

Review of serious road crime

Preliminary submissions by the Justice Support Centre

16 February 2023

This report was authored by Montanna Tassell, Ravi Prasad and Sun-Jae An



**Justice
Support
Centre**

**SOUTH WEST SYDNEY
COMMUNITY LEGAL
SERVICE**

E info@justicesupportcentre.org.au | **P** (02) 9601 7777 | **W** justicesupportcentre.org.au
Level 4, 2-14 Meredith St, Bankstown NSW 2200 | PO Box 3558, Bankstown Square NSW 2200
Darug + Eora Land

Justice Support Centre thanks the NSW Attorney General and the NSW Law Reform Commission for the opportunity to contribute our expertise to the Review of Serious Road Crime.

About Justice Support Centre

Justice Support Centre was founded in Liverpool in 1986 as a community legal centre (formerly known as the South West Sydney Legal Centre). Since that time, we have provided free legal services to our local community to improve their access to justice. Our legal service supports many thousands of clients every year. Demand continues to increase in South West Sydney, where 1 in 5 people are likely to need assistance from a community legal centre if they have a legal problem (compared to an average of nearly 1 in 10 in New South Wales).¹

We provide legal advice about a range of criminal law matters and driving offences. For 10 years, we have assisted Bankstown and Fairfield (and for some time Burwood) Local Courts with duty lawyer services on traffic list days. We continue to offer weekly legal assistance through the Driving Offences Legal Service outreach program at Bankstown Local Court. This program allows us to advise and **assist defendants with driving and traffic offences who would otherwise be unrepresented at court**. This is particularly important as these defendants would otherwise be ineligible for Legal Aid because of the nature of offences.

In 2021–22, we assisted more than 500 community members in South West Sydney with a range of traffic and driving offences. Of these clients, the vast majority were from very vulnerable groups.

Scope of this submission

We acknowledge that this review of serious road crime by the NSW Law Reform Commission is largely in response to advocacy by victims of serious road crime and their families. We are sensitive to the concerns raised by these groups and do not seek to undermine their valuable perspectives by contributing our own submission.

To offer expertise on matters with which we have the most experience, we have limited the scope of our submissions to the offence of “presence of prescribed illicit drug in person’s oral fluid, blood or urine” in [section 111](#) (“**section 111**”) of the Road Transport Act (“**the Act**”).

Although not specifically addressed, our submissions would also be applicable to the [subsection 111A\(1\)](#) (“**subsection 111A(1)**”) offence (“presence of both prescribed illicit drug in person’s oral fluid, blood or urine and PCA in person’s breath or blood”). We make reference to other provisions of the Act as relevant to our submissions, such as, [section 112](#) (“**section 112**”) of the Act (“use or attempted use of a vehicle under the influence of alcohol or any other drug”).

¹ Randell SA, Mulherin G, Mirrlees-Black C 2018 Evidence of legal need in NSW to support the Cameron Review implementation, Law and Justice Foundation of NSW, p78.

Submissions

In response to the [terms of reference](#), our submissions primarily address whether section 111 of the Act is fit for purpose.

Executive summary

1. We do not wish to advocate for weaker laws or reduced sentences for road crimes, especially serious road crimes.
2. However, our position is that:
 - a. section 111 is **not** fit for purpose
 - b. detection drug offences, including section 111, have very little efficacy in protecting the community from dangerous drivers.
3. Section 111 is predicated on the trace of an illicit substance in the driver's blood or saliva. This is regardless of when or how the substance was consumed or came to be present in the driver's blood or saliva, and it does not consider whether the accused's ability to drive was adversely affected. The offence carries a mandatory disqualification period upon conviction of 3–12 months.²
4. We say this is onerous and disproportionately punitive, especially given the offence is based on mere traces of illicit substances being present in someone's system, which can linger weeks after ingestion of an illicit substance without impairing a person's ability to drive safely.
5. Unlike section 112, which has an obvious and supported policy basis, section 111 was newly introduced in 2006³ and raises significant policy issues.
6. Keeping our roads safe must be balanced against ensuring our drug driving laws are reasonable and fair.

The offence does not consider whether a driver is under the influence and is inconsistent with driving offences related to alcohol consumption

7. We do not cavil with any research or data that suggests that driving under the influence of alcohol or illicit drugs can impair driving, increase risk to the safety of other road users and leads to an unacceptable road toll.

² For a first offence, an automatic disqualification period of 6 months and minimum 3 months. For a second offence, an automatic disqualification period of 12 months and minimum 6 months.

³ <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=1246>

8. However, section 111 relates to the detection of the **mere presence** of illicit drugs in bodily fluid, rather than how the drug adversely affects a person's driving.
9. The detection model is void of context; it does not consider how or how long ago the drug was consumed. **A positive test can show up days to weeks after consumption.** In many cases, there is no connection between the mere presence of the drug detected in bodily fluid and dangerous driving. In all of the section 111 matters in which our Centre has appeared on behalf of a client, there is **no reference in police facts to an accused person appearing to be affected or under the influence when stopped by police.** Further, in the majority of the section 111 matters our Centre has appeared in, there was nothing in the accused person's manner of driving that brought them to the attention of police. Instead, they were stopped for the purposes of a random drug test, usually after a random breath test for alcohol consumption that has returned negative.

Case study 1: A client showing traces after being in the vicinity of people consuming drugs

An unrepresented defendant, charged with the section 111 offence, appeared in one of the Local Courts in which we regularly offer legal support. His instructions were that he has never ingested any illicit drugs in his life, much less prior to the detection of drugs in his saliva. However, he did admit that he was at a gathering where other people were consuming illicit drugs within 24 hours of the roadside test.

While we concede that the defendant's instructions are not equivalent to sworn evidence tested in court, this situation highlights a possible scenario in which a person in the vicinity of another person taking drugs can be detected with illicit drugs present in their oral fluid, even when drugs have not been knowingly ingested. For such a defendant who presents with multiple vulnerabilities in our community, the prospects of being able to successfully defend the charge are minimal while the prospects of facing a conviction and ensuing period of driver disqualification is very high.

10. Former Magistrate Heilpern describes that the tests used by NSW Police to detect illicit drugs in bodily fluid show up drug use that is "historical or [has a] relatively benign impact on their driving ability".⁴ Changes in government advice highlight that it is relatively unknown how long illicit drugs can stay in a person's system. In *Police v Carrall (2016)*, the Magistrate criticised the **"mystery and uncertainty by design of the current testing system"**.⁵

⁴ N Wiggins and D Carrick, 'Drug driving laws so 'grossly unfair' I can't apply them, says magistrate after a tenure affected by trauma and threats', ABC News, 18 June 2020, <https://www.abc.net.au/news/2020-06-18/drug-driving-laws-cannabis-nsw-unfair-magistrate-david-heilpern/12361312>

⁵ Police v Joseph Ross Carrall (2016), <http://opengovernmentnsw.org.au/wp-content/uploads/2016/02/Carral-RDT-case-judgment.pdf>

11. As Moxham-Hall & Hughes write, drug driving laws can be either zero-tolerance or per se, where “thresholds of drugs are specified and where a driver will only be deemed to have committed an offence if they are detected driving with this amount of drug on board”.⁶ For the latter, there have been critics of laws that criminalise driving where the drugs consumed have no effect on driving ability.⁷
12. **The detection model for illicit drugs is inconsistent with the way the law treats the consumption of alcohol in relation to driving offences**, which is either directly related to the measurement of blood alcohol levels (section 110 of the Act) or dependent on an assessment of the extent to which a driver is impacted by the consumption of alcohol (section 112 of the Act). There is no equivalent offence provision for the mere presence of alcohol, except in relation to [novice drivers](#).
13. When section 111 was inserted into the Act in 2006, the relevant Second Reading Speech noted that the legislation would “ensure that motorists who take drugs and drive can be detected and penalised just as those who drink and drive.”⁸ However, the penalties for drink driving are predicated on varying levels of Blood Alcohol Concentration (BAC) in each driver (section 110) or driving under the influence of alcohol (section 112), which requires a subjective assessment of a person’s impaired ability to drive safely.
14. Extensive research, data and case law has aided NSW drivers with significant guidance in making a decision to drive after consuming alcohol. While the biological make up of a particular driver may weigh into the number of drinks that a driver may consume over a certain period of time to be under the relevant BAC levels or to be under the influence, there is a clear objective test measuring BAC or a more subjective test measuring the degree to which a person is influenced by the consumption of alcohol. It is conceivable that an unrestricted licence holder who is found to have a BAC reading of 0.04 may not be charged with a low-range drink driving offence but is so affected and impaired by that level of alcohol that they may, in fact, be charged with a section 112 offence of driving under the influence. In either case, between sections 110 and 112, the public interest in protecting all road users is served while providing clear guidance to drivers.
15. For many years studies have shown that even a minimal BAC reading doubles the risk of a collision.⁹ There are no similar statistics or studies correlating the **mere presence** of illicit substances in blood or saliva and higher rates of collisions or fatalities. In short, the focus of this current regime on “presence” rather than “impairment” means that it **criminalises driving for those who consume illicit substances on an irregular basis** or even those who may have involuntarily ingested illicit substances and who otherwise do not feel impaired or affected by said consumption.

⁶ V Moxham-Hall and C Hughes, ‘Drug driving laws in Australia: What are they and why do they matter?’, *Drug Policy Modelling Program, UNSW Social Policy Research Centre*, Bulletin No 29, University of NSW, May 2020, https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/DPMP_Bulletin_29.pdf

⁷ Ibid

⁸ New South Wales, Legislative Assembly, 19 September 2006, Second Reading of Road Transport Legislation Amendment (Drug Testing) Bill 2006 (Matt Brown, Parliamentary Secretary) <https://www.parliament.nsw.gov.au/bill/files/1246/LA%207906.pdf>

⁹ Wells v Council of the City of Orange (No 2) [2017] NSWSC 510

16. There are alternative models of drug driving offences that can be explored, however, we say the existing offences in NSW, without section 111, are sufficient.

Existing offences are sufficient without section 111

17. We submit that there are existing offences that cover the field and render section 111 unnecessary.
18. In particular, we refer to section 112, which captures a situation where the driver is, in fact, adversely affected by illicit drugs. Without need to wait until such impaired driving causes a collision, injuries or a fatality, **section 112 prohibits driving while under the influence of any drugs.**
19. If a driver is affected by illicit drugs and causes a collision, resulting in a fatality or grievous bodily harm, they can be charged with several existing offences, such as negligent driving under [section 117 of the Act](#) or dangerous driving under [section 52A of the Crimes Act 1900](#), which attract harsher penalties.
20. The rationale for drug tests is outlined in the Second Reading Speech introducing section 111 was that illicit substances “affect the skills and sound judgment required for driving.”¹⁰ While we do not question the use of random drug tests by police as a deterrent to promote road safety (similar to random breath tests), we do query criminalising the mere presence of illicit substances in blood or saliva when nothing in section 111 speaks to the driver’s impaired skill and judgment while operating a motor vehicle.
21. As such, we question why section 111 is necessary at all, what situations it covers that section 112 does not and how it increases the safety of road users by criminalising mere presence rather than actual impairment to driving?
22. We submit that the only real impact of this offence provision is to punish the most vulnerable members of our community (those unable to access representation from a lawyer), further entrench them in cycles of poverty and disadvantage and place an unnecessary burden on our criminal justice system.
23. Each roadside drug test is followed up by further testing at the police station on the often-faulty Drager Drug Test 5000 device and then forensically tested at the Forensic and Analytical Science Service Lidcombe. All these resources are used simply to detect the *mere presence* of illicit drugs, with no testing or assessment of the driver’s impaired driving ability. Once mere presence is established, these drivers are then charged with a criminal offence, and unless represented by lawyers, are likely to face convictions – the consequences of which are **criminal records and mandatory periods of licence disqualifications, both of which impact upon current and future earning capacity.**

¹⁰ New South Wales, Legislative Assembly, 19 September 2006, Second Reading of Road Transport Legislation Amendment (Drug Testing) Bill 2006 (Matt Brown, Parliamentary Secretary) <https://www.parliament.nsw.gov.au/bill/files/1246/LA%207906.pdf>

24. This over-resourcing to criminalise the mere presence of illicit drugs in saliva and blood could be diverted to:
 - a. resourcing police training so they can better assess whether a driver's ability to drive has been impaired under the influence of drugs
 - b. provide better health, education and rehabilitation to communities impacted most by illicit drug use.

This offence has an adverse impact on vulnerable communities

25. In respect of the disqualification period attached to section 111, the [2013 Committee on Law and Safety's report *Driver Licence Disqualification Reform*](#) has shown that extended periods of disqualification are not an adequate deterrent to the repeated commission of road crime offences.¹¹ In fact, longer disqualification periods can lead people to drive unlawfully and have a disproportionate impact on vulnerable persons. This report underpinned the reforms brought about in 2017,¹² part of which involved reducing lengthy automatic disqualification periods for existing road safety offences.
26. Indeed, when the bill to reform driver licence disqualification laws was introduced, the Honourable Mark Speakman acknowledged in his [Second Reading speech](#)¹³ [emphasis added]:

This bill will change the penalties for driver licence disqualification to ensure that they are fairer and more effective in reducing unauthorised driving and repeat offending. First, the current driver licence disqualification framework **increases the risk of reoffending, with evidence showing longest qualifications are not a deterrent to unauthorised driving**, and yet some people have disqualification periods of more than 10 years in addition to fines and imprisonment terms. Secondly, it **has a serious adverse social impact, particularly on vulnerable people** and people in regional and rural areas, as **long disqualifications affect the ability to travel for education and employment purposes**. Thirdly, it **contributes to the over-representation of Aboriginal people in the criminal justice system**, with more than 14 per cent of those sentenced and almost a third of those imprisoned for unauthorised driving identifying as Aboriginal. Fourthly, it is harsher by comparison with other jurisdictions. Fifthly, **it imposes a significant burden on the criminal justice system**, with about 12 per cent of people sentenced in New South Wales being sentenced for unauthorised driving offences, increasing pressure on the court and prison systems.
27. Detection laws have the function of criminalising driving for drug users. The flow on effects of mandatory disqualification on a person can be personally devastating.

¹¹ Committee on Law and Safety, *Driver Licence Disqualification Reform*, Report 3/55, November 2013, Legislative Assembly of New South Wales, <https://www.parliament.nsw.gov.au/ladocs/inquiries/1760/Driver%20licence%20disqualification%20reform%20report.pdf>

¹² *Road Transport Amendment (Driver Licence Disqualification) Act 2017*.

¹³ *Road Transport Amendment (Driver Licence Disqualification) Bill 2017 Second Reading Speech*

28. In our practice, we have seen numerous persons being charged and sentenced in court in **circumstances where they have consumed illicit substances days or weeks prior and have not realised that traces of these substances remain in their system**. Many of these defendants are employed and live in areas of Western Sydney where they rely on a driver's licence for work and family purposes. Being charged means they face significant consequences to their income and family life due to the risk of a criminal conviction as well as a mandatory disqualification period.
29. Many of our clients experience layers of disadvantage. Many are fleeing family and domestic violence, raising children as a single parent, and often raising children with behavioural issues as a result of witnessing violence in the home. Many are trying to reduce their reliance on income support from Centrelink and try to find work, often work requiring them to drive. For some, they let their hair down one night, wait out a couple of days to rid their bodies of any traces of drugs before deciding to drive and then find themselves facing a criminal conviction and ensuing period of licence disqualification.

Case study 2: The impact for a single mother, recovering from domestic violence

One of our clients was charged 3 times over a 3-month period for the same offence of driving with cannabis present in her saliva. She is a single mother who had recently escaped domestic violence and had just started her own business. In all 3 instances, she had ingested the illicit substance days prior and felt completely fine to drive. After these charges, took steps to educate herself by completing a Traffic Offender Program where she learned more about how long an illicit substance stays in your system.

Unfortunately, rather than all 3 matters being heard before the court at the same time, her cases were heard on separate occasions, due to the delays in bringing charges because of the forensic testing. These required the later charges to be regarded as subsequent offences, with increased mandatory disqualification periods. She was convicted and ordered a total of 9 months disqualification. This meant **she had to shut down her business**, go back to relying on Centrelink parenting payments, and **lost the ability to drive her children to school and to health appointments** for behavioural issues impacting their learning and socialisation.

30. We submit that excessive mandatory disqualification periods for detection drug laws pose very real economic and social risks for our vulnerable community members. This impact seems unjustifiable when the utility and efficacy of section 111 offences in themselves seem negligible, having regard to existing offence provisions elsewhere in the Act and the *Crimes Act 1900* (see submissions 17–24).

There is not enough evidence that this offence reduces road accidents:

31. There is no evidence to suggest that mere traces or historical consumption of an illicit substance lead to an increase in road accidents.
32. There are also no statistics to establish that the introduction of section 111 has reduced road fatalities. More generally, the year 2021 had the lowest road fatality rate since records were first compiled in 1908.¹⁴
33. There is research that demonstrates that Police roadside tests routinely return false results.¹⁵
34. **If the goal of drug driving laws is to improve road safety and reduce road fatalities, then more evidence is required to justify the ongoing enactment of section 111** or to determine whether the provision is “fit for purpose”.
35. Although the primary public interest to be protected in the enactment of any road safety laws is the safety of all road users, the burden to taxpayers and government budgets must also be a significant consideration in this review. The paucity of evidence on the efficacy of section 111 when measured against the **financial and social cost of enforcing this offence provision** (as indicated above and including roadside drug tests, police station drug tests, forensic analysis in government testing facilities, criminal charges heard through courts, administrative enforcement of licence disqualifications, increased risk of driving whilst disqualified, all leading to further entrenchment of poverty and disadvantage) cannot justify the ongoing enactment of section 111 nor a characterisation of the provision as “fit for purpose”.

¹⁴ Centre for Road Safety, *Road Traffic Casualty Crashes in New South Wales: Statistical Statement for the year ending 31 December 2021*, Transport for NSW, <https://roadsafety.transport.nsw.gov.au/downloads/crashstats2021.pdf>

¹⁵ B Knight, 'Roadside drug tests for cannabis return false results, research finds', *ABC News*, 12 September 2019, <https://www.abc.net.au/news/2019-09-12/police-roadside-cannabis-drug-testing-devices-questioned/11502436>; T R Arkell et al, 'Detection of THC in oral fluid following vaporized cannabis with varied cannabidiol (CBD) content: An evaluation of two point-of-collection testing devices', *Drug Testing and Analysis*, Vol. 11, Iss. 10, 2019, pp 1486-1497 <https://analyticalsciencejournals.onlinelibrary.wiley.com/doi/10.1002/dta.2687>

Conclusion and recommendations

Justice Support Centre in no way seeks to trivialise serious road crimes nor undermine the tragic consequences of offending behaviour. We offer our deepest condolences to all victims of serious road crimes and their families.

Through these submissions, we aim to demonstrate the need to review and reconsider the utility and efficacy of section 111 of the Act (and similarly subsection 111A(1) of the Act) for the reasons submitted above.

In summary, we recommend:

- A. Law reform to repeal the section 111 offence of “presence of prescribed illicit drug in person’s oral fluid, blood or urine” and the subsection 111A(1) offence of “presence of both prescribed illicit drug in person’s oral fluid, blood or urine and PCA in person’s breath or blood”.
- B. In the alternative, that the section 111 and subsection 111A(1) offences only be applicable to [novice](#) and/or [special category drivers](#) in the same way that the drink driving standards apply differently to these drivers.
- C. In the alternative, that mandatory disqualification periods upon conviction of section 111 and subsection 111A(1) offences be removed.
- D. For the NSW Law Reform Commission to conduct further inquiry into whether, in the absence of section 111 and subsection 111A(1) offences, there is any need to strengthen existing provisions and safeguards.

For transparency, we authorise and encourage publication of these submissions.

If you would like further information or input on matters raised in this submission, please contact the Acting CEO of the Justice Support Centre and Principal Solicitor of the South West Sydney Community Legal Service, Peter Multari, by email to info@justicesupportcentre.org.au.



Peter Multari - Principal Solicitor/Acting CEO,

Justice Support Centre