Drive Change

REFORM FOR ROADSIDE DRUG TESTING IN NEW SOUTH WALES

February 2025

Overview

This report provides an overview of recent data provided to the Legislative Council by the Minister for Police and Counter-terrorism in New South Wales on 10 September 2024, with regards to roadside drug tests conducted over the last 5 years (by Local Area Command), number of positives by drug type and whether there has been improvements in road safety from the rollout of mobile drug testing programs (MDT) in NSW.

Some key statistics provided by the Minister are:

- Between 2019 and 2023 (over a four-year period), NSW Police Force conducted a total of 677,494 roadside drug tests.
- The highest number of roadside drug tests were conducted in the following regions: North West Metropolitan, South West Metropolitan and Southern region.
- In the North West Metropolitan region, 39,106 tests were conducted in 2023. This was a 49.06% increase from the previous year, where 19,914 tests were conducted.

In Australia, the use of cannabis by a driver (even if legally prescribed), is determined by the presence of delta-9-tetrahydrocannabinol (THC) in oral fluid or blood. It is a zero-tolerance approach, as opposed to one that should be determined by impairment.

While prescriptions for medicinal cannabis in Australia have continued to increase since being legalised in 2016, patients are unable to drive due to current drug driving laws and can be subjected to MDT programs which are conducted across New South Wales.

There is a distinct lack of available data and information to assess the value and effectiveness of the MDT Program. Accordingly, we urgently seek the NSW Government's commitment to the following actions:

1. NSW Police must record details on whether drivers have a valid prescription for medicinal cannabis, when a positive test for delta-9-tetrahydrocannabinol (THC) is detected;
2. NSW Police must release regular data on: tests conducted (by drug type), positive tests broken down by drug type, number of positive confirmatory tests (by drug type) and number of false positive tests (by drug type);
3. NSW Government must provide transparency on the cost to taxpayers of conducting the MDT program, including: annual budget provided to NSW Police for the program, cost of each initial test and name/value of any external contracts for the program; and
4. The NSW Government must provide further transparency by releasing all internal and external assessments and evaluations of the MDT program.

About Drive Change

Under the auspices of Harm Reduction Australia, Drive Change was formed in 2020. Drive Change is a national law reform campaign that aims to amend the driving laws to ensure that patients on prescribed medicinal cannabis have the same rights as all other patients.

The unjust drug driving laws continue to impact both current and potential patients who are prescribed medicinal cannabis in New South Wales.

Roadside Drug Testing in New South Wales

Background

In December 2006, the legislation for roadside drug testing was passed in New South Wales in addition to existing laws for driving under the influence (DUI). Under this legislation, a driver may be charged with an offence if the presence of delta-9-tetrahydrocannabinol (THC), methylamphetamine (or cocaine), or methylenedioxymethyalamphetamine (MDMA) is detected in oral fluid during roadside drug testing by Police.

All Australian jurisdictions carry out random mobile drug testing (MDT), analogous to random breath testing for alcohol. This is a three-stage process involving an initial and a secondary oral fluid test at the roadside using two different devices. If the secondary test is positive, the oral fluid is then subject to confirmatory analysis in a police station or in government analytical laboratories.

The three drugs that are usually tested for are THC, methamphetamine and 3,4-methylenedioxymethamphetamine (MDMA), with cocaine also tested for in NSW. It is important to note that MDT only tests for the presence of drugs and not for impairment, and that driving with the presence of an illicit drug (ie 'mere presence') is a separate offence from driving under the influence.

Between 2015 and 2018, the MDT program expanded extensively, with the first expansion announced in March 2015 and commitment by the NSW Government to triple testing numbers to 100,000. This was followed by a second expansion in January 2018, with the intention to double the number of roadside tests to 200,000 by 2020.

Road Transport Act

The offence of driving with an illicit drug present (even if prescribed) in the body is set in Section 111 of the *Road Transport Act*. For a person to be found guilty of this offence, prosecution does not need to prove that the person was driving impaired by a drug at the time of the offence.

A person can be found guilty if they were driving with an illicit drug present in their system. If a person tests positive from the MDT program, police will issue a Notice of Suspension and prohibit the driver from driving for 24 hours (Section 148G).

The MDT program in New South Wales is one of the largest roadside drug testing programs in Australia, representing a quarter of all roadside drug tests undertaken nationwide.

It is important to note that with alcohol, the stepped concentration readings approximate impairment levels, but with illicit drugs, including patients on legally prescribed medications that contain delta-9-tetrahydrocannabinol (THC), motorists are tested simply for the presence of the drug in their system, regardless of whether a person is impaired at the time.

Penalties

Patients who are subjected to mobile drug testing can face penalties if THC is found present in their oral fluid or blood. If the offence is 'driving with an illicit drug present in your system' and it is the first alcohol or other drug related driving offence (in the past 5 years), instead of receiving a notice to attend court, the police can give you a fine and a disqualification of 3 months. This means that patients do not have to go to court.

The table below summarises the penalties for first offences relating to driving under the influence (DUI) and driving with an illicit drug in the system (in the oral fluid, blood or urine):

Offences		**Penalties**			
Provision of Road Transport Act 2013		1st offences			
		Max. fine	Max. gaol	Automatic disqualification	Minimum disqualification
s.112(1) (a)	Driving under the influence of alcohol or other drug	3,300	18 months	3 years	12 months
s.111	Drive with illicit drug in oral fluid, blood or urine	2,200	Nil	6 months	3 months

The legalisation of medicinal cannabis in Australia

In 2016, the Australian Federal Government passed legislation enabling a range of cannabis-based products (including products with THC), to be prescribed to patients by registered healthcare professionals. Following this, the Therapeutic Goods Administration (TGA) published clinical guidance regarding the use of medicinal cannabis for a range of conditions.

To date, there are a million prescriptions for medicinal cannabis, and more than 5,700 medical and nurse practitioners prescribing these medicinal cannabis products. While the number of patients continues to rise in Australia, it remains illegal for patients taking medicinal cannabis which contain THC, to drive.

THC enters oral fluid when cannabis products are smoked, vaporised or eaten through contamination of the oral cavity. There is no evidence that THC can be transferred from blood into oral fluid, meaning that products that avoid THC deposition in the oral cavity (e.g. THC capsules, patches or suppositories) are unlikely to give rise to a positive roadside drug test.

There are no current legal prohibitions related to driving in patients using CBD-only products, and there is no evidence that CBD can give rise to positive roadside drug tests in the absence of THC.

In November 2021, Cate Faehrmann MLC introduced the Road Transport Amendment (Medicinal Cannabis - Exemptions from offences) Bill, with the object to exclude users of medicinal cannabis from the application of offences relating to driving while a prescribed illicit drug is present in a person's oral fluid, blood or urine.

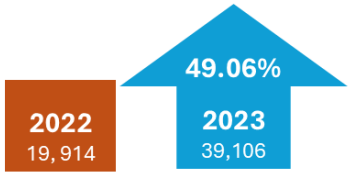
In October 2022, the Liberal-National and Labor parties opposed this Bill to amend the unfair prosecution of medicinal cannabis patients which would have provided patients with a defence against drug driving charges if they were not impaired and took their medications as prescribed.

Data on roadside drug testing in New South Wales

Roadside drug testing

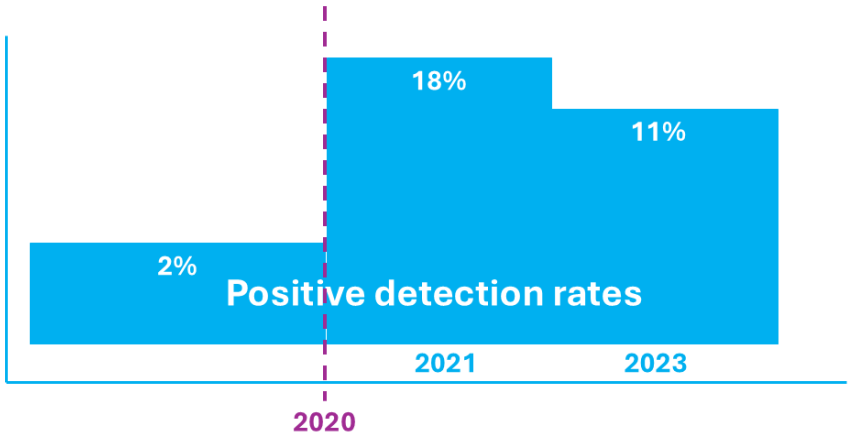
The highest number of roadside drug tests were conducted in North West Metropolitan, South West Metropolitan and Southern region.

In the North West Metropolitan region, 39,106 tests were conducted in 2023. This was a 49.06% increase from 2022, when 19, 914 tests were conducted.



The expansion of NSW Mobile Drug Testing led to a significant increase in testing volumes, from around 20,000 per year (2008) to 156,000 per year (2019).

Positive detection



Medicinal cannabis has been legalised and is widely prescribed since 2020.

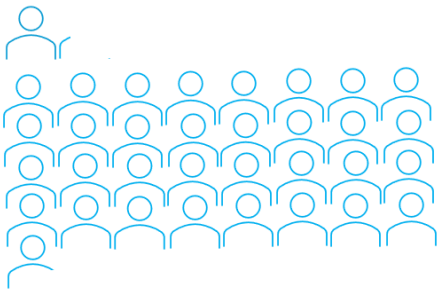
Positive detection rates hovered around 2 per cent. As MDT expanded, this peaked at nearly 18 per cent in 2021 before settling around 11 per cent in 2023.

Drug driving charges and detection

Charges

2008

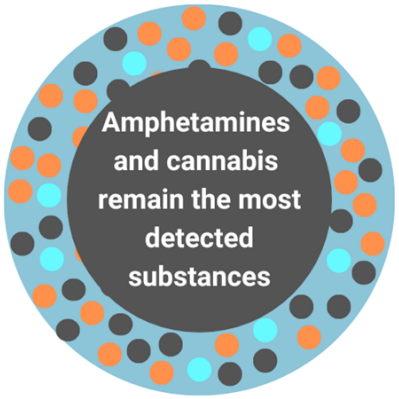
2023



= 3,131% increase

The number of drug driving charges rose from an average of 102 per quarter in 2008, to 3,296 in 2023. This is an increase of 3,131% (32 fold) within the 15-year period.[1]

Substances detected

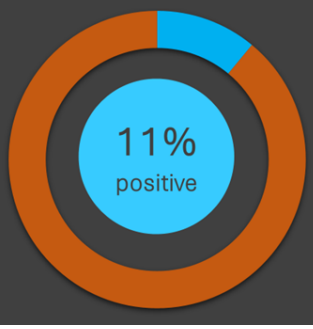


[1] https://bocsar.nsw.gov.au/research-evaluations/2024/BB172-summary-trends-in-drug-driving-charges.html?mc_cid=b6c4527917&mc_eid=cd87f2e1aa

2019 - 2023

677,494
roadside drug tests

Between 2019 and 2023 – a four year period - NSW Police Force conducted a total of 677,494 roadside drug tests.



75,858
positive roadside drug tests

During 2019 and 2023 the program returned 75,858 positive roadside drug tests. Based on this data, 11% of the total number of roadside drug tests were positive for illegal drugs.

Roadside drug testing and medicinal cannabis patients

To date, there have been over a million prescriptions for legal medicinal cannabis across Australia and it is expected that the number of patients will continue to grow. According to FreshLeaf Analytics, the average patient age is 49 years old, and approximately 70% of patients take cannabis medicine containing THC.

In December 2020, the TGA rescheduled low-dose CBD from Schedule 4 to Schedule 3, in which products containing traces of THC will be available via a pharmacist once a product is registered in Australia. The expectation is that over 2 million Australians will be using Schedule 3 CBD products. As such, the detection of small volumes of THC in MDT will pose a significant issue for patients who will access these 'pharmacist only' medications.

In Tasmania, driving with any detectable amount of THC in your system is an offence, unless it was obtained and administered in accordance with the Poisons Act 1971 (Tas), including medicinal cannabis (Road Safety (Alcohol and Drugs) Act 1970 s 6A(2) and associated regulations. However, if patients have a prescriber outside of Tasmania, they are unable to use this medical defence.

Importantly, these medical defences provide an exemption to presence offences, but if the person is under the influence of a drug to the extent that the person is incapable of having proper control of the vehicle they are guilty of an offence.

The science behind cannabis and impairment

Recent studies have revealed the inaccuracy of these Mobile Drug Testing (MDT) programs, proving that measuring impairment has more to do with the individual user and much less with the blood or saliva content.[1]

While cannabis can impair driving ability and certain cognitive abilities, these effects are relatively mild and disappear as the body metabolises THC. A driver who tests positive for cannabis is approximately 1.1-1.4 times more likely to be involved in a crash, in comparison to a sober motorist.[2]

[1] https://www.sciencedirect.com/science/article/pii/S0149763421004978?via%3Dihub#bib0145

[2] https://www1.racgp.org.au/ajgp/2021/june/medical-cannabis-and-driving

The table below summarises the crash risk and crash culpability estimates for different substances. A driver with a legal blood alcohol concentration of 0.5 is approximately 1.3-1.8 times more likely to be involved in a crash, and a driver who tests positive for benzodiazepines is approximately 1.2-2.3 times more likely to be involved in a crash.[3]

From the data provided below,[4] cannabis (and specifically THC) appears to have a relatively minor impact on driving performance. It is important to note that it can cause impairment in certain situations, such as when combined with alcohol and in people who are unfamiliar with its effects.

Table 1. Crash risk and crash culpability estimates for different drug classes

Drug class	Crash risk estimate	Crash culpability estimate
Alcohol (BAC = 0.02)	1.03–1.19[18,46]	1.36[18]
Alcohol (BAC = 0.05)	1.38–1.75[18,46]	2.19[18]
Alcohol (BAC = 0.08)	2.69–2.92[18,46]	3.63[18]
Cannabis	1.11–1.42[15,16,47–49]	1.20–1.42[15,16,47]
Antidepressants	1.35–1.40[48,50]	N/A
Antihistamines	1.12[48]	N/A
Benzodiazepines and Z-hypnotics	1.17–2.30[48,51]	1.41[51]
Opiates	1.68–2.29[48,52]	1.47[52]

BAC, blood alcohol concentration; N/A, not available

A study published in *Neuroscience and Biobehavioural Reviews*[5] revealed that blood and saliva testing for THC has no actual correlation with impairment. Referencing data from their own studies and 30 other publications, the publication highlighted the differences in measuring THC and alcohol in roadside tests.

[3] Ibid

[4] https://www1.racgp.org.au/ajgp/2021/june/medical-cannabis-and-driving

[5] https://www.sciencedirect.com/science/article/pii/S0149763421004978?via%3Dihub#bib0145

It was found that higher blood THC concentrations were only weakly associated with increased impairment in occasional cannabis users, while no significant relationship was detected in regular cannabis users. As such, patients with a less frequent dosage would display a positive THC blood content in roadside tests, in which police would interpret this as impaired without taking into account whether there are signs of intoxication.

The science continues to suggest that blood and oral fluid THC concentrations taken as part of the MDT program, are poor indicators of cannabis-THC induced impairment.

International models

Australia remains the only jurisdiction in the world that conducts random tests for the presence of THC in drivers as opposed to impairment.

Canada

Following Canada legalising cannabis for adult use in 2018, the Canadian Government mandated a periodic review of any public health consequences arising from the move.

A report gathered records from all emergency departments in Ontario and Alberta, two states which account for 50% of the Canadian population. The data looked at moderate to severe traffic injuries leading to ER visits between April 2015 and December 2019.[6]

There was no evidence of significant changes associated with cannabis legalisation, and post-legalisation weekly counts of drivers' traffic injury ED visits in both Ontario and Alberta.[7]

While the implementation of cannabis legalisation in Canada raised a concern that it will increase traffic-related harms, the results of this study showed no evidence that legalisation was associated with significant changes in emergency department traffic-injury presentations.

[6] https://www.med.ubc.ca/news/study-finds-no-increase-in-traffic-injuries-after-cannabis-legalization/#:~:text=The%20project%20reviewed%20all%20Ontario,all%20drivers%20or%20youth%20drivers.
[7] Ibid

United States

In a study analysing fatal crash data from 2010-2017 in the United States, it was found that in states with 'medical cannabis only' frameworks, the move away from prohibition was associated with fewer total fatal crashes for both males and females.

Similarly, another study that looked at the association of medical marijuana laws with traffic fatality rates found that the laws were associated with reductions in traffic fatalities, especially among those aged 25 to 44 years old.[8]

In California, there is no legal bloodstream concentration limit for THC and drug driving laws rely on field sobriety tests. From this example, we believe that sobriety tests prove a more effective means for identifying drivers who pose a crash risk as THC metabolites alone are disproven as indicators of intoxication.

Correlation and causation

It is evident that there needs to be a distinction between correlation and causation when it comes to the Roadside Drug Testing program. In New South Wales, the research shows that in the period between 2010 and 2018, 21 per cent (384) of the 1,818 drivers (or riders) who died on NSW roads had an illicit drug in their system.[9]

In Baldock's study, it was over 15 per cent, with around 9 per cent amphetamines and 6 percent THC. However, there is no proof of causation.[10] There is nothing to suggest that within the number of deaths reported, it was *caused* by the presence of drugs. This study, and other research, have wrongly claimed a causative connection, which is that THC presence leads to deaths.

We strongly argue that in order to show causation, research will need to prove that drivers were adversely affected by the THC in their system. Further to this, we contend that there is no such causation that patients who are prescribed medicinal cannabis with THC (and take their medications accordingly) are at significant risk to impairment.

[8] https://pmc.ncbi.nlm.nih.gov/articles/PMC5227945/

[9] https://pubmed.ncbi.nlm.nih.gov/25287700/

[10] https://pubmed.ncbi.nlm.nih.gov/25287700/

Drive Change call to action for the NSW Government

There is a distinct lack of data and information available to assess the value and effectiveness of the MDT Program, accordingly we urgently seek the NSW Government's commitment to following actions:

1. NSW Police must record details on whether drivers have a valid prescription for medicinal cannabis, when a positive test for delta-9-tetrahydrocannabinol (THC) is detected.

2. NSW Police must release regular data on:

    a) The number of tests conducted broken down by drug type
    b) The number of positive tests broken down by drug type
    c) The number of positive confirmatory tests broken down by drug type
    d) The number of false positive test broken down by drug type

3. Given the exponential rise in testing taking place, the NSW Government must provide transparency on the cost to taxpayers of conducting the MDT program, including:

    a) The annual budget provided to NSW Police for the program
    b) The cost of each initial test and any confirmatory testing
    c) The name and value of any external contracts for testing

4. The NSW Government must provide further transparency by releasing all internal and external assessments and evaluations of the MDT program.

Drive Change would like to acknowledge NSW Greens in their involvement in this report.

Drive Change

https://www.drivechangemc.org.au

Fair.
Just.
Effective.

Drug driving laws for medicinal cannabis patients.