

## In Confidence

Office of the Associate Minister of Transport  
Cabinet Economic Development Committee

## Legislative Amendments to Enable Oral Fluid Testing

### Proposal

- 1 This paper seeks agreement to amend the Land Transport Act 1998 (the Act) to introduce a new compulsory roadside oral fluid (saliva) drug testing regime to detect and deter drug driving.

### Relation to government priorities

- 2 The proposal in this paper supports the Government's commitments under the national road safety strategy, Road to Zero, by ensuring New Zealand Police (Police) has the resources and powers to detect and deter drug driving.

### Executive Summary

- 3 On 11 March 2023 the Land Transport (Drug Driving) Amendment Act 2022 came into force. This amended the Act to introduce a random roadside oral fluid test (OFT) regime to enable Police to test drivers for the presence of the highest risk illicit and prescription drugs that impair driving, similar to the alcohol breath testing regime. Drivers that receive two positive OFT results for the same specified qualifying drug/s can be prohibited from driving for 12 hours and (if they haven't requested an evidential blood test) issued an infringement notice, carrying 50 demerit points and a \$200 fee.
- 4 The Act sets out criteria the Minister of Police must have regard to before approving a device, including that Minister be satisfied that the device will return a positive result only if it detects the presence of a qualifying drug at a level that indicates recent use of a specified qualifying drug. Recent use is a proxy for impairment.
- 5 Police completed a procurement process for OFT devices in 2022. That process confirmed there is no currently available device that meets the existing legislative settings for approval, s 9(2)(h) This means that random roadside oral fluid testing cannot be implemented.
- 6 This paper seeks agreement to new approval criteria for OFT devices that will be used for screening, with evidential testing of oral fluid in a laboratory before infringement notices are issued. This will reduce the risk of drivers receiving an infringement notice at the roadside on the basis of false positive OFT results. It also introduces a small number of additional measures to strengthen the roadside testing process.

### Background

- 7 In December 2019, the Cabinet Economic Development Committee agreed to introduce a new compulsory random roadside oral fluid testing regime. Under the regime, a Police officer could stop any driver of a motor vehicle and administer an

OFT without cause to suspect a driver has consumed drugs, similar to the approach to drink driving enforcement [DEV-19-MIN-0360].

- 8 In July 2020, Cabinet approved the introduction of the Land Transport (Drug Driving) Amendment Bill [CAB-20-MIN-0354]. Parliament passed the Bill in 2022, with the new provisions coming into force on 11 March 2023.

## Analysis

### *Drivers in New Zealand are using impairing drugs and driving*

- 9 Many illicit and prescription drugs have the potential to impair driving, and studies show that people are using those drugs and driving. Over 2019-2021, an average of 101 people were killed each year in crashes where the driver had consumed impairing drugs before driving.<sup>1</sup> This represented 31 percent of all road deaths.

### *A new regime was introduced to improve detection and deterrence of drug driving*

- 10 Previously, the only option for police officers to detect drug driving at the roadside was to perform a compulsory impairment test (CIT) on drivers they had 'good cause to suspect' had consumed drugs.<sup>2</sup> A driver that fails the test is required to undertake a blood test. A CIT can take up to 1.5 hours, which limits the number of tests Police can give to detect and deter drug driving.<sup>3</sup>
- 11 The OFT regime is intended to improve detection and deterrence of drug driving. The Act gives Police the ability to randomly (without suspecting drug use) test the oral fluid of drivers at the roadside. If a driver produces two positive OFT results for the same qualifying drug/s, a police officer can prohibit that person from driving for 12 hours and issue an infringement notice (which results in 50 demerit points and a \$200 fee, or 75 demerit points and a \$400 fee if more than one drug is identified). A driver is able to challenge the positive OFT results by requesting a blood test or apply for a medical defence if they have consumed medication in accordance with their prescription or instructions from their health practitioner.

### *The random roadside drug testing regime cannot be implemented as intended as no OFT device meets legislative requirements*

- 12 Before approving an OFT device, section 71G of the Act requires the Minister of Police to be satisfied that the device will return a positive result only if the device detects the presence of a qualifying drug at a level that indicates recent use. Recent use is an important part of the regime, as it was adopted as a proxy for impairment.
- 13 Police completed a procurement process for OFT devices in 2022, which confirmed that there is no currently available device that meets the approval criteria in the Act. This is due to concerns with accuracy (devices can produce false positive and false negative results), specificity (devices can detect classes or families of certain drugs, rather than an individual qualifying drug) and recent use issues (some drugs can be detected up to 24 hours, or longer, after consumption). s 9(2)(h)

<sup>1</sup> Noting this is not necessarily indicative of impairment.

<sup>2</sup> A CIT is a behavioural test that comprises eye, walk and turn, and 1-leg stand assessments.

<sup>3</sup> Approximately 500 blood samples following a CIT are analysed on average each year.

- 14 The limitations of OFT devices were known throughout the development of the new legislation, and measures were built into the regime to address the risk of false positive test results. However, the full extent of these limitations was not clear until the procurement process was completed.

### **Proposed changes to oral fluid testing regime**

*Remove current OFT regime, and introduce a new regime that will enable random roadside screening to detect and deter drug driving*

- 15 I propose that the current oral fluid testing regime in the Act be replaced with a new regime which reflects the capability of currently available technology. Police would use the devices to conduct screening tests at the roadside, with an evidential laboratory test used to establish an infringement offence. This will require changes to the device approval criteria to account for devices producing a low proportion of false positive or false negative results, and detecting families of drugs which specified qualifying drugs are a member of.
- 16 The new regime will operate alongside the existing CIT process. This process needs to be retained as oral fluid testing devices can only indicate the presence of a limited range of specified qualifying drugs.<sup>4</sup>

### *Key features of the new oral fluid screening regime*

- 17 Under the new regime:
- 17.1 A police officer will conduct an oral fluid screening test on a driver. If the test is negative, the driver will generally be free to go. An exception would be if a police officer has good cause to suspect the driver has consumed a drug or drugs and instigates a CIT process.
- 17.2 If the first screening test is positive, the officer will conduct a second screening test. If that test is also positive for the same or different qualifying drug/s or family of drugs, the person would be forbidden from driving for 12 hours. Regardless of the outcome of the second screening test, all second test oral fluid samples would be sent to a laboratory for evidential testing.<sup>5</sup> If the laboratory test detects the presence of a specified qualifying drug/s (see para 17.3 below) above a threshold that is indicative of recent use, Police will issue an infringement notice to the driver. The regime will allow the driver to undertake independent testing.
- 17.3 The qualifying drugs will be specified in a notice issued by the Minister of Police that approves the evidential laboratory test. This is similar to the approach used for approval of oral fluid screening devices. The specified drugs for the evidential test will need to be from the list of 25 qualifying drugs in Schedule 5 of the Act. These potentially impairing drugs were included in the Schedule on the advice of an independent expert panel, based on New Zealand data linking road crashes with the presence of the drugs in the drivers'

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<sup>4</sup> Typically, OFTs can detect THC (the main psychoactive constituent of cannabis), methamphetamine, amphetamine, benzodiazepines (sedatives), cocaine and opiates (e.g. morphine).

<sup>5</sup> Police is yet to confirm the number of oral fluid swabs to be required from the driver, as this is reliant on the outcome of the procurement process. However, I anticipate that only two physical swabs will be required.

blood samples.

- 18 The option for a driver who has failed two OFTs to elect an evidential blood test is not required under this proposed regime, as the evidential laboratory test will be used instead. It will be an infringement offence for a driver to refuse an OFT, punishable by an infringement fee of \$400 and 75 demerit points (the maximum penalty available for a driver who provides an oral fluid sample and is subsequently found to have two or more qualifying drugs in their oral fluid). The driver will also be prohibited from driving for 12 hours (to address any potential road safety risk).
- 19 New infringement offences, enforcement and evidential provisions will be required to implement the new regime. The infringement offences will be similar to the existing offences in the Act (including combination offences where drivers have consumed both alcohol and drugs).<sup>6</sup> Procedures for dealing with oral fluid specimens will be set out in regulations made under the Act.

#### *New device approval criteria*

- 20 I propose that under the new regime, the approval criteria for an OFT device to use as a screening tool aligns broadly with existing legislative requirements, with the following changes:
  - 20.1 Accuracy: the Minister of Police will be required to have regard to the accuracy of the device, but will no longer need to be satisfied that the device will *only* return a positive result if the device detects the presence of a qualifying drug.
  - 20.2 Drug detection: devices can be approved if they detect families of drugs that individual qualifying drugs are members of. I note that, for many qualifying drugs, OFT devices do not indicate the use of a specific drug, but rather a family of drug. For example, the opiate channel on a device can detect a range of specified qualifying drugs, including morphine, codeine and tramadol, but won't indicate which of these specific drugs is present.
  - 20.3 Recent use: the device will need to have a cut-off threshold that aligns with those set out in any relevant Standard. I note that the current Standard is the AS/NZS 4760:2019 Australian/New Zealand Standard "Procedure for specimen collection and the detection and quantification of drugs in oral fluid". The cut-off thresholds in the Standard are generally accepted as indicative of relatively recent drug use (as opposed to historical use or accidental exposure).

#### *The proposed regime will reduce the impact of false positive results*

- 21 Commercially available OFT devices can produce false positive (and false negative) results. False positive results are particularly problematic, as they can result in enforcement action taken against drivers who have not recently consumed any qualifying drug. In recognition of this, safeguards were built into the regime in the Act,

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<sup>6</sup> For example, the current infringement offence of driving while oral fluid indicates use of qualifying drugs attracts an infringement fee of \$200 and 50 demerit points, which aligns with penalties for similar alcohol driving offences. Other infringement offences include driving while oral fluid indicates use of two or more qualifying drugs (section 57B(3) of the Act) and driving while blood or breath contains alcohol and oral fluid indicates the use of a qualifying drug (section 57C(3) and (4) of the Act).

including the requirement for two positive test results before enforcement action is taken, and the ability for a person to request an evidential blood test.

- 22 The new regime will also require two positive OFT results before enforcement action (prohibiting the person from driving for 12 hours) is taken at the roadside. Using laboratory tests to form the evidentiary basis for an infringement removes the chances that a driver is incorrectly issued an infringement when they have not recently used specified qualifying drugs. However, a very small proportion of drivers (estimated to be between less than 1 percent and up to 5 percent) may be forbidden from driving for 12 hours on the basis of two false positive oral fluid screening results. While this is not ideal, the regime seeks to save lives on our roads. In my view, this justifies the inconvenience caused to a very small number of drivers.

## Implementation

- 23 Police has estimated they will require a 12 month lead-in time after legislation is passed, to procure OFT devices and laboratory testing services through a competitive tendering process, develop operational procedures, and train police officers. Procedures for dealing with oral fluid specimens will be set out in regulations made under the Act.

24 s 9(2)(b)(ii), s 9(2)(g)(i)

## Financial Implications

- 25 The costs of implementation the oral fluid testing regime will mostly fall on Police. These costs will be met through the National Land Transport Fund (the NLTF), which funds road policing through the Road Safety Partnership Programme.

26 s 9(2)(b)(ii), s 9(2)(i)

- 27 A cost-benefit analysis completed on the current OFT regime in the Act estimated that Police costs would be \$26.3M over a ten-year period. s 9(2)(b)(ii)

This compares to estimated benefits of \$812.5M.<sup>7</sup>

- 28 The level of funding required will depend on the number of OFTs administered by the Police. Cabinet has previously agreed the following targets: 33,000 OFTs in the first year, 50,000 in the second year, and 66,000 in the third and subsequent years after the provisions come into force [DEV-19-MIN-0360]. These may have to be scaled depending on the available funds.

<sup>7</sup> The cost-benefit analysis estimated that 65 lives would be saved over a ten-year period. The updated value of statistical life is \$12.5M per fatality.

## Legislative Implications

- 29 The Land Transport Act 1998 will need to be amended to introduce the proposed new oral fluid screening regime. As the issues with the current regime in the Act have only recently come to light following the Police procurement process, there is no Bill on the legislative programme to progress these proposals. I will be seeking agreement to include a Land Transport (Drug Driving) Amendment Bill (No 2) on the 2023 Legislation Programme with a category 4 priority (to be referred to Select Committee before the 2023 general election).

## Te Tiriti o Waitangi considerations

- 30 The Crown has obligations to Māori under Te Tiriti o Waitangi when designing and implementing policy. A key obligation in the context of road safety is the Crown's duty to promote equitable outcomes for Māori.
- 31 Māori experience substantially higher rates of road traffic death and serious injury than people of other ethnic groups in Aotearoa New Zealand.<sup>8</sup> We must also be mindful that Māori are overrepresented in the justice system and rates of cannabis use.<sup>9</sup> These factors have informed the development of the proposed infringement offence scheme, which mitigates the risk of Māori receiving criminal penalties for drug driving. However, there remains the potential for unpaid fees to escalate drivers into the criminal justice system. I expect these factors will be carefully considered as the new regime is implemented, to ensure equitable outcomes.
- 32 By detecting and deterring drug driving, roadside oral fluid testing aims to reduce deaths and serious injuries, which will provide a benefit to this population. I consider this to provide more of a benefit than a potential increased risk of interaction with the criminal justice system.

## Regulatory Impact Statement

- 33 The Regulatory Impact Analysis requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached. A Ministry of Transport Quality Assurance Panel has reviewed the Regulatory Impact Statement "Legislative amendments to enable roadside oral fluid testing" produced by the Ministry of Transport and dated 19 April 2023. The RIS was finalised before additional proposals were included in this Cabinet paper (any positive OFT being sent for evidential testing, laboratory evidential testing for *specified* qualifying drugs before an infringement offence is established, and a new infringement offence for drivers who refuse to undertake an OFT).
- 34 The panel considers that the RIS partially meets the Quality Assurance criteria. Because the legislated roadside drug testing regime is inoperable, the preferred option represents a new approach. The RIS makes a reasonable case for this option, but there are two important provisos. First, given the time constraints this proposal has been developed under there has not been an opportunity to directly consult non-government stakeholders, s 9(2)(g)(i)

<sup>8</sup> For 2013 to 2017, the average rate of death and serious injuries (DSIs) per 100,000 population for all Māori men was 87 compared to the average rate of 61.5 for all men. For Māori women the DSI rate was 40.5 per 100,000 population, compared to 29 for all women. Waka Kotahi (2021). *He pūrongo whakahaumarū huarahi mō ngā iwi Māori: Māori road safety outcomes*.

<sup>9</sup> A Ministry of Health survey has found that Māori are 2.2 times more likely to use cannabis compared to non-Māori. Ministry of Health (2015) *Cannabis Use 2012/2013: New Zealand Health Survey*.

Second, time constraints have also precluded a detailed benefit cost analysis. A previous analysis is relied on.

## Population Implications

- 35 The OFT regime may have a disproportionate impact on specific communities. Submitters on the bill that led to the new provisions in the Act were concerned about the disproportionate negative outcomes of the OFT regime on young people, Māori and lower socio-economic communities. The impact may also be heightened for commercial drivers and those living in rural communities.

## Human Rights

- 36 The proposals within this paper have implications under the New Zealand Bill of Rights Act (BORA). In particular, the proposals are likely to raise considerations under the following sections:

36.1 Section 21: the right to be secure against unreasonable search or seizure. The taking of a body sample, including oral fluid, constitutes a search for the purposes of this section. In addition, drivers with two positive oral fluid screening tests will be forbidden from driving for 12 hours (i.e., have their keys seized), which in 0.1 – 5 percent of cases will be for people who have not used drugs recently.<sup>10</sup> Taking keys to prevent driving involves a seizure.

36.2 Section 22: the right not to be arbitrarily arrested or detained. Drivers will be detained at the roadside for OFTs to be administered.

36.3 Section 25(c): an infringement offence for refusing to undertake an OFT engages the right to be presumed innocent until proven guilty.

- 37 A number of mitigations have been included in the proposed new oral fluid screening regime to address reduce the BORA implications. These include:

37.1 The procedural safeguard of two positive OFTs before a driver is forbidden to drive.

37.2 The new regime includes an evidential laboratory test of oral fluid, removing the likelihood of an infringement being issued on the basis of a false-positive result. An OFT is less invasive than a blood test, which is the evidential test option under the current OFT regime in the Act. The evidential laboratory process will only be testing for specified qualifying drugs listed in Schedule 5 of the Act. These potentially impairing drugs were included in the Schedule on

<sup>10</sup> As noted above, oral fluid devices can produce both false positive and negative results. Depending on the device, these can range from 5 – 10% of results. There are a number of reasons why a device might report a false positive result (including operator error, manufacturing fault, sample contamination, unusual subject biology, out-of-operating-limits, and climatic conditions). Performing a second test will not necessarily eliminate all of these causes. The chance of a positive result after two tests could therefore range from 0.01% – 5.5%.

the advice of an independent expert panel, based on New Zealand data linking road crashes with the presence of the drugs in the drivers' blood samples.

37.3 The sanction for failing an OFT and an evidential laboratory test, and refusing an OFT, are infringement fees, not a criminal charge.

38 The Ministry of Justice agrees the proposal may engage the Bill of Rights Act and raises some human rights concerns but supports the mitigation safeguards proposed. The Ministry of Justice notes if the proposal is agreed, the draft Bill will be assessed for consistency with the Bill of Rights Act.

## Consultation

39 The following departments were consulted during the development of this paper: ACC, NZ Police, Waka Kotahi New Zealand Transport Agency (Waka Kotahi), Ministry of Health, Ministry of Justice, the Crown Law Office, Parliamentary Council Office, The Treasury, WorkSafe, Office of the Privacy Commissioner and Te Puni Kōkiri. The Department of Prime Minister and Cabinet was informed.

40 WorkSafe is comfortable with the proposal. Waka Kotahi supports the approach, but notes this may cause additional pressures on the National Land Transport Fund depending on the final costings of the regime.

41 The Ministry of Justice is satisfied that the proposed offences and penalties are appropriate, focused on road safety, and that the human rights considerations have been properly considered. However, Justice is mindful that the drug driving regime overall risks disproportionately targeting Māori and could result in further criminalisation via secondary administrative- or drug-related offences. Justice notes the regime includes protections designed to mitigate these risks. Justice will continue to work with agencies to consider these risks as the work progresses to operational delivery.

42 Police has been closely consulted on this paper and strongly supports the proposals it contains. Police considers these proposals will provide a more robust and effective roadside drug testing approach.

43 The Privacy Commissioner continues to have significant privacy concerns about the oral fluid testing regime as a whole, and about the specific proposals in this Cabinet paper. The concerns centre on the lack of sufficient evidence that the proposed privacy intrusion is proportionate, considering the anticipated benefits, and some specific issues about matters relevant to privacy principles under the Privacy Act 2020, including issues around fairness and accuracy in the collection, use and retention of highly sensitive personal information.

## Communications

44 I intend to issue a media statement on the proposal if the recommendations in this paper are agreed. I also intend to proactively release this paper (and the accompanying RIS) by publishing it on the Ministry of Transport's website. The release may be subject to redactions as appropriate under the Official Information Act 1982.



## Recommendations

The Associate Minister of Transport recommends that the Committee:

*A new random roadside drug testing regime cannot be implemented as intended*

- 1 **note** that new provisions introduced into the Land Transport Act 1998 (the Act) from 11 March 2023 included a new roadside oral fluid testing regime intended to detect and deter drug driving;
- 2 **note** that a procurement process confirmed that there is no oral fluid testing device currently available that meets the legislative approval requirements;

*Remove current regime, and introduce a new regime*

- 3 **note** that a new oral fluid testing regime is required to address issues identified through the recent procurement process noted in recommendation 2 above;
- 4 **agree** to replace the current oral fluid testing regime in the Act with a new regime that uses oral fluid testing devices as screening devices, with evidential laboratory testing of oral fluid samples for specified qualifying drug(s) required before infringement notices are issued;
- 5 **note** that before approving an oral fluid testing device under the existing regime in the Act, the Minister of Police must consult the Minister of Transport and Science Minister, have regard to the accuracy of the device and be satisfied that the device will return a positive result only if the device detects the presence of a qualifying drug at a level that indicates recent use;
- 6 **agree** that under the new roadside screening regime, the approval criteria for an oral fluid device aligns broadly with the outline in recommendation 5 above, with the following changes:
  - 6.1 the Minister of Police will be required to have regard to the accuracy of the device, but will no longer need to be satisfied that the device will *only* return a positive result if the device detects the presence of a qualifying drug;
  - 6.2 devices can be approved if they detect classes or families of drugs that individual qualifying drugs are members of;
  - 6.3 the device will need to have a cut-off threshold that is indicative of recent drug use,

*Offences and enforcement action for drug drivers*

- 7 **agree** to create new infringement offences for drivers that produce a positive oral fluid screening test for a qualifying drug/s or a family of drugs that a qualifying drug/s is a member of, and the evidential laboratory test detects the presence of a specified qualifying drug/s at or above a threshold that is indicative of recent use;
- 8 **agree** to create new combined offences (where blood or breath contains alcohol, and an oral fluid screening test plus evidential laboratory test establishes the presence one or more specified qualifying drugs at or above a threshold that is indicative of recent use), aligned to those in the Act;

- 9 **agree** that the specified qualifying drugs to be tested in the laboratory will be set out in a notice issued by the Minister of Police that approves the evidential laboratory test, and the specified drugs will be from the list of 25 qualifying drugs in Schedule 5 of the Act;
- 10 **agree** to align the penalties for the new offences in recommendations 7 and 8 with the penalties for comparable offences in the Act;
- 11 **agree** that, aligned with the current regime, drivers who receive two positive oral fluid tests for specified qualifying drug/s or a family of drugs will be forbidden to drive for 12 hours;
- 12 **agree** to create an infringement offence for a driver who refuses to undertake an oral fluid test, punishable by an infringement fee of \$400, 75 demerit points, and being prohibited from driving for 12 hours;
- 13 **agree** to amend the Land Transport Act 1998 to include the necessary enforcement and evidential provisions to implement the new oral fluid screening regime, aligned with existing provisions in the Act where possible;
- 14 **note** that procedures for dealing with oral fluid specimens will be set out in regulations made under the Land Transport Act 1998;
- 15 **note** that the new oral fluid screening regime will operate alongside the existing compulsory impairment test process which needs to be retained as oral fluid testing devices can only detect a limited range of specified qualifying drugs;

#### *Financial costs and implementation*

- 16 **note** that the costs of implementing the new oral fluid screening regime will be met through the National Land Transport Fund, and that Police will require an estimated 12-month lead-in time after legislation is passed before implementing the regime;

#### *Legislative implications*

- 17 **note** that the Associate Minister of Transport will seek approval to include the Land Transport (Drug Driving) Amendment Bill (No 2) on the 2023 Legislation Programme with a category 4 priority (to be referred to select committee before the 2023 general election);
- 18 **invite** the Associate Minister of Transport to issue drafting instructions to the Parliamentary Counsel Office to give effect to the changes in legislation required to give effect to these decisions; and
- 19 **authorise** the Associate Minister of Transport, in consultation with the Ministers of Police and Justice, to make decisions in relation to any minor, technical, procedural, transitional or consequential matters that arise during the drafting of legislative amendments for the purpose of giving effect to these recommendations.

Authorised for lodgement

Hon Kiri Allan  
Associate Minister of Transport