



Cabinet Economic Development Committee

Minute of Decision

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Proposed Enhanced Drug Driver Testing Regime

Portfolio Associate Transport (Hon Julie Anne Genter)

On 11 December 2019, the Cabinet Economic Development Committee (DEV):

Proposed roadside oral fluid testing process

- 1 **noted** that:
 - 1.1 evidence demonstrates that drivers in New Zealand are using impairing drugs and driving;
 - 1.2 in 2018, 95 people were killed in crashes where a driver had consumed impairing drugs before driving;
- 2 **noted** that the current compulsory impairment test for drug driving is not able to be conducted in sufficient numbers to deter drug driving, and that surveys show that only 26 percent of New Zealanders think they will be caught drug driving versus 60 percent for drink driving;
- 3 **noted** that the government has committed to an action under the *Road to Zero* road safety strategy to strengthen the deterrence and detection of drug-impaired driving;
- 4 **noted** that:
 - 4.1 on 12 September 2018, DEV agreed to undertake public consultation to inform the development of policy options for a proposed Bill to enhance New Zealand's current drug driver testing regime [DEV-18-MIN-0193];
 - 4.2 on 13 February 2019, DEV approved the release of the discussion document, *Enhanced Drug Driver Testing*, for public consultation [DEV-19-MIN-0010];
- 5 **noted** that a majority of submitters to the public consultation on enhanced drug driver testing supported the introduction of random roadside oral fluid testing;
- 6 **agreed** to introduce a compulsory random roadside oral fluid testing scheme in New Zealand under which a Police officer can stop any driver of a motor vehicle and administer an oral fluid test without cause to suspect a driver has consumed drugs, consistent with the approach to drink driving enforcement;

- 7 **noted** that the new oral fluid drug testing process will operate alongside, and complement, the existing compulsory impairment test process, which needs to be retained because oral fluid testing devices can only detect a limited range of drugs;
- 8 **noted** that, based on analysis of the elevated crash risk of drugs and the prevalence of their use by New Zealand drivers, the drugs or drug classes that will be tested for as part of the oral fluid testing process are THC (the psycho-active ingredient in cannabis), methamphetamine, benzodiazepines (sedatives), MDMA (ecstasy), opiates (e.g. morphine) and cocaine;

Cut-off detection thresholds in oral fluid testing devices

- 9 **noted** that oral fluid testing devices are manufactured with ‘cut-off’ thresholds for the detection of drugs to reduce the risk of false-positive results by ensuring there is a sufficient amount of a drug present in oral fluid to accurately determine a result, and to avoid penalising drivers for:
- 9.1 accidental or passive exposure to drugs;
 - 9.2 low residual levels of a drug that are unlikely to impair driving in their blood due to previous but not recent use;
 - 9.3 consumed doses of some prescription or over-the-counter medicines that are unlikely to impair driving;
- 10 **agreed** that, before procuring oral fluid testing devices, including determining the appropriate cut-off thresholds to be incorporated in the devices, the Minister of Police be required to consult with the Minister of Transport and the Minister of Research, Science and Innovation, and take into account advice from an independent expert panel (paragraphs 23 to 24 below);
- 11 **agreed** that the Minister of Police will notify the oral fluid screening devices to be used in New Zealand by notice in the New Zealand Gazette, but will not publish details about the cut-off thresholds in the devices;

Drivers who fail two consecutive oral fluid tests will incur an infringement penalty

- 12 **agreed** to create an infringement offence for producing two positive (failed) oral fluid tests after driving or attempting to drive a motor vehicle on a road;
- 13 **agreed** to align the infringement penalty for failing two oral fluid tests with the drink driving infringement penalty, currently a \$200 fee, 50 demerits, a 12-hour suspension from driving but no criminal record;
- 14 **agreed** that drivers who fail two oral fluid tests be given the right to elect an evidential blood test, but that the fee for the test be deferred until the result of the test is known;
- 15 **agreed** that the fee for electing a blood test be waived if a driver’s blood sample does not show the presence of drugs or if the drugs are legitimately prescribed;
- 16 **noted** that drivers who elect to undertake an evidential blood test will be subject to both infringement and criminal penalties, depending on the levels of drugs in their blood sample;

Switching between the compulsory impairment test and oral fluid testing processes will be restricted

- 17 **agreed** that an enforcement officer cannot switch to the oral fluid testing process after they have commenced the compulsory impairment test process;
- 18 **agreed** that an enforcement officer can only switch to the compulsory impairment test process after the oral fluid testing process has commenced if:
- 18.1 a driver has passed the first oral fluid test, but the enforcement officer has good cause to suspect a driver has consumed drugs that the device may not be able to test for; or
- 18.2 a driver has failed the first oral fluid test and passed the second oral fluid test, but the officer has good cause to suspect a driver has consumed drugs;
- 19 **agreed** that a Police officer can require drivers who refuse to undertake oral fluid tests, or whose oral fluid tests show the presence of a combination of drugs and/or alcohol, to undertake an evidential blood test;
- 20 **agreed** that:
- 20.1 it will be an offence to refuse to permit a blood sample to be taken;
- 20.2 the penalty for refusing be aligned with the existing penalty under section 60 of the Land Transport Act 1998;

Limits to be specified for blood analysis

- 21 **agreed** to specify the limit for criminal penalties based on drug concentrations in blood that align with drink driving measures of impairment, being a limit equivalent to a blood-alcohol limit of 80mg/100ml – the level of the current drink driving criminal penalty;

Low-level ‘tolerance’ thresholds to be applied to the detection of drugs in blood

- 22 **agreed** to specify low-level tolerance thresholds to be applied to the detection of drugs in blood by the Institute of Environmental Science and Research, to avoid penalising drivers who have:
- 22.1 accidental or passive exposure to drugs;
- 22.2 low residual levels of a drug that are unlikely to impair driving in their blood due to previous but not recent use;
- 22.3 consumed doses of some prescription or over-the-counter medicines that are unlikely to impair driving;

Establish an independent expert panel

- 23 **agreed** to commission an independent panel of medical science experts to provide advice to the government on:
- 23.1 the limits to be specified for drugs in legislation;
- 23.2 the low-level tolerance thresholds to be applied to the detection of drugs in blood by the Institute of Environmental Science and Research;

23.3 the cut-off thresholds to be included in oral fluid testing devices;

24 **noted** that the independent panel of medical science experts will be appointed by the Associate Minister of Transport (Hon Julie Anne Genter), the Minister of Police and the Minister of Research, Science and Innovation in accordance with the Cabinet Fees Framework for advisory bodies;

Penalties for exceeding legal limits

25 **agreed** to create the following offences and penalties for drivers who fail an evidential blood test:

25.1 an infringement offence for driving or attempting to drive a motor vehicle on a road with drugs in blood below an equivalent blood alcohol level of 80mg/100ml (paragraph 21 above): a \$200 fee, 50 demerits, a 12-hour suspension from driving but no criminal record;

25.2 a criminal offence for driving or attempting to drive a motor vehicle on a road with drugs in blood at or above an equivalent blood alcohol level of 80mg/100ml (paragraph 21 above): a prison term of up to 3 months or a fine of up to \$4,500, and a mandatory disqualification from driving of 6 months or more;

Penalties for driving after consuming combinations of alcohol and/or drugs

26 **noted** that research shows that driving after consuming combinations of drugs, or drugs and alcohol, can increase crash risk by 20 times or more;

27 **noted** that the Associate Minister of Transport (Hon Julie Anne Genter) intends to consider developing higher penalties for drivers that test positive for a combination of impairing drugs and alcohol, including higher infringement penalties and criminal penalties, based on the level of alcohol that is present in the driver's blood;

28 **noted** that the Associate Minister of Transport (Hon Julie Anne Genter) intends to consider developing higher penalties for driving after consuming a combination of drugs;

29 **noted** that, to support establishing any criminal offences arising from paragraph 27 and 28 above, and to ensure that no driver receives a criminal penalty without having blood analysis, Police officers will be authorised to require a blood sample from the drivers, and that the existing offence for refusing to permit a blood specimen to be taken will be extended to these drivers;

30 **noted** that the Ministry of Justice will be consulted during the development of drafting instructions for the offences proposed in the paper under DEV-19-SUB-0360;

31 **noted** that drivers with prescriptions, who have taken drugs in accordance with their prescriptions and are eligible for a medical defence will not be subject to penalties for combined drug and alcohol use, but will remain liable for any qualifying drink driving offences;

32 **agreed** to create additional penalties for third and subsequent convictions for drug impaired driving under the proposed scheme, aligned with current offences and penalties for drink and drug driving;

Medical defence

- 33 **noted** that section 64 of the Land Transport Act 1998 provides a medical defence for drivers who fail a compulsory impairment test but have consumed drugs in accordance with a valid prescription;
- 34 **agreed** that a medical defence only be available to drivers who have undertaken an evidential blood test, either by election or as required by a Police officer;
- 35 **noted** that the Ministry of Transport will collaborate with the Ministry of Health to investigate options to ensure prescriptions are dispensed with correct information about the impairing effects of prescribed drugs, to avoid drivers being required to use the medical defence, and will report back to Cabinet if regulatory options are required;

Harm minimisation approach to drug-impaired driving

- 36 **agreed** to require Police to issue information about the availability of drug-related health services with infringement notices provided to drug drivers;
- 37 **agreed** that the Courts issue a compulsory health referral to a drug education or rehabilitation programme for second and subsequent criminal offences;

Te Tiriti o Waitangi

- 38 **noted** that new measures to address drug impaired driving could have disproportionate impacts for Māori men and women who experience more of the risk factors and vulnerabilities leading to offending and entry into the criminal justice system;
- 39 **noted** that these risk factors have informed the development of the proposed infringement offence scheme, which mitigates the risk of Māori men and women receiving criminal penalties for drug-impaired driving;
- 40 **noted** that Police are currently undertaking a programme of work to manage the potential for unconscious bias in Police practices;

Financial and operational implications

- 41 **agreed** to implement the new oral fluid drug testing regime delivering 33,000 drug tests in the first year, rising to 50,000 tests in the second year, and 66,000 tests in the third and subsequent years;
- 42 **noted** that the Ministry of Transport's cost-benefit analysis predicts harm saving from the proposed scheme at \$415 million over ten years, in a range of \$239 million to \$778 million, which equates to 65 lives, in a range of 37 to 123 lives;
- 43 **noted** that the costs to Police of implementing the proposed scheme will be met from the National Land Transport Fund under the Road Safety Partnership Programme of the National Land Transport Programme;
- 44 **noted** that the next Government Policy on Land Transport (GPS) will include funding for the new roadside drug testing regime as part of the government's increased safety investment proposed for the delivery of the *Road to Zero* road safety strategy;
- 45 **noted** that additional Budget funding for the Police costs of the scheme will not be required during the three-year term of the GPS;

- 46 **noted** that the Ministers of Transport and Police will approve any variation to the Road Safety Partnership Programme to accommodate the proposed scheme;
- 47 **noted** that the proposed scheme will have cost implications for the Waka Kotahi New Zealand Transport Agency, the Ministry of Justice and the Department of Corrections, which may require funding from Budget 2021;
- 48 **directed** the Waka Kotahi New Zealand Transport Agency, in conjunction with the Ministry of Transport, to review the driver licence reinstatement fee that applies for drivers after being suspended, to ensure the fee is sufficient to cover the increased volume of licence suspensions from the proposed scheme;
- 49 **noted** that in 2019, the government boosted District Health Board funding for mental health and addiction services by \$213 million, with \$44 million allocated to improve alcohol and drug residential services and \$14 million to improve support for those with mild to moderate needs;
- 50 **noted** that the Ministry of Transport will work with the Ministry of Health to model the financial impacts of the potential increase in demand for health-related services arising from the introduction of enhanced drug driving measures, and will report to Cabinet if there are further funding implications;

Legislative implications

- 51 **noted** that the Land Transport Act 1998 will be amended to introduce the drug testing proposal;
- 52 **noted** that consequential amendments will also be needed to the Land Transport (Offences and Penalties) Regulations 1999 to specify the infringement fee and demerit points for the new infringement offence;
- 53 **noted** that limits for drug concentrations in blood that establish offences will be specified in the Land Transport Act 1998;
- 54 **noted** that the drugs to be tested for by the oral fluid testing process will be specified by Order in Council, and that the Minister of Police will approve the oral fluid screening devices to be used in New Zealand by Notice in the *New Zealand Gazette*;
- 55 **invited** the Associate Minister of Transport (Hon Julie Anne Genter) and the Minister of Police to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 56 **authorised** the Associate Minister of Transport (Hon Julie Anne Genter), in consultation with the Minister of Police, 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 the above paragraphs;
- 57 **noted** that a category 4 priority will be sought for the Land Transport (Drug Driving) Amendment Bill on the 2020 Legislation Programme (to be referred to a select committee in 2020).

Janine Harvey
Committee Secretary

Hard-copy distribution: (see over)

Present:

Hon Kelvin Davis
Hon Phil Twyford
Hon Dr Megan Woods (Chair)
Hon David Parker
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Kris Faafoi (part of item)
Hon Shane Jones
Hon Julie Anne Genter
Hon Eugenie Sage

Officials present from:

Office of the Prime Minister
Officials Committee for DEV

Hard-copy distribution:

Minister of Police
Associate Minister of Transport (Hon Julie Anne Genter)