



# **ROAD TRANSPORT FORUM NEW ZEALAND INC**

## **SUBMISSION ON MINISTRY OF TRANSPORT DISCUSSION DOCUMENT ENHANCED DRUG IMPAIRED DRIVER TESTING RELEASED MAY 2019**

Contact: **Kerry Arnold**  
Technical Manager  
Road Transport Forum NZ  
PO Box 1778  
Wellington  
Ph: (04) 471 8281  
Email: [kerry@rtf.nz](mailto:kerry@rtf.nz)

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## **REPRESENTATION**

Road Transport Forum New Zealand (RTFNZ) is made up of several regional trucking associations for which the Forum provides unified national representation. The Forum members include Road Transport Assns. NZ, National Road Carriers, and NZ Trucking Assn. The affiliated representation of the Forum is some 3,000 individual road transport companies which in turn operate 16-18,000 trucks involved in road freight transport as well as companies that provide services allied to road freight transport.

The Forum is the peak body and authoritative voice of New Zealand's road freight transport industry which employs 28,600 people (3.0% of the workforce), has a gross annual turnover in the order of \$6 billion and transports about 70% of New Zealand's land-based freight measured on a tonne/kilometre basis.

Forum members are predominately involved in the operation of commercial freight transport services both urban and inter-regional. These services are entirely based on the deployment of trucks both as single units for urban delivery and as multi-unit combinations that may have one or more trailers supporting rural or inter-regional transport.

## **Introduction**

1. This submission responds to the Ministry of Transport's Discussion Document *Enhanced Drug Impaired Driver Testing* (May 2019) (**the discussion document**).
2. The submission is made by the Road Transport Forum New Zealand Inc (**the Forum**).

### **3. Summary of the Forum's response**

- a) The Forum's submission refrains from debating the merits, or otherwise, of Government policy around cannabis consumption and liberalisation of recreational drugs, and focuses on the necessity for a comprehensive roadside drug testing policy as part of the mechanism to confirm driver impairment, or lack of capability to have adequate control of a motor vehicle.
- b) The Forum has always been a committed advocate for comprehensive road side testing for drug impairment, whether the impairment is the result of

recreational drug use, or the use of prescription pharmaceuticals. This position was reflected in our submission to a Parliamentary select committee during hearings on the Transport Law Reform Bill No 4 of 2007 that saw the introduction of the Compulsory Impairment Test, or CIT, referred to on page 12 of the discussion document.

- c) The Forum's view has not changed in the intervening years from when the CIT was introduced. We argued at the time the CIT was a soft option. Even back in 2006, sophisticated drug wipes and saliva testing were available for screening purposes and were in use in number of police jurisdictions in overseas countries.
- d) The Forum fully supports a comprehensive roadside drug screening policy as a first line tool for early detection of impaired, or potentially impaired, drivers. This should without question, be part of an overall aspiration to mitigate risk on New Zealand roads of injury and death caused by drugged drivers.
- e) The Forum believes the discussion document drifts away from this core purpose and into the costs and inconvenience (time spent) of dealing with what is essentially, a crime ie. impaired driving as a result of drug use. The person committing the crime appears to become a victim of all sorts of circumstances, while there is no mention of the rights of, or responsibilities to, the victims of drug-fuelled drivers. In fact, the discussion document puts up time (for testing and for prosecuting) and cost or "pressure" on the system (for testing and prosecuting) as significant barriers to any change to the status quo. The inconvenience of time spent is mentioned 12 times and the inconvenience of cost and "pressure" on the system is mentioned 12 separate times.
- f) If the Government were as committed to road safety as they say they are, surely a bit of time spent on a roadside (2-5 minutes), or at a Police station, for testing, is justified in the face of 71 road deaths recorded in 2018, and 88 in 2017, as a result of drivers using drugs. We know this is under-reported due to the lack of testing across the board. Drug use has overtaken excess alcohol consumption in the road deaths stakes. The Forum would suggest proper emphasis be placed on this contributor to road safety.

#### **4. The evidence in favour of roadside drug impaired driver testing**

- a) The record of evidence of drug-involved road deaths referred to in the discussion document (page 6) speaks for itself.
- b) Interestingly, the discussion document offers no serious injury accident numbers where drug impairment would have been a contributor, only the fatality data. Perhaps the data is too significant to contemplate, especially if the fatality versus serious injury accident numbers is in the ratio of 1:3, which

means an unknown number of individuals could be left with serious physical impairment following accident involvement with a drug impaired driver.

- c) The flow chart on page 14 presents a balanced outline of the current process but we also acknowledge that it is compromised by the “good cause to suspect” criteria.
- d) The commentary on page 15 touches on the limitations of the current drug driver testing process. The Forum believes with the size of the current road safety problem and present number of fatalities attributable to drug impairment, something has got to change if there is going to any level of deterrent in the enforcement process.
- e) Putting aside the discussion points of paragraphs 50 to 53, we believe Police officers have sufficient expertise, even under the good cause to suspect, to judge when it is appropriate to move to evaluating a driver for drug impairment whether that be by some oral screening test or the CIT, or a combination of both if necessary. Police officers would surely make the decision to evaluate the driver on the basis of visual cues. There is no reason why this approach should not be used within a random stop drug impairment detection process.
- f) The good cause to suspect seems to be bit of red herring to some degree. In the current road safety context, we have the random stops for alcohol testing with no consideration as to good cause. It’s only the reliability of the testing tool and the science and research behind the readings that characterises this process to be sound and reliable first call on whether an individual is fit to drive.
- g) Para 52 of the discussion document states the Police cannot always carry a CIT because of shock emotional distress of the because of injuries. The Police’s reluctance to conduct a CIT under such circumstances is not unreasonable, but this shouldn’t detract from using the CIT or other more sophisticated tests in other situations.
- h) Sec 12 of the Land Transport Act makes a very explicit statement: **Persons not to drive while under influence of alcohol or drugs;**  
*“A person may not drive or attempt to drive a motor vehicle while under the influence of drink or a drug, or both, to such an extent as to be incapable of having proper control of the vehicle.”*
- i) The key is the determination of the existence of some level of incapacity to have proper control. It doesn’t imply the driver has to lose proper control of the vehicle, but simply that the driver is demonstrating in some way a lowered mental and visual acuity, or functional responsiveness, that implies

or reflects a loss, or reduction, in vehicle control capability.

- j) Sec 58 LTA 98 presents the same criteria and requalifies the point of Sec 12 that driving under the influence of drugs or alcohol is an offence; the point being that either are an affront to public welfare and conceivably attract strict liability.
- k) The policy principle going forward is to determine whether a drug screening device (and process) is sufficient in itself, or coupled with a more sophisticated CIT assessment, to be used to determine a sufficient degree of impairment that a driver is not fit to drive. The Forum submits that it is, particularly in light of the progress being made in the performance of various drug screening tactile wipes.
- l) To argue otherwise is to ignore the reality of the situation faced today by employers. By virtue of legislation other than the Land Transport Act, employers in safety sensitive industries are expected to deal with potential drug related and impairment risks in the workplace every day, yet they have little professional skill to determine employee fitness for duty. They are certainly bearing the costs of testing for drug use with pre-employment, random, and post-incident/post-accident testing.

## **5. The contrast in responsibilities within the employment environment and the on-road environment for driver drug related impairment**

- a) In a typical employment environment, the employer or person in control of the business unit (PCBU) is required to mitigate or remove hazards. In both the former Health and Safety in Employment Act 1992 and the current Health and Safety at Work Act 2015, drugs are defined as a work place hazard and therefore, the effect and possible wider safety impacts must be mitigated. As a result, transport company employers have adopted routine drug testing for driving staff, as outlined above (4. l)).
- b) However, in the USA where the growth in the availability of drugs has risen exponentially and with many states now having liberal cannabis policies, this has caused uncertainty around the level of impairment among the truck driver population. Employers are grappling with managing this situation. There has been some literature circulating that suggests drug impairment should be determined on the basis of impairment assessments, as opposed to routine random drug testing. While that approach might be fine for the welder in the fabrication shop where the public don't have access, it may be a poor choice for any trucking sector employer where staff expose others, or are equally exposed to car drivers who have consumed drugs, when they (the truck drivers) are on the public roading network. The road transport industry is in the unique position of sharing a work place – the roading network – with the general public for whom it is not necessarily a workplace.

- c) In the USA, interstate truck drivers are not permitted to use cannabis much less have it their blood. The point being, as in USA, New Zealand employers are expected to manage any level of driver impairment, or lack of fitness for duty, whether it has arisen due to drug consumption, or due to general life demands leading to the onset of fatigue, as well as normal task fatigue. The consequences (for non-compliance under New Zealand's work place legislation) for not managing these risks, or the potential for consequential outcomes, places a significant burden on employers and their safety management staff, as well as costs on their insurance policies.
- d) The demands placed on employers to manage drug impairment risk in the trucking industry is in complete contrast to the approach taken under New Zealand's road safety management objectives.

## **6. On road drug impairment must be actively managed**

- a) The Forum would like to think the likelihood of a drug impaired driver from the road freight sector being on the road would be relatively low given the current level of employment-related drug testing. Many truck drivers are subjected to pre-employment testing, random testing, and post incident or post-accident testing. These processes are part of a company's overall safety management system and backed by both the Health and Safety at Work Act 2015 (HASWA) as the regulatory platform, and by the insurers of commercial transport.
- b) Insurers don't want unquantifiable risk and with a combination truck and trailer costing in the order of half a million dollars, and having a load worth a similar amount, the insurer is certainly interested in the risk profile of their clients. The HASWA places significant duties on employers and company owners to proactively manage risk and this is not unreasonable.
- c) However, the roads are the trucking industry's workplace and are a shared environment with a range of other road users, particular private motorists with mixed skill capability and drug and alcohol exposure.
- d) This is a fundamental departure from any other business type where access to the business activity is essentially limited to individuals and other entities with appropriate authority. Even members of the public visiting a commercial premise have no right of entry and the actual work place activity area is usually off limits.
- e) This contrasts with the public road environment where commercial vehicles must interface with all range of drivers from the novice, to the proficient. It is in essence a system in tension because of the different aspirations of the relevant users of the network. Trucking and road transport activity is governed and constrained by extensive legislative frameworks including route access,

vehicle weights and sizes, working time and rest periods, and health and safety management, as well as the general provisions applicable to all road users set out in NZTA's Road User Rule.

- f) Private motorists have largely unbridled and unconstrained access to the network though they are likewise expected to meet the requirements of the Road User Rule.
- g) While many aspects of on-road travel can be managed by the employer such as driver fatigue, inclement weather (avoid travel), and the deployment of on-vehicle safety technology, the actions of the other road users and light vehicle drivers are unpredictable. This is evidenced by the primary crash contribution disparity between heavy and light vehicles, where the heavy vehicles are the primary contributor in 25% of fatalities.

## **7. Concluding comments**

- a) Not only does the discussion document appear to argue the difficulty of implementing a more reliable and comprehensive drug impairment testing regime, it ignores the employers' role as gate keeper in respect of safety on the road for employees. It also overlooks the provisions of NZTA publication [\*Medical aspects of fitness to drive\*](#) (2014) and the aspects that medical practitioners must consider in relation to drugs, medications and abuse of substances. This publication comments on the impact of drugs, as well as alcohol consumption mixed with drugs, by stating the typical risk to safety through impaired reactions in the context of medical practitioners' perspective. Chapter 14, page 130, provides examples of short-term impairment. In the simplest analysis of this sort of commentary, it should be possible to build from these core impairment attributes a more comprehensive CIT and combine that process with a new generation drug wipe or oral fluid test as a first order tool, before moving to an evidential test regime. This would be in line with current processes around alcohol testing.
- b) It is very easy to get caught up in what type of drug is the cause of the impairment, but this is secondary from a road safety perspective. The key aspect of the policy must be to remove the impaired driver from the vehicle control task, therefore removing the potential for an accident arising from the impaired vehicle control capability. The conviction and penalty process is derived from the evidential process.

## **8. Answers to specific questions**

The Forum provides the following responses to some of the questions presented in text of the discussion document.

**QUESTION 1:** *Do you think that roadside drug screening is a good option for deterring drug driving and detecting drug drivers? Are there other options not mentioned in this Discussion Document?*

**Answer:** Yes, we support roadside drug testing and suggest some of the new oral technologies and saliva wipes as screening tools for determining the next step in the determination process. The Police should use other behavioural cues for the initial determination, much the same an employer has to.

**QUESTION 2:** *Do you support oral fluid screening for roadside drug testing of drivers? Are there other options not mentioned in this Discussion Document that could be considered?*

**Answer:** Yes, the Forum supports oral fluid screening for roadside drug testing of drivers. The discussion document reflects the current oral fluid testing technology. The Forum believes that any legislative framework should be designed to allow approval of any new, or advanced, reputable testing or screening technologies that become available in the market.

**QUESTION 3:** *Is it reasonable to delay drivers by 3 to 5 minutes to administer a roadside drug screening test, in order to detect drug drivers and remove them from the road?*

**Answer:** Yes. The Government alleges to be committed to road safety. If 3-5 minutes on a roadside could have saved 71 lives last year known to have been taken by drugged drivers, and 88 the year before, is this really even an appropriate question?

**QUESTION 4:** *Is a presence-based, zero-tolerance approach to drug driving, where presence of a drug is sufficient for an offence, appropriate for New Zealand?*

**Answer:** In principle yes, but we need the detail of what this means in practice.

**QUESTION 5:** *Should there be legal limits for some drugs?*

**Answer:** We are focusing on impairment to control a motor vehicle. While setting thresholds for impairment for some drugs might be feasible in time, it's premature to go down this route before the authorities have adequate evidence to determine the appropriate thresholds.

**QUESTION 6:** *If roadside drug screening was introduced, which of the three approaches discussed above do you prefer?*

- Testing under the current 'good cause to suspect' criterion*
- Targeted testing following an incident or a driving offence*
- Random roadside drug screening, along the lines of the current breath alcohol testing model.*

*Are there other approaches that should be considered?*

**Answer:** All three approaches are valid and are supported by the Forum.

**QUESTION 7:** *If random drug screening was introduced, do you think it is a reasonable and proportionate response to the harm of drug driving? Are there circumstances in which it would be more or less reasonable?*

**Answer:** Our views are stated in the text of our submission. The Forum would like to see one standard approach across the board that provides appropriate guidance for trucking sector employers deploying drivers on the road, that is consistent with Work Safe's expectations. We don't have that now. We have a mixed and inconsistent regulatory approach where greater regulatory emphasis is placed on the employer than on road safety enforcement policy.

**QUESTION 8:** *What criteria should be used to determine if a drug is included, or excluded, from drug screening?*

**Answer:** That is up to those with the appropriate expertise to comment on but any drug that results in impairment, or reduction of cognitive ability, and therefore makes it unsafe for the user to drive, should be included.

**QUESTION 9:** *What regulatory process should be used to specify the drugs that are identified for screening?*

**Answer:** The Forum is not qualified to answer this.

**QUESTION 10:** *Should illicit and prescription drugs be treated differently?*

**Answer:** This question appears to be more in line with Government ideology than about driver impairment and inability to have proper control of a vehicle, which is the supposed purpose of the discussion document.

**QUESTION 11:** *Should there be a medical defence for drivers who have taken prescription drugs in accordance with a prescription from a medical professional.*

**Answer:** There has been a long history of medical professionals not supplying the correct advice around prescription drug use. This approach would require a very finely granulated legislative frame work to address this question with input from medical professionals.

**QUESTION 12:** *If oral fluid testing was introduced in New Zealand, do you think there should be a requirement for a second drug screening test following a failed first test? Do you prefer another option for screening drivers?*

**Answer:** Where a level of driver impairment has been established by an enhanced CIT, then a screening test to determine the probability of cause, either blood alcohol or drug related, must be carried out. For the latter, a drug wipe or oral fluid test could be used. A second test should only be required if the first failed on a technical issue. An evidential test should always follow a positive screening test but let's not lose sight of the fact that driver impairment has already been detected and the driver deemed not fit to have control of the motor vehicle

**QUESTION 13:** *Do you think that drug driving offences should be confirmed with an evidentiary blood test? If not, what evidence should be required to establish an offence of drug driving?*

See answer to question 12.

**QUESTION 14:** *Do you think an infringement offence (an instant fine and demerit points) or a criminal penalty (mandatory licence qualification, fines and possible imprisonment) is appropriate for the offence of drug driving?*

**Answer:** In general, the penalty format should largely mirror the alcohol impairment provisions. This excludes any treatment of offences around use and possession of illegal drugs.

**QUESTION 15:** *Is there any other penalty or action in response to the offence of drug driving that you think should be considered?*

**Answer:** The Court may wish to order a defendant to attend some sort of rehabilitation programme

**QUESTION 16:** *Do you think it is reasonable to penalise drivers who have used drugs, but may not be impaired?*

**Answer:** It comes back to the risk assessment approach. If there is no vehicle control issues, then there is no impairment issue to answer to. If there is collateral mischief, such as misuse of drugs, then further investigation or action might be warranted.

**QUESTION 17:** *Do you have anything else you would like to say about drug driving?*

**Answer:** Drug driving is clearly a road safety issue of some magnitude. There were more road deaths in 2018 involving drugs (71) than deaths involving drivers above the alcohol limit/refused test (66), with similar statistics in 2017 (88 deaths involving drugs; 74 involving drivers above the alcohol limit/refused

test). The Forum believes the emphasis of ongoing policy and law should be on the safety of those who share the road with drug users, rather than the focus of this discussion document which is heavily towards the “rights” of drug-using drivers. There is an adequate framework around alcohol use and driving that could be replicated for drug use and driving to ensure safer roads for all road users.