

15 February 2023

OC221027 / BR/23/14

**Hon Michael Wood**

**Action required by:**

**Minister of Transport**

Monday, 20 February 2023

**Hon Stuart Nash**

**Minister of Police**

## **ADVICE ON NEXT STEPS FOLLOWING POLICE PROCUREMENT PROCESS FOR ORAL FLUID TESTING DEVICES**

This briefing contains legal advice which is legally privileged. It should not be disclosed on an information request or as part of a pro-active release of information, without further legal advice.

### **Purpose**

To test your appetite for the level, scope, and timing of any legislative reform to address issues identified through the procurement process for oral fluid testing devices.

### **Key points**

- As part of Road to Zero, the Government's road safety strategy, Te Manatū Waka Ministry of Transport (Te Manatū Waka), New Zealand Police (Police), and Waka Kotahi NZ Transport Agency (Waka Kotahi) have an action to enhance the drug driving testing regime. The Land Transport (Drug Driving) Amendment Act 2022 (the Act) is due to come into force on 11 March 2023. The Act introduces a random roadside oral fluid test (OFT) regime that allows Police to test drivers for the presence of the most prevalent and highest risk illicit and prescription impairing drugs, similar to the alcohol breath testing regime.
- Police has finalised a procurement process to assess currently available OFT devices. Police has been unable to find a device it can lawfully recommend to the Minister of Police for approval, on the basis of accuracy and specificity (i.e., the ability of the device to identify individual drugs) concerns. Although we were aware OFT devices had some limitations, the full extent was not known until completion of the procurement process.

• s 9(2)(h)

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- The outcome of the procurement process s 9(2)(h) that, under current legislative settings, there are no currently available OFT devices that can be s 9(2)(h) approved for use and the random roadside testing aspect of the drug driving regime cannot immediately be implemented as intended.
- s 9(2)(g)(i)  
Police has a strong preference for legislation change that allows for the use of OFTs as a screening tool with the requirement for a confirmatory laboratory test to establish an offence. This approach would allow testing for the most commonly implicated drugs and resolve accuracy and specificity issues with the current legislative design.
- This briefing seeks Ministerial direction on next steps and appetite to progress primary legislative change to implement random roadside oral fluid testing. We can provide advice on additional options (if required) following discussion with Ministers. We have identified three possible options:
  - Option 1: delay the implementation of the random roadside oral fluid testing regime until a suitable device is available (not recommended)
  - Option 2: amend the Act to clarify the criteria the Minister of Police must consider when approving a device and to allow for identification of a class or family of drug
  - Option 3: redesign the Act to make OFTs a screening tool followed by evidential testing (strong Police preference)
- Other aspects of the regime will be implemented on the commencement date of 11 March 2023. This includes new criminal offences for drivers who have blood drug concentration levels above tolerance levels, infringement offences where a drug is

present below the threshold , new combination offences for drivers who are over the allowed threshold for drugs and alcohol simultaneously, and a new medical defence for infringement offences.

## Recommendations

We recommend you:

1 **note** the Police procurement process has not identified an oral fluid device that meets current legislative requirements for approval

2 **note** s 9(2)(h)

3 **indicate** which of the following is your preferred option or options moving forward:

Option 1: delay implementation of the random roadside oral fluid testing regime until a device is developed that meets legislative requirements (not recommended) OR Yes / No

Option 2: amend the Act to clarify the device approval criteria and allow for identification of a class or family of drug AND / OR Yes / No

Option 3: revisit the scope of the regime, including amending the Act to make OFTs a screening tool followed by evidential testing (Police strong preference) Yes / No

4 **note** that, if you want further information on option 2 and/or 3, we will provide further advice on design, cost, feasibility of implementation and any other relevant information

5 **advise** officials a timeframe for providing further any advice on your preferred option or options.



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Helen White  
**Manager, Mobility and Safety, Ministry of Transport**

14 / 02 / 2023



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Gillian Ferguson  
**Director Policy, New Zealand Police**

16 / 02 / 2023

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Hon Michael Wood  
**Minister of Transport**

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Hon Stuart Nash  
**Minister of Police**

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- Minister's office to complete:**
- Approved
  - Declined
  - Seen by Minister
  - Not seen by Minister
  - Overtaken by events

**Comments**

**Contacts**

Name	Telephone	First contact
Helen White, Manager, Mobility and Safety, Ministry of Transport	s 9(2)(a)	✓
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## ADVICE ON NEXT STEPS FOLLOWING POLICE PROCUREMENT PROCESS FOR ORAL FLUID TESTING DEVICES

**The Land Transport (Drug Driving) Amendment Act 2022 (the Act) is intended to deter impaired driving and includes a new random roadside oral fluid testing regime**

- 1 Impairment from illicit and prescription drugs remains a significant contributing factor to deaths and serious injuries on our roads. Our current system for identifying drug-impaired drivers, based on a roadside behavioural test, does not adequately deter drug driving. Rolling out an enhanced roadside drug testing regime is a key action under our road safety strategy, Road to Zero.
- 2 The policy intent of the Land Transport (Drug Driving) Amendment Act 2022 (the Act) is to reduce death and serious injury on our roads through detecting and deterring people from driving after taking potentially impairing drugs. A key element of the detection and deterrence approach is the introduction of a random roadside oral fluid testing regime to detect drivers who have recently consumed qualifying drugs.
- 3 The Act is due to come into force on 11 March 2023. The Act introduces a random roadside oral fluid test (OFT) regime that is intended to allow New Zealand Police (Police) to test drivers for the presence of the highest risk and most prevalent illicit and prescription impairing drugs, using an approach similar to the alcohol breath testing regime.
- 4 Under this regime, drivers commit an infringement offence if the results of two consecutive OFTs are positive and indicate the use of the same qualifying drug, and the person does not elect to have a blood test to establish a defence. These drivers will incur an infringement fee, demerit points, and be immediately forbidden from driving for 12 hours. A medical defence is available for drivers who have consumed medication in accordance with their prescription or instructions from their health practitioner.
- 5 The roadside oral fluid testing regime was designed to:
  - deter people from driving after having consumed impairing drugs
  - remove drivers from the road who have recently used impairing drugs
  - sanction drivers who have recently used a qualifying drug in a way that is proportionate with risk but minimises potential harm (i.e., the creation of an infringement regime rather than only criminal offences)
  - initially focus on the drugs that present the highest risk to road safety in Aotearoa
  - be operationally feasible for Police (including being efficient and cost-effective) and
  - minimise any inconsistencies with the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) and Te Tiriti o Waitangi.
- 6 This approach is unique to New Zealand. OFT devices are designed to screen drivers for drug use. Other jurisdictions utilise random roadside OFTs in this way, requiring

further laboratory testing of either an oral fluid sample or a blood sample in order to confirm the presence of a specific drug or drugs.

- 7 Police has recently completed a procurement process for OFT devices ahead of the Act coming into force. Police briefed the previous Minister of Police on the outcome of the procurement process, advising that Police has not identified an OFT device it considers suitable to recommend to the Minister of Police for approval under current legislative settings [BR/22/107CH refers]. The procurement process identified concerns around both accuracy and specificity (the ability of the device to identify individual drugs).
- 8 Limitations of currently available OFT devices, including that they can produce false positive results and, in most cases, can only indicate the use of a class of drug (as opposed to a specific drug), were advised throughout the policy and legislative process. However, the full extent of these limitations was not clear until after the procurement process. Police noted during the reform process the implementation of the regime was subject to the successful outcome of the procurement process. Further understanding of how the approval criteria for the devices (sections 71G(2) and (3)) apply in practice has also raised some legal questions.
- 9 The Act sought to mitigate these limitations by putting several safeguards in place.<sup>1</sup> At the time, these mitigations satisfied the Attorney-General that the provisions of the Act were consistent with the Bill of Rights Act:
  - **Accuracy:** the risk of false positive results from OFTs has been known throughout the policy development process. False positive results are those where the oral fluid result for a drug is positive, but the drug is either not present, or present at a level that should not result in detection. To minimise the risk of false positives, the Act requires two positive OFTs before an infringement offence is established and allows a driver to elect a confirmatory blood test to establish a defence against the OFT results [OC210284 / BR/21/48 refers].<sup>2</sup>
  - **Recent use:** OFTs have built-in cut-off thresholds. If a drug is present, but under the threshold, the OFT will not return a positive result.<sup>3</sup> The Independent Expert Panel on Drug Driving (the Expert Panel) noted the recommended cut-off thresholds in the *Australian/New Zealand Standard AS/NZS 4760:2019: Procedure for specimen collection and the detection and quantification of drugs in oral fluid* (the Standard) are accepted as indicative of recent use, rather than historical or accidental exposure. In line with this advice, the criteria for approving a device were amended to reference consideration of any relevant New Zealand or joint Australian/New Zealand Standards [OC210284 / BR/21/48 refers].

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<sup>1</sup> Mitigations include the sanction for failing two OFTs being an infringement rather than criminal offence, requiring information on the oral fluid drug concentration to be published in the Gazette notice approving the device, providing a defence where a person has a prescription for the qualifying drug and they complied with any instructions about driving while consuming the drug, and the retention of the compulsory impairment test pathway where a Police officer has good cause to suspect that a person has consumed a qualifying drug.

<sup>2</sup> If the result of a blood test indicates the person has consumed one or more drugs and is liable for an offence, they may also be liable for the cost of the blood test (section 71D(2)). The cost of a blood test has increased since initial policy decisions, with the cost ranging from \$696.80 to approximately \$1700 depending on the tests conducted.

<sup>3</sup> Unless the device returns a false positive result in error.

- **Specificity:** OFT devices test for certain drugs or families of drugs that commonly cause impairment when driving (THC, cocaine, benzodiazepines, opiates, methamphetamine, and MDMA). Advice from the Expert Panel noted commercially available OFTs that detect benzodiazepines, opiates, methamphetamine, and MDMA detect only indicative use of a class or family of drug, rather than specific drugs within these families.<sup>4</sup> The report also notes issues of cross-reactivity, where the similarity in the chemical composition of a drug may cause it to be mistakenly identified as another. If a device cannot accurately test for all six drug classes, the Minister of Police may approve a device that tests for fewer drugs, although this is not recommended as a desired approach.

**The legislative criteria for approving OFT devices are set out in section 71G of the Amendment Act**

- 10 Section 71G of the Act sets out the legislative criteria to approve an OFT device for use in a roadside testing environment. In summary, before approving a device, the Minister of Police must:
- 10.1 consult the Minister of Transport and the Science Minister; and
  - 10.2 have regard to the accuracy of the device (the section 71G(2)(b) test); and
  - 10.3 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 of a specified qualifying drug. When determining this aspect, the Minister must have regard to any relevant New Zealand Standards or joint Australian/New Zealand Standards (the section 71G(2)(c) test).
- 11 The requirement that the Minister of Police must consider any relevant standards when approving a device was added by the Select Committee that considered the Bill, responding to issues raised relating to the Bill of Rights Act. The recommended addition drew on advice from the Expert Panel's final report.

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<sup>4</sup> Independent Expert Panel on Drug Driving, *Recommending statutory limits for drug concentrations relating to impaired driving*, April 2021, p 27: <https://www.transport.govt.nz/assets/Uploads/Report/IndependentExpertPanelonDrugDrivingFinalReportApril2021.pdf>


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## **There is one non-legislative option for potentially implementing aspects of the Act**

*Option 1: delay implementation of the roadside testing regime until a suitable device can be procured (not recommended)*

- 27 Under this option, Police will procure a device that meets the statutory criteria if or when such a device becomes available. While Police anecdotally understand new products may be in development, it is likely to be some years before these devices are available and there is no clear indication of their potential capabilities.
- 28 Risks with this option include:
- There will be key aspects of the legislation that are not enforceable once the Act comes into effect. This will impact the policy intent of creating a general deterrent effect across the driving population. Failure to deliver this may undermine public confidence in the drug driving regime as a whole.
  - Modelling in the 2019 Cost Benefit Analysis indicated the implementation of the regime as designed would prevent approximately 37-123 fatalities over a ten-year period.<sup>7</sup> Delay in implementation means a longer timeframe before these benefits are realised. This also applies for Options Two and Three, although to a lesser extent.

## **We have identified additional options, but these will require legislative change**

- 29 Te Manatū Waka and Police recommend that in order to give effect to the policy intention of the Act to deter, detect and remove drugged drivers from the road, legislative amendment is required. These amendments would allow the regime to roll out with the OFT devices that are currently available on the market. However, we note any primary legislative amendment could, to some extent, impact the policy design, intent, and rationale underpinning the regime.
- 30 Risks common across both options include:
- 30.1 These options will likely require significant resource and delay progress of other Road to Zero policy projects.
- 30.2 Depending on how these options are designed, they may raise issues of unreasonable search and seizure (section 21), arbitrary detention (section 22), and innocence until proven guilty (section 25(c)) under the Bill of Rights Act. We note that although legislation can be inconsistent with the Bill of Rights Act, inconsistent legislation will result in the Attorney-General notifying the House of Representatives under section 7 of the Bill of Rights Act.<sup>8</sup> Section 7 reports are not binding, and Parliament may form a different view about whether a particular right or freedom is limited, and if that limitation is justified.

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<sup>7</sup> Enhanced testing regime for drug-impaired driving: Cost Benefit Analysis, p 35. Ministry of Transport, 2019.

<sup>8</sup> For example, section 7 reports were generated when the alcohol breath testing regime was introduced in 1997 and when changes to the regime were made in 2012 and 2013.

30.3 As with the breath alcohol breath testing regime (which relies on more accurate devices and has been in place for almost 30 years), a risk of legal challenge remains, although the success of these challenges may be minimised.

30.4 There is a reputational risk for the Government, Police, Te Manatū Waka, and the Road to Zero programme.

*Option Two: amend the Act to clarify the criteria the Minister of Police must consider when approving a device and to allow for identification of a class or family of drug*

31 This option will require three key changes to the Act, with additional changes likely if we explore this option further. The key changes are:

31.1 amend section 71G to allow for devices to record a low proportion of false positives (on the basis that there are protections built into the testing regime, including the requirement for two positive test results before an infringement can be issued, and the ability for a person to request a blood test), and

31.2 amend section 71G to clarify the test for recent use is to be a proxy based on the thresholds in the Standard, and

31.3 amend the Act to allow an infringement notice to be issued when a driver tests positive for a class or family of drug (rather than a specific qualifying drug).

32 This option may lessen the risk of a successful legal challenge and will allow for infringement notices to be issued to drivers at the roadside. However, it would not directly address Police concerns about the potential for some drivers (potentially one in each thousand tested) to be falsely issued an infringement notice.

33 Officials will need to undertake further policy and operational investigation to determine the feasibility of this option (including whether it can be implemented). Requiring only a family or class of drug as sufficient to issue an infringement notice may raise questions under the Bill of Rights Act, Criminal Procedure Act 2011, and the Solicitor-General's Prosecution Guidelines, but these potentially could be addressed through the design of the regime.

*Option Three: amend the Act to provide for a different mechanism of random roadside testing*

34 This option would redesign the policy intent and rationale of the Act. It would shift the regime away from the initial policy design of issuing infringement notices to drivers at the roadside but aligns with regimes used overseas, including in Victoria, Australia.

35 Legislative design could retain initial policy design of detecting and deterring drug driving by using a random roadside testing regime. The option would involve using the OFT devices as a screening tool, which is what the devices are designed for. A positive test would result in the driver being forbidden from driving for a period of time (for example, 12 hours), with an infringement notice being issued following a confirmatory positive test in a laboratory. It would allow infringements to be issued for all classes of qualifying drugs.

- 36 We have identified two possible pathways for this option:
- 36.1 amend the Act to require a confirmatory **blood test** following at least one positive OFT (this was previously considered and decided against because of cost and time constraints),<sup>9</sup> or
  - 36.2 amend the Act to require a confirmatory **saliva test** following at least one positive OFT (this option was not explored during initial policy development).
- 37 Officials will need to conduct further policy and operational investigation to provide further advice on Option Three, including establishing whether the Institute of Environmental Science and Research has or can develop capacity and capability to undertake confirmatory testing.
- 38 From an initial assessment, we consider requiring a confirmatory saliva test following at least one positive OFT to align more closely with the original policy intent of the Act. It maintains the detection, deterrence, and infringement regime aspects of the original legislative/policy design and is more efficient for both Police and drivers compared to requiring a confirmatory blood test following at least one positive OFT. It will go toward addressing the identified issues around device accuracy and specificity (as any infringement is based on a confirmatory laboratory test that detects accurately the specific drug or drugs the driver has consumed). However, requiring a confirmatory test will increase costs for Police to implement and maintain the regime.

#### Next steps

- 39 We are seeking initial feedback on a preferred option or options to explore further. Officials can provide further and more detailed advice on a way forward and associated cost, benefits and implementation consideration of the options. We can provide advice on additional options (if required) following discussion with Ministers on policy priorities within the regime.
- 40 Police considers that more in-depth scoping and analysis is required in order for an informed decision to be made. Police has a strong preference for option three, however if option two is to be considered Police believes both options two and three should be scoped, including whether the options can practically and legally be operationalised. For this reason, Police has a strong preference that these options be developed in tandem to ensure Ministers have robust analysis available to inform your final decisions on any scope of legislative change to implement oral fluid testing as a road safety measure.

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<sup>9</sup> Regulatory impact statement: Enhanced drug driver testing, Ministry of Transport, 2020.