

02 June 2021

Ms Margaret Crawford
Auditor General
NSW Audit Office
Level 19, Tower 2 Darling Park,
201 Sussex St, Sydney NSW 2000

Dear Ms Crawford,

Request for a performance audit of the NSW Police Random Drug Test Regime

I write to request that you conduct a performance audit of the NSW Police Random Drug Testing (RDT) regime.

I make this request as a result of;

1. Detected breaches of the Standard Operating Procedures (SOP) by officers whilst conducting Random Drug Tests.
2. Testing methods detecting the presence of drugs, not impairment caused by drugs, leading to alarming reports of individuals testing positive for THC days after consuming cannabis and long after its effects have ceased.
3. The legal prosecution of patients who are charged for testing positive to THC despite having a prescription for a medicinal cannabis product and having presented no signs of impairment.
4. The proven inaccuracy of the drug testing devices utilised in the RDT regime.
5. The Government's inability to demonstrate that the RDT regime has led to a reduction in road trauma.

Detected Breaches of Standard Operating Procedure

On the weekend of 1 and 2 May, I attended Mardi Grass in Nimbin as a guest speaker on a number of panels.

On Sunday morning, 2 May, at approximately 9 AM I was stopped by NSW Police for a random drug test on Blue Knob Road just outside of Nimbin, as were hundreds of others over the course of that weekend.

Whilst conducting the test, the officer failed to use gloves while handling the device which is a clear breach of part 1-5 of the [Standard Operating Procedures \(SOP\) for Random Oral Fluid Testing](#) which reads:

Under no circumstances will oral fluid or equipment used to obtain oral fluid samples be handled by police without wearing protective latex or nitrile gloves.

At the end of this letter, I have provided screenshots from the video taken by my advisor during the test which clearly shows the officer in breach of the SOP.

This is significant as the sensitivity of the tests makes them extremely vulnerable to contamination, especially if the officer had also been handling the tests of other drivers without gloves.

It is also poor COVID-19 protocol for the officer to be potentially exposed to the oral fluids of multiple drivers without using appropriate protection.

I have received expert legal advice which has confirmed my concerns over the integrity of the testing conducted over the weekend. As such, none of the tests administered over that weekend can be relied upon with any certainty.

This incident raises serious questions about how an officer was able to breach the SOP so blatantly without drawing the attention of other officers on site. Is it typical behaviour for NSW police to breach the SOP during RDTs? If so, how many tests are being contaminated due to breaches of the SOP?

A previous case against Sydney Lawyer Bretty Galloway, who tested positive for methylamphetamine, was dismissed after similar breaches of the SOP. Magistrate Rodgers found that police failed to adhere to standard operating procedures during the police station drug test.¹

A video recording of the test showed that police did not clean or decontaminate the area where the test was conducted, placed a pair of gloves on a table before putting them on and then failed to take care with what they touched while wearing the gloves.

Footage also showed one of the constables touching the foam head of the drug testing device with gloves that had touched other items in the room.

¹ [Brett Galloway has drug driving charge dismissed after police drug test 'contamination' \(smh.com.au\)](#)

These detected breaches of the SOP may be indicative of a wider culture of disregarding the SOP within the NSW Police which could be leading to thousands of false-positive tests.

Testing for presence, not impairment

Unlike the alcohol random breath testing (RBT) regime, which measures and determines impairment based on blood alcohol levels that are scientifically proven to impair driving, the RDT regime merely tests for the presence of a drug in an individual's system.

The NSW Government has previously claimed that THC remains in your system for up to 12 hours, a claim that has been disputed.²

The tests used by the RDT regime are sensitive at 5 nanograms per millilitre. Heavy cannabis users can take up to 22 - 24 hours to drop below 10 nanograms per millilitre³.

Individuals can test positive for THC well after its effects have ceased. Some individuals report testing positive to THC days or even over a week after using cannabis. There is even a case of an individual claiming they tested positive for THC as a result of kissing their partner who is a medical marijuana user.⁴

The University of Sydney Lambert Initiative conducted a comprehensive analysis of 80 scientific studies to determine the 'window of impairment' caused by the consumption of THC. The analysis indicated that impairment may last up to 10 hours if high doses of THC are consumed orally. When lower doses of THC are consumed via smoking or vaporisation the duration is generally four hours.⁵

One study found almost no increase in crash or culpability risk from the presence of THC.⁶ A different study found that users with THC in their system were 1.1 - 1.4 times more likely to be involved in a crash than sober drivers.⁷ This is comparable to individuals on antidepressants who are 1.35 to 1.4 times more likely to be involved in a crash than sober drivers.

² [NSW Government claim cannabis stays in system for up to 12 hours questioned by magistrate - ABC News](#)

³ [Current Knowledge on Cannabinoids in Oral Fluid \(nih.gov\)](#)

⁴ [How A Kiss Can Get You Prosecuted Under NSW Broken Drug Driving Laws - Sydney City Crime](#)

⁵ [Determining the magnitude and duration of acute Δ9-tetrahydrocannabinol \(Δ9-THC\)-induced driving and cognitive impairment: A systematic and meta-analytic review - ScienceDirect](#)

⁶ Compton RP, Berning A. Drug and alcohol crash risk. Traffic Safety Facts Research Note. Washington, DC: National Highway Traffic Safety Administration, 2015.

⁷ Drummer OH, Gerostamoulos D, Di Rago M, et al. Odds of culpability associated with use of impairing drugs in injured drivers in Victoria, Australia. *Accid Anal Prev* 2020;135:105389. doi: 10.1016/j.aap.2019.105389.

A study measuring the driving performance of occasional cannabis users who vaporised 13.7 mg of THC found modest driving impairment at 40 - 100 minutes and no impairment at 240 - 300 minutes.⁸

With 9,446 positive tests in 2019⁹, this results in potentially thousands of individuals entering the justice system for the mere presence of a drug in their system despite a lack of evidence of their having driven whilst impaired due to the influence of THC.

For many, the loss of licence leads to the loss of employment, housing and the breakdown of relationships with lifelong negative impacts.

It is clear that prosecution for positive detections for THC under the regime has no basis in science, and that the NSW Government is unable to give clear advice to drivers as to how to avoid testing positive for THC after consuming cannabis.

Prosecution of patients with medicinal cannabis prescriptions

The medicinal cannabis system is rapidly expanding. The Therapeutic Goods Administration (TGA) has approved over 100,000 Special Access Scheme Category B applications for patient access to cannabinoid products as of March 2021.¹⁰

Despite this, legally prescribed cannabis is the only prescription medication without a legal defence for presence when not impaired¹¹. Tasmania remains the only state in Australia where a medicinal cannabis prescription is a defence to testing positive for THC.

Benzodiazepines are more often found in the blood of drivers who cause crashes than THC. Despite this benzodiazepines are not tested for during RDTs.¹²

All users of legally prescribed cannabis are at risk of testing positive to THC at an RDT and subsequently losing their licences and livelihoods. This is a grossly unfair outcome for those individuals reliant on medicinal cannabis and stimulates the increased uptake of medicinal cannabis as a safer and more effective alternative to other pharmaceutical drugs.

⁸ Arkell TR, Vinckenbosch F, Kevin RC, Theunissen EL, McGregor IS, Ramaekers JG. Effect of cannabidiol and Δ9-tetrahydrocannabinol on driving performance: A randomized clinical trial. JAMA 2020;324(21):2177–86. doi: 10.1001/jama.2020.21218.

⁹ [NSW Police roadside drug testing numbers triple in four years despite stable positive results \(smh.com.au\)](https://www.smh.com.au/nsw-police-roadside-drug-testing-numbers-triple-in-four-years-despite-stable-positive-results-20200811)

¹⁰ [RACGP - Medical cannabis and driving](https://www.racgp.org.au/medical-cannabis-and-driving)

¹¹ [8 Problems With Current Drug Driving Laws & Medicinal Cannabis - Drive Change \(drivechangemc.org.au\)](https://drivechangemc.org.au/8-problems-with-current-drug-driving-laws-medical-cannabis-drive-change)

¹² [Police Accused Of Targeting The Young And Poor With Drug Driving Tests \(buzzfeed.com\)](https://www.buzzfeed.com/police-accused-of-targeting-the-young-and-poor-with-drug-driving-tests)

Inaccuracy of tests utilised by the RDT regime

A 2019 study by the University of Sydney's Lambert Institute found that the devices utilised by the NSW RDT regime suffered from significant inaccuracies.¹³ The study tested participants who had vaporised placebo cannabis, THC heavy cannabis and equal THC CBD concentrated cannabis. Participants were also tested for driving performance via a driving simulator to determine their impairment.

The devices often failed to detect high concentrations of THC with false-negative rates of between 9 and 16 per cent. The devices also provided positive results for low or negligible levels of saliva THC concentrations between 5 and 10 per cent of the time.

The study also found that measures of accuracy, specificity and sensitivity of the two devices fell below the levels recommended by EU authorities. The study concluded that there was no reliable link between THC levels in saliva and the level of intake or impairment.

No evidence that the regime has reduced road fatalities

Unlike the introductions of random breath testing and mandatory seat belts, the NSW Government has been unable to produce any evidence that the RDT regime has reduced road trauma in any meaningful way.

Legislation making seat belts compulsory in NSW was introduced at the end of 1971. A 1973 analysis of comparing actual road fatalities in 1972 to 'expected' fatalities found a 25% reduction in deaths.¹⁴

Random breath testing was introduced into NSW in 1982. A 1985 study of the impacts of the introduction of RBT found a 25.7% reduction in fatalities and an 11.4% reduction in injuries in 1983 compared to the pre RBT average¹⁵

Since then, trauma from fatal crashes involving alcohol in NSW has dropped from about 40 per cent of all fatalities to the 2017 level of 15 per cent.¹⁶

By contrast, there appears to be no correlation between an expansion of the RDT regime and the number of road fatalities, nor the number of positive RDT tests as illustrated in figure 2.

¹³ [Study casts doubt on accuracy of mobile drug testing devices - The University of Sydney](#)

¹⁴ Compulsory Wearing of Seat Belts in New South Wales, Australia, M. Henderson, R. Wood 1973
https://media.opengov.nsw.gov.au/pairtree_root/a7/f0/5b/fe/bf/d1/48/7d/90/7a/47/bd/94/4e/da/9d/obj/164974.pdf

¹⁵ 'The Impact of Random Breath Testing in NSW', J. Cashmore 1985 [R04.pdf \(nsw.gov.au\)](#)

¹⁶ [Random breath testing - Alcohol and driving - Alcohol and other drugs - Staying safe - NSW Centre for Road Safety](#)

Year	RDT Tests	Positive RDT tests	Positive as a percentage	Fatalities
2014	38,830	2096	5.3%	307
2015	62,247	9123	14.6%	350
2016	89,101	8,220	9.22%	380
2017	111,176	9,273	8.34%	389
2018	115,874	9,067	7.82%	347
2019	166,351	9,446	5.67%	353

Figure 1: RDT tests, Positive RDT tests and road fatalities in NSW.

Source: [Transport for NSW Crash and Casualty statistics](#) and [Safety Statistics | Bureau of Infrastructure and Transport Research Economics \(bitre.gov.au\)](#)

RDT Tests vs Road Fatalities

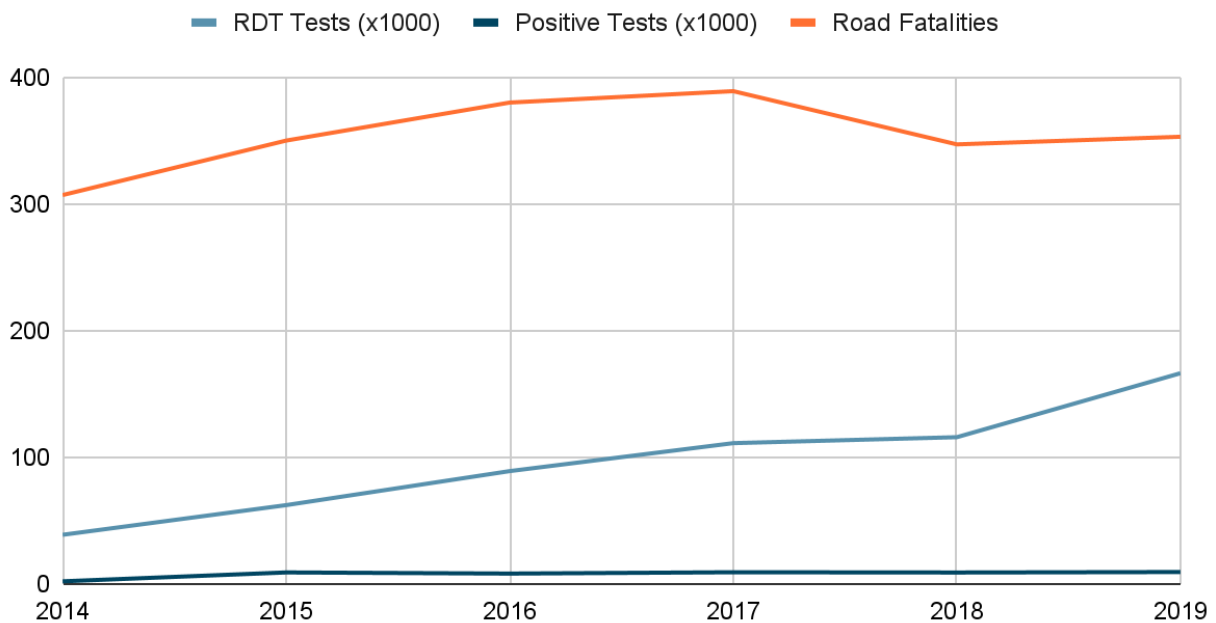


Figure 2: Comparing RDT tests with road fatality trends.

In the years from 2014 to 2017, RDT tests increased from 38,830 to 111,176 and through the same period fatalities increased from 307 to 389. In 2018 fatalities dipped to 347 but increased marginally again to 353 in 2019 despite a 43.56% increase in RDT tests from 115,874 to 166,451.

The number of positive RDT tests has also stopped increasing in line with the number of overall RDT tests. Positive results represented 14.6% of 62,427 tests in 2015, 8.34% of 11,176 tests in 2017 but only 5.67% of 166,351 tests in 2019.

It is worth noting that a significant portion of these tests may be false positives or cases where individuals test positive despite having consumed a substance well before driving and are no longer experiencing impairment as a result of that substance.

Despite this, the NSW Government set a 2020 target of 200,000 tests.¹⁷ Given that the tests cost at least \$40 per unit, this target represents \$8 million in costs. This is without accounting for the costs of police personnel, increased pressure on the criminal justice system and the social costs of individuals negatively impacted by entering the criminal justice system.

Request for a performance audit

The RDT regime has several clear flaws which the NSW government has failed to address. It is unclear on what evidence the government not only continues the regime but seeks to vastly expand it or how the regime represents the most strategic use of taxpayer funds to reduce road trauma.

Based on the available evidence it would seem the regime causes far more harm to the public than it prevents.

I respectfully request that you conduct a performance audit into the NSW Police's Random Drug Testing regime considering the following:

1. What portion of tests are being conducted by an officer who is in breach of the SOP?
2. What portion of tests are potentially returning false positives as a result of breaches of the SOP?
3. Do positive RDT results have legal validity considering the known and potential breaches of the SOP?
4. Are officers being adequately trained to follow the SOP when conducting RDTs?
5. Is there a culture within NSW Police of ignoring the SOP when conducting RDTs?
6. How are blatant breaches of the SOP going undetected by other officers?
7. Do the tests utilised by the regime accurately measure impairment caused by THC, or even the presence of THC?
8. Does the RDT regime unfairly impact users of recreational cannabis who are prosecuted despite not driving whilst impaired by THC?
9. Does the RDT regime unfairly impact users of prescribed medicinal cannabis compared to other prescription drugs that cause impairment (i.e opioids, benzodiazepines)?

¹⁷ [Is it time to review drug driving laws? - Criminal Law - Australia \(mondag.com\)](https://mondag.com.au/criminal-law/is-it-time-to-review-drug-driving-laws/)

10. Has the RDT regime had a meaningful impact on reducing road trauma caused by illicit drug use?
11. Is the RDT regime a strategic or efficient use of taxpayer resources to reduce road trauma caused by illicit drug use?

If you have any questions please do not hesitate to call me.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Cate Faehrmann', with a long horizontal flourish extending to the right.

Cate Faehrmann MLC
Greens NSW spokesperson for Drug Law Reform

Pictured: A police officer fails to wear gloves whilst conducting an oral fluid testing Ms Cate Faehrmann, therefore breaching the RDT SOP, outside of Nimbin on 2 May 2021



