

# Review of the WA Police Drug and Alcohol Testing Regime

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**Prepared by the Western Australian Police Union of Workers**

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## Introduction

The *Police Force (Member Testing) Regulations 2011 (The Regulations)* regulate the process for alcohol and drug testing of police officers in Western Australia. This process was introduced to protect police officers and the public from dangers associated with officers working under the influence of alcohol and/or drugs. Drug and alcohol misuse by officers poses a significant safety and health risk to police officers and the wider community because of the potential to impair physical and mental performance. Police work involves exposure to and use of fire arms, urgent duty driving, split second decision making, emergency management, intervention at critical incidents, availability for recall, security sensitive work, work in isolated and remote locations, extended and irregular hours of duty and work in specialist groups<sup>1</sup>. Many of the dangers associated with these factors are exacerbated by drug and alcohol misuse.

Whilst the WA Police Union endorses alcohol and drug testing both in principle and practice to protect police officers and the community, these considerations must be balanced against the needs and rights of individual officers. Officers may provide an adverse testing outcome having not engaged in misbehaviour, and if they do so they should not be negatively impacted. Legitimate exposure to alcohol and drugs can happen through a number of circumstances including taking prescription or over the counter medication, ingesting particular foods, drinking alcohol before being unexpectedly recalled to duty and as the inadvertent victim of criminal acts.

This submission was developed after members brought various issues with the testing to the WA Police Union's attention. This submission seeks to firstly identify some of the issues with the current testing regime and secondly recommend changes which will assist in addressing these problems. This submission is intended to instigate a dialogue between the WA Police Union and WA Police in order to amend the current testing system, which should improve outcomes for members and for the public.

This submission was developed through consultation with individual members who had faced negative experiences of drug and alcohol testing, as well as the general membership. The WA Police Union canvassed the opinions of the membership through a survey via the website [surveymonkey.com](https://www.surveymonkey.com). The response to this survey was very high, with 701 members commencing the survey and 602 (85.9%) completing it. It should be noted that there was widespread support from officers for drug and alcohol testing, and the issues raised in this document, whilst important, do not indicate that the WA Police Union is opposed to the drug and alcohol testing regime.

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<sup>1</sup> Working Party Resolutions; Qld Police Service D&A Policy 1998

## Survey Data

Thirty four per cent of respondents (238) had been subjected to an alcohol or drugs test, 66 per cent (463) had not. Three categories of testing can occur under The Regulations: random; mandatory; and targeted. Of those respondents who had been tested 30.9 per cent (72) perceived their test as being mandatory, 69.1 per cent (161) as being random and 8.6 per cent (20) as being targeted. Thirteen and a half per cent (32) of those tested reported providing a presumptive positive test and 86.5 per cent (205) did not report a positive test.

The majority (79.7 per cent) of the 236 respondents who had been tested responded that they did not have any issues with the testing, however over one fifth (20.3 per cent, 48 people) of respondents reported at least one issue with the test. The major issues reported were:

- Testing positive with a valid reason (13);
- Gender difference between tester and subject (8);
- Being pressured to disclose private medical information (7);
- Physiological issues producing a sample (eg. Having been to bathroom immediately prior to testing) (5);
- Rudeness of testers (5);
- Lack of privacy in how the sample was collected (4); and
- Confusion by testers of the protocol and procedure of the test (4).

Other issues reported were unclean facilities, negative impacts on policing operations while the officer was being sequestered for a test and feeling that the test was being conducted at a time to try to get positive results.

One officer who presented a positive test reported that they did not feel they had a valid reason for the positive test. The remainder (30) did feel they had a valid reason, and all of the 28 who reported the reason for the positive test reported that it was legally obtained (prescription or over the counter) medication.

The 30 officers who provided a presumptive positive test were asked *“How do you feel you were treated by the agency and your supervisors after the positive test?”*. Fourteen responded that there was no issue or change in behaviour, nine felt they were treated fairly well or were accepted, four felt as though they were treated badly, reporting being treated poorly or treated like a criminal. One was moved from their normal role and the remaining two expressed strong reservations about having their private medical information emailed to supervisors.

Twenty-four officers reported that the positive test did not impact upon how the officers were treated at work or how they were able to do their job. Of the seven who reported an effect, five officers were clearly distressed with how they were treated: being stood aside without an explanation further than ‘risk management’; transferred to a different section under intense scrutiny and with diminished autonomy; being treated differently due to a perception of suffering from mental illness; suffering bullying and harassment causing undue stress; and feeling less capacity to do the job due to perceived lack of trust from the employer.

Five hundred and thirteen of the 701 officers reported that they were not aware of the procedures which follow a positive test, 157 were and 31 officers skipped the question. When asked if they

would like to see a more rehabilitative process put in place 217 said they would, 113 said they would not and 347 replied 'N/A or not sure'.

Of the 217 members who responded that they would like to see a more rehabilitative approach, 66 gave reasons for a rehabilitative approach included:

- the role for colleagues and WA Police to support officers who were users of alcohol and drugs (19);
- that there was a moral obligation to rehabilitate as the drug/alcohol issues may be related to the stresses of police work (17);
- the need to find out why an officer has tested positive to drugs/alcohol before immediately punishing the officer (15);
- that a fairer and more rehabilitative approach is an appropriate way to respond to positive drug/alcohol tests, as this is primarily a health issue (11);
- the result of no misbehaviour (7);
- that the current system is too punitive (6);
- that everyone deserves a second chance (4);
- that a positive test could be a false positive (4); and
- that the level of exposure to alcohol could be very low (2).

Of the 113 who said that they would not favour a rehabilitative approach, 63 gave a reason as to why. Thirty one said this was because taking illicit drugs is illegal and wrong, 16 stated that it would be hypocritical for officers to police drug use and tolerate it amongst officers, 11 did so on Occupational Health and Safety (OHS) grounds (risk posed to colleagues of an drug/alcohol affected officer) and five did so because they were willing to abide by current rules.

Of the 347 who replied N/A or not sure, 56 said that this was because their opinion would be influenced by the circumstances of the case, such as what drug, what level of exposure and whether the use was illegal or legal. Eleven commented they weren't sure of the process with one officer respectively noting they would prefer to be trusted than tested, that there were two sides to every story and that the need for a combination of punishment and rehabilitation is optimal.

It should also be noted that there was a large discrepancy between how members viewed officers who tested positive to alcohol and prescription medication as opposed to illicit drugs. Of those who favoured a more rehabilitative approach, 11 explicitly stated that this shouldn't apply to illicit drug use and of those who did not favour more rehabilitation, 16 stated that rehabilitation or similar would be appropriate in positive tests for alcohol and three for prescription drugs.

Members were then asked "*What (if any) changes would you suggest to the current testing system?*". The most common answers were:

- No changes/not applicable (101);
- I don't know the current system (80) ;
- Improve privacy in both discussion of testing and provision of samples (12);
- Ensuring the tester and subject are of the same gender (9);
- Not asking officers about what medication they are taking (9);
- Better system of informing staff about the entire drug testing regime (7);

- More politeness from testers (7);
- The targeting of all staff, not just frontline staff (6);
- The testing of random staff within a unit, not just an entire unit (5);
- Ensuring the independence of testers (non-WAPOL employees) (5);
- Giving officers the option of a blood test or mouth swab (5);
- Clearly informing the subject of their rights (especially the right not to disclose what medication they were taking) before the test (5).

## **Issues with the Current Testing Regime**

From the survey data and consultation with membership, the WA Police Union has compiled the following list of actual or perceived shortcomings of the current testing system.

### **The ability to legitimately explain a positive result is not reflected in The Regulations**

Superintendent Flack, in discussions with the WA Police Union on 1 August 2012, stated that not one positive test had occurred which had not been legitimately explained by the officer involved; however, this was contradictory to at least one case reported by members to the WA Police Union.. The WA Police Union encourages the practice of seeking out legitimate excuses and believes that officers should be given the opportunity to explain the presence of drugs in their system and avoid any negative consequences of a provisional or confirmed adverse test result for drugs or alcohol.

Part 5 of The Regulations allows an officer to self report involuntary or accidental drug ingestion or alcohol consumption, however, for this to occur the officer must know that they have taken the alcohol or drugs in order to self report. There are circumstances where officers may have taken substances and not be aware of this. The capacity to explain an adverse test result for drugs or alcohol after the test is not currently provided for in The Regulations until any loss of confidence proceedings. This difference between The Regulations and practice is an issue, and the WA Police Union believes that the current practice should be reflected in the wording of The Regulations.

Further to this, a test which shows exposure to a drug, even if it can be legitimately explained, constitutes a confirmed adverse test result and potentially exposes the officer to the actions set out in r.35(1)(a-d). This is a real issue as in these circumstances the officer has not behaved inappropriately and is at risk of facing what the WA Police Union view as punishment, ranging from a review by Health and Welfare to removal under section 8 of the Police Act 1892.

### **Questions as to what constitutes a positive test**

One member complained to the Police Union that the test showed up with what they viewed as a marginal result, and that it was up to the discretion of the tester as to whether the test was escalated. Therefore questions of the uniformity of how the tests were being applied across the state were raised.

### **Prescription medication**

The Regulations r35(3) state that the Police Commissioner is not compelled to invoke the removal powers in r35(2) for the use of a prescription drug prescribed to the officer by a medical practitioner. However, The Regulations currently require that where a test shows exposure to a drug, even if it is medically prescribed, this constitutes a confirmed adverse test result. This has the potential to expose the officer to the processes described in r35(1)(a-d). This is a problem as in these circumstances the officer has not behaved inappropriately and is at risk of punishment ranging from a review by Health and Welfare to removal under section 8 of the Police Act 1892. Whilst the WA Police Union is not implying that it is the intention of WA Police to invoke Section 8 for legitimate

use of prescription drugs, it is the view of the WA Police Union that The Regulations need revision to remedy this apparent anomaly.

Additionally, there are issues around the misuse of prescription drugs. There is no differentiation in The Regulations between legitimate use and overuse of prescription drugs. It is the opinion of the WA Police Union that if an officer tests positive for prescription drugs, even if those drugs are being used under prescription, the test constitutes a confirmed adverse test result for drugs. This doesn't differentiate between a level of drugs which is consistent with the prescription by the medical practitioner or otherwise, and treats both these uses of prescription drugs similarly. In discussions with Superintendent Tony Flack, the WA Police Union were assured that the testing regime was being implemented in a way which differentiated between these two cases, so an amendment to The Regulations to reflect this may resolve this issue.

The issue of non-prescription but legally available drugs is also an issue. If an officer tests positive to these drugs, strictly applying The Regulations may lead to the commencement of a removal of the officer under section 8 of the *Police Act*. Again this process may be commenced through no misbehaviour of the officer and the WA Police Union believes that this needs to be addressed.

### **Gender difference**

Another issue of concern raised by a number of officers is the difference in gender between the tester and the test subject. This was described by one officer as *"embarrassing and uncomfortable"* and by others as *"[having a female] standing behind me in the urinal [was an issue]"*, *"females standing behind me in toilet while urinating"* and *"female testers following male officers into toilets and being within 1 m[etre] of sample giving"*. The discussions with Superintendent Flack indicated that this wasn't considered a problem by the Department as officers were given a cubicle to conduct the test out of sight of the tester. This, whilst acceptable in principle, did not match the experiences of officers and thus needs to be enforced.

### **Confidentiality**

Officers expressed reservations about the confidentiality of their medical information being compromised if they had to tell WA Police Internal Affairs staff about prescription or legal over the counter drugs to excuse a positive test. Further to this, the places where some interviews and tests occurred allowed officers' colleagues the opportunity to overhear the discussion of private medical information. Thirdly, the perceived need to disclose all medical information before a test, regardless of whether or not it will result in a positive test was an issue within the current testing framework that was considered unnecessary and impinged on confidentiality.

### **The timing of testing**

Officers also reported that they were concerned that drug tests were often conducted at the end of a shift. This is problematic as if an officer has been working under the influence of drugs or alcohol as they would be exposing colleagues and the public to serious risk for the duration of their shift. If the test was undertaken at the commencement of the shift, this risk would be avoided.



### **The approach of testers**

Another issue with the current regime is the apparent disjoint between the intention and implementation of the tests. During the discussion with Superintendent Flack, he assured the WA Police Union that the drug testing regime was not designed to catch officers with the intention to criminally prosecute them for possession of a drug, rather to use the testing as part of an occupational health and safety agenda. This was not reflected in the responses of many officers, who reported being treated like a criminal and not being afforded trust or respect. One officer noted that *"I have never felt more guilty and degraded in the way our ... testing was conducted"*, and another *"[the testing regime] Made you feel like you were a common criminal and [!] was spoken down to, without due respect"*.

### **Privacy**

Many officers complained of a lack of privacy in how the tests were completed. Firstly, the initial interview was often conducted in an open space where officers were within earshot of their colleagues. In cases where the officer wanted to disclose private information to the tester, the officer being tested reported feeling very uncomfortable. Officers also reported an issue with providing the sample at a urinal with people, again, walking around the toilet area.

### **Issues providing a sample**

Officers complained that when they were unable to provide a urine sample they felt pressured to do what they felt they physically couldn't. One reported being informed of a *"requirement to provide [a sample] within 4 hours or being given a loss of confidence"* and others used words such as *"had to"* or *"needed to"* when discussing issues with producing a sample.

### **Confusion as to how officers are treated immediately after a presumptive positive test**

There was a great deal of ambiguity and discordance in how officers reported being treated after a presumptive positive test. Firstly, that only officers who produced a presumptive positive test were interviewed, allowing colleagues to deduce that there was an issue with the test. Secondly, there is confusion for officers, especially in light of the wording of The Regulations, as to whether the follow up interview is merely trying to clarify possible reasons for the presumptive positive test or whether it forms the commencement of a disciplinary hearing and that what the officer says may be used against them potentially in a loss of confidence proceeding.

### **Unfamiliarity of officers with processes**

Another issue with the current testing regime is that officers are not familiar with the current testing regime, appropriate procedures for testing and what procedures are followed if the officer returns either a presumptive or confirmed positive test to drugs or alcohol, as is reflected in the survey data.

### **Doesn't mean officers can't do their jobs**

A further issue for consideration is that officers who take prescription drugs may have levels of exposure to those drugs which register on a test, however this doesn't indicate a level of impairment

that means the officers can not do their job. Drug testing measures exposure to drugs, not impairment, and therefore a positive drug test should not determine whether an officer can or can not perform their duties. Officers reported that their experience after a positive test was of having their duties changed as a result of the test.

### **Testing a sample of a squad, not the whole squad**

Officers reported logistical and policing difficulties caused when an entire unit is sequestered for testing. During discussions with Superintendent Flack, he assured the WA Police Union (without expanding on his assertions) that there were statistical, testing or economic benefits of testing a whole squad, rather than taking a random sample. Therefore the WA Police Union believe that a dialogue should be opened as to the advantages and disadvantages of testing and locking down an entire unit rather than just randomly selected officers.

## Recommendations

### 1) Differentiate between Impairment and Exposure

That while drug and alcohol testing may be a valid way to signal the potential for work to be affected, acknowledgement that exposure to substances does not necessarily mean impairment, and that an officer's fitness to carry out his or her duty should not be decided by a confirmed adverse testing outcome, but by a review of the officer's capacity to perform the task.

### 2) Legitimate Use

Acknowledgement that officers may legally use substances which may result in an adverse testing outcome, through use of either over the counter or prescription medication, or by some other means.

### 3) Privacy

That the interview which immediately precedes the drug test mandatorily be conducted in a separate and reasonably sound proof office, affording officers some privacy if they wish to discuss medical information with the tester.

That the test be conducted in a cubicle in all circumstances, ensuring the officer is not in direct sight of the tester.

### 4) Gender Differences in Testing

The WA Police Union recommends incorporation into any explanation the reasoning behind allowing testers and subjects to be of different genders. As part of this explanation officer should be assured that they will not be in sight of the tester when providing the sample (i.e. in a cubicle or similar) and that this condition of testing be strictly adhered to.

### 5) Confidentiality of Medical Exposures

It is recommended that WA Police take measures to ensure that confidential medical information is not unwillingly disclosed by officers. These measures should include the privacy measures in recommendation 3, but also allowing the officer to report potential exposures from either the environment or legitimate drug use either verbally to the tester, or in the form of medical certification from a medical practitioner to the tester.

It is recommended that these methods be considered valid for the purpose of providing a legitimate excuse for a confirmed adverse test result, which would then apply to recommendation 19.

### 6) Confidentiality of Environmental Exposures

That the recommendations in 5 – Confidentiality of Medical Exposures are also applied for environmental exposures (such as the consumption of poppy seeds) and that officers be able to provide a verbal explanation or a statutory declaration to the tester as a legitimate excuse for a confirmed adverse test result, and again would apply to recommendation 19.

7) Medical Excuse

The WA Police Union recommends that officers be advised generally about the capacity to obtain medical certification from a medical practitioner advising both their current regimen of prescription drugs and that these drugs do not inhibit the officer's capacity to perform their duties. Further that this letter be considered sufficient to provide a legitimate excuse as per recommendation 19.

8) Pre-test interview

The WA Police Union recommends that the interview which immediately precedes a test involve the tester listing the officers' rights and responsibilities in the test, but no longer asks for a list of all medications the officer is taking due to confidentiality considerations.

9) Immediate Follow Up of Presumptive Positive Test Result

It is recommended that all tested officers be given an "exit interview" after the test to confirm the results of the test. If the test is a presumptive negative test result then the interview will inform the officer of this.

The reasoning behind interviewing all officers who were subjected to testing is that if only officers who return a presumptive adverse test result for drugs or alcohol are subjected to an 'exit interview', then an officers' colleagues will be aware that those officers who are called in for an interview after the test have provided a presumptive positive result. This has large privacy implications as colleagues will know by simple deductive reasoning who has returned a positive test, without necessarily understanding the circumstances surrounding this.

Finally there is great contention as to the purpose of the immediate follow up area. It is a 'grey area' as to whether the immediate post-test interview is an investigation of misbehaviour or an exploration to find why the test is positive. It is the view of the WA Police Union that officers should be told of their options as per recommendations 5 and 6, to talk to the tester or engage in writing with the tester. This may remove the necessity of involving of Internal Affairs and makes clearer that the reason for the test is being explored, rather than having the officer feel like they are being disciplined.

These issues are important as there are real OHS implications of leaving officers who have tested positive to drugs or alcohol on duty, as is discussed in the introduction. Therefore, in the absence of a reasonable excuse, either as discussed with the tester or provided in writing from a doctor, then the officer in charge, Internal Affairs or Health and Welfare should be able to make a determination as to what course of action WA Police should take.

10) Inform OIC of Testing

It is recommended, after consultation with WA Police Union members that as a matter of courtesy Officers in Charge is given notice if a unit under their control is being tested, giving them the option to return to the situation to provide support to officers subjected to tests.

11) Return to Service after being Off Duty

The WA Police Union seeks clarification with regard to r.34(2) as to what forum determines whether the officer's behaviour relevant to that regulation is appropriate to the circumstances.

12) What happens if you can't give a sample

That WA Police set a time limit which is considered reasonable for the production of a urine sample, for example 60 minutes, and in cases where it is a random test, if the officer can not genuinely produce the sample within this time then the test be abandoned. If the test is either targeted or mandatory then a blood sample should be taken. This was the view expressed by Superintendent Flack, which he reported to the WA Police Union Board on 1 August 2012, and the WA Police Union is in agreement with this view.

13) Intention of Testing: Rehabilitation and Punishment

That WA Police investigate the capacity of shifting the responsibility of Drug and Alcohol Testing to the Health and Welfare Branch of WA Police from Internal Affairs. This step would make it clearer to officers that this is an OHS and Health and Welfare issue, rather than a disciplinary issue.

14) Self Testing of Unsure Officers

That WA Police seek to extend Part 5 of The Regulations to incorporate allowing officers to test themselves in order to assist officers in declaring to their Officer in Charge if they are impaired at work. This will improve a culture of self declaring if an officer is impaired.

15) Testing of Random Officers

The WA Police Union believe than a dialogue should be advanced as to the advantages and disadvantages of testing and locking down an entire unit rather than just randomly selected officers within a unit. Such a discussion would weigh up the importance of testing each officer with the disruption to police activities of sequestering an entire unit.

16) Explanatory Mechanism

That The Regulations allow for an appeal mechanism against any adverse testing outcomes, providing a forum where the officer could persuade WA Police that the positive drug test did not occur through any misbehaviour by the officer. Further it is recommended that officer satisfactorily persuades WA police that the officer has not engaged in misbehaviour, that Regulation 35 processes not be applicable.

This forum could be initiated in the exit interview, which would allow the officer the chance to convince the tester that the exposure to the drug or alcohol did not occur through misbehaviour.

Otherwise, a formal process should be developed by WA Police so that officers have the opportunity to convince a manager from WA Police, preferably from Health and Welfare, that there has been no misbehaviour on the part of the officer. The process should be in an official setting, with appropriate representation, and the officer should be given sufficient

time to prepare a case, obtain test results from an independent tester. The process should conform to principles of natural justice, and should apply to all officers, whether on probation or otherwise.

Many officers surveyed indicated their willingness to consider the specific circumstances of the case before deciding what processes should be followed following a positive test. This view, which is shared by the WA Police Union, will be reflected should this recommendation be adopted.

17) Rehabilitation

That the regulation 35, sub regulation 1 include a sub-sub regulation (e) to provide for the officer to engage in rehabilitative activities under the oversight of the Health and Welfare Branch.

18) Differentiation Between Use and Overuse of Prescription Drugs

That r. 35 incorporate a sub regulation which states that sub regulations 1 and 2 do not apply where the confirmed adverse test results for drugs is for a drug that has been prescribed to that member by a medical practitioner and the test results indicate that the level of that drug is consistent with the prescribed dosage.

19) Legitimate Excuse

That r. 35 be amended so that sub regulations 1 and 2 do not apply where the confirmed adverse test result has been reasonably excused either to the tester or to WA Police, as per recommendation 16.

20) Discretionary Power for the Commissioner in r.35(2)

That the Commissioner be given discretion in Regulation 35 sub regulation 2 as to whether or not removal powers are invoked, dependent on the circumstances of the case. This would allow the Commissioner to take into account any legitimate excuse for the confirmed adverse test result for drugs or alcohol before the relevant officer is subject to removal proceedings under section 8 of the *Police Act*.

21) Information Brochure

It is recommended that the WA Police Union and WA Police collaborate to create an information brochure to officers to read before they are subjected to testing. The brochure should incorporate the powers of the tester and rights of the subject, options for how to declare legitimate excuses for positive test results (as per Recommendations 5 & 6), what the testing process involves, what exposures may affect the test result, what the purpose of the testing is and what the consequences of a confirmed adverse test result can be.

22) Testing at Start of Shift

It is recommended that alcohol and drug tests be conducted at the start, rather than the end, of a shift. In the event an officer is in under the influence of alcohol and/or drugs, early testing removes any dangers to colleagues and the public.

## Conclusion

Generally, the use of drug and alcohol testing within the WA Police Force is considered by the WA Police Union and its members as being a positive measure. The testing regime is designed to improve the safety of both officers and the public. The WA Police Union also believes that officers should in no way be adversely affected if they have not engaged in misbehaviour.

The meeting between Superintendent Flack and the WA Police Union was an excellent forum to commence a dialogue, and the WA Police Union hopes that this working relationship between WA Police and the WA Police Union continues in this fashion.

There are several issues with the current wording and the execution of The Regulations and the WA Police Union believes that the implementation of the recommendations listed above would act to protect the rights of officers without compromising the effectiveness of the regime, whilst improving the safety of the community and police officers.