tasmanian Deputy Premier and Minister for Police and Public Safety, David Llewellyn MHA, announced that Cabinet had agreed to draft legislation amending the *Road Safety (Alcohol and Drugs) Act 1970*, to enable police officers to conduct random saliva screening tests for drugs.¹¹⁷ Mr Llewellyn quoted toxicology statistics showing that drugs other than alcohol were detected in the blood of 22.4% of drivers fatally injured in motor vehicle crashes in Tasmania in 1999-2003.

The proposed saliva tests would be carried out using portable equipment at the roadside, to identify certain drugs including cannabis, speed and ecstasy. A positive screening test would result in the driver being directed to provide a blood sample for confirmatory laboratory testing. Penalties for breaches of the proposed legislation would correspond to breaches of drink driving laws. Mr Llewellyn anticipated that the legislation would be introduced into Parliament during the autumn session of 2005.

(iii) Western Australia

It was reported on 1 December 2004 that the Western Australian Government is considering introducing random roadside saliva testing in 2005, if the trial by Victorian police is successful.¹¹⁸

¹¹⁶ Hon Trish White MP, 'State Government to get tough on drug drivers', *News Release*, 30 November 2004.

¹¹⁷ David Llewellyn MHA, Deputy Premier, 'Drug Testing Drivers', *Media Release*, 23 November 2004, accessed at <www.media.tas.gov.au>

¹¹⁸ 'Lawyers urge caution over roadside drug testing', ABC News Online, 1 December 2004, <www.abc.net.au>

6. CONCLUSION

Drink driving and drug driving were prominent road safety issues in 2004, and this can be expected to continue. The involvement of young drivers in fatal motor accidents has been the subject of much concern in New South Wales. One important change, which came into force in May 2004, was the new 'zero alcohol limit' for learner and provisional drivers. The Government is also considering other reforms with respect to young drivers, such as improved training, and limits on the number of passengers and the power of vehicles.

Whether a punitive or rehabilitative approach has the most impact on drink driving offenders is a matter of ongoing research and debate. Some recent initiatives that focus on modifying the behaviour of drink drivers are the Sober Driver Program and fitting alcohol interlock devices to vehicles. There is evidence that serious drink driving offences are still being dealt with leniently by many sentencing judges, in comparison to the maximum penalties that are available. For example, statistics from the Judicial Commission of New South Wales reveal that only 3% of the 9412 cases that were sentenced in the Local Court from July 2002 to June 2004 for driving with a high range PCA received a prison sentence.¹¹⁹ Yet the maximum penalty is 18 months imprisonment for a first offence and two years imprisonment for a second or subsequent offence.¹²⁰ Acknowledging that sentencing for high range PCA offences may be inadequate, the Court of Criminal Appeal delivered a guideline judgment in September 2004.

The creation of more extensive drug driving laws is on the agenda in several States. Victoria became the first jurisdiction in Australia to introduce legislation, which commenced on 1 December 2004, to enable random drug testing of drivers and to create an offence of driving with any concentration of cannabis or methylamphetamine in the blood or saliva. Roadside testing operations started on 13 December 2004 in preparation for the festive season. The New South Wales Government plans to introduce legislation and commence a 12 month trial of random drug testing during the second half of 2005. Legislative amendments will also require the mandatory drug testing of all drivers involved in road accidents where a fatality occurred.

It is more than 20 years since random breath testing of drivers for alcohol was introduced in New South Wales, yet random drug testing seems to be a more controversial proposal. This is partly due to the challenge of finding reliable, accurate methods of testing. Perhaps another factor is that drug testing exposes the consumption of prohibited substances, even those that were taken some time prior to driving. Alcohol, by contrast, is not inherently

¹¹⁹ Statistics were obtained from the Sentencing Information System component of the Judicial Information Research System online database. The percentage of cases receiving a prison sentence rose to 5% when the sample of offenders was narrowed to those with prior convictions, although the database does not specify whether the prior convictions were for similar or dissimilar offences.

¹²⁰ In addition or alternatively to the maximum periods of imprisonment, the maximum fines allowable are 30 penalty units (\$3300) for a first offence or 50 penalty units (\$5500) for a second or subsequent offence: s 9(4) of the *Road Transport (Safety and Traffic Management) Act 1999*. Licence disqualification periods also apply.

illegal and most drivers (with some exceptions) are permitted a blood alcohol concentration of up to 0.05 before they commit an offence. If New South Wales follows Victoria's approach, it will penalise *any* presence of illicit drugs found in the driver's system, without the need to prove impairment. Other States including Tasmania and South Australia have also indicated their intention to introduce random drug testing legislation in 2005.

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