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Hon Kiri Allan

Action required by:**Minister of Justice, Associate Minister of Transport**

Wednesday, 3 May 2023

cc Hon Ginny Andersen

Minister of Police

ADVICE ON CHANGES PROPOSED BY POLICE TO THE ORAL FLUID TESTING REGIME

Purpose

Provide information about the similarities and differences between the roadside alcohol and drug testing regimes.

Seek your agreement to two additional proposals being included in the Cabinet paper that seeks to amend the roadside oral fluid testing regime.

Key points

Similarities and differences between roadside alcohol and drug testing regimes

- The roadside alcohol and drug testing regimes are well aligned, as they both:
 - enable Police to randomly stop drivers on any road to test for the presence of alcohol or drugs
 - involve a sequence of steps before penalties are imposed, including screening and evidential testing
 - allow enforcement action at the roadside (prohibiting a person from driving for 12 hours) to address immediate road safety risks presented by impaired drivers
 - penalise drivers who refuse to engage with the testing processes.
- The key difference between the two regimes is that the device used to screen and detect alcohol in a driver's breath is more advanced than the available oral fluid testing options for impairing drugs. The evidential test used for alcohol can detect the concentration of alcohol in a driver's breath. High level concentrations attract criminal penalties, whereas lower concentrations attract infringement penalties.
- For oral fluid, testing (both using devices at the roadside and evidential testing in a laboratory) can only detect the presence of drugs in a person's oral fluid above a threshold. Only more invasive blood tests can detect drug concentration levels. This means that most drivers who have specified qualifying drugs present in their system will only receive infringement penalties.

Officials recommend Ministers progress the two changes proposed by the Police

- Police, Justice and Transport officials have met to discuss the two proposals that Police recommend be included in the Cabinet paper:
 - (i) establishing an offence for drivers refusing to provide an oral fluid sample, and
 - (ii) enabling infringement offences to be established for any specified qualifying drug that is detected in an evidential laboratory test of oral fluid, regardless of whether that drug was detected in the roadside oral fluid screening process.
- For the first proposal, officials agree that a new infringement offence should be established for drivers who refuse to provide an oral fluid sample. This avoids the need for Police to require a blood sample, which is more invasive and practically more challenging (as the driver will usually be taken to a police station for a medical professional to obtain the blood sample).
- We recommend that the penalty level for the infringement offence should align with the maximum penalty available for a driver that provides an oral fluid sample and is subsequently found to have two or more qualifying drugs in their oral fluid. This penalty is an infringement fee of \$400 and 75 demerit points. The driver will also be prohibited from driving for 12 hours (to address any potential road safety risk if the driver has recently consumed impairing drugs). Setting the penalty at this level would mean there is no incentive for the driver to not engage with the oral fluid testing process.
- For drivers who refuse to provide an oral fluid sample, a police officer has the option of requiring the driver to undergo a compulsory impairment test if they have good cause to suspect the person has consumed a drug or drugs. Refusal to undergo this test is a criminal offence.
- Justice officials note that while the proposed new infringement offence engages rights protected by the New Zealand Bill of Rights Act 1990, the limitations on the rights are likely to be justifiable. A final view will be determined when the bill is vetted for consistency with the Bill of Rights Act.
- For the second proposal, Police has advised that all oral fluid samples that are sent to the laboratory for testing will undergo evidential analysis. This will involve a standardised test for all specified qualifying drugs that the laboratory test can detect in oral fluid, at a standard cost (estimated to be around s 9(2)(b)(ii), s 9(2)(i)). This is the same approach taken to testing blood for drugs. Police further advise that testing individual samples only for the drugs that are detected at the roadside screening test would be a bespoke test that is likely to be less cost effective.
- The roadside oral fluid screening test is only the first step in the oral fluid testing process, and the current technology has inherent limitations in accuracy and breadth of testing capability. The evidential laboratory test determines whether an infringement offence has been committed. For these reasons, officials are of the view that the laboratory test should examine the oral fluid for any detectable specified qualifying drug. Only qualifying drugs listed in Schedule 5 will be able to be specified. These 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' blood samples.

- Justice officials observe that while the second proposal constitutes a search, they consider it is reasonable. The roadside testing will indicate the presence of one or more drugs. Further laboratory testing to confirm the nature and number of drugs present in order to impose the appropriate infringement penalty connects to the objective of ensuring deterrence of drug-impaired driving. A final view will be determined when the bill is vetted for consistency with the Bill of Rights Act.

Recommendations

We recommend you:

- note** that the roadside alcohol and drug testing regimes are broadly aligned, but do have some key differences due to the limitations of testing oral fluid for impairing drugs
- agree** to seek Cabinet’s agreement to amend the roadside oral fluid drug testing regime to:
 - create a new infringement offence for drivers that refuse to provide an oral fluid sample when required to do so by a police officer. The infringement fee will be \$400, and 75 demerit points. The driver would also be prohibited from driving for 12 hours, and Yes / No
 - enable infringement offences to be established for any specified qualifying drug that is detected in an evidential laboratory test of oral fluid, regardless of whether that drug was detected in the roadside oral fluid screening process Yes / No
- refer** this briefing to Hon Ginny Andersen, Minister of Police. Yes / No



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Te Manatū Waka Ministry of Transport
2 / 5 / 2023

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..... / /



Rajesh Chhana
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2 / 5 / 2023

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

Comments

Contacts

Name	Telephone	First contact
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ADVICE ON CHANGES PROPOSED BY POLICE TO THE ORAL FLUID TESTING REGIME

Police has sought two further proposals to be included in the Cabinet paper that is seeking legislative amendments to enable oral fluid testing

- 1 At a meeting with Justice and Police officials on Friday 28 April 2023, we discussed with you two proposals that Police recommend be included in the Cabinet paper seeking legislative changes to enable oral fluid testing to detect and deter drug driving:
 - 1.1 create a new infringement offence for drivers that refuse to provide an oral fluid sample when required to do so by a police officer
 - 1.2 enable infringement offences to be established for any specified qualifying drug that is detected in an evidential laboratory test of oral fluid, regardless of whether the drug was detected in the roadside oral fluid screening process.
- 2 You asked officials to work through these proposals, and provide advice. Justice, Transport and Police officials have now met, and have agreed a way forward. Subject to your agreement, we recommend that the Cabinet paper be amended to include these two proposals.
- 3 You also asked for a summary of the two roadside testing regimes for alcohol and drugs, identifying where there is alignment, and where the two regimes differ.

The alcohol and drug testing regimes are similar, but do have key differences due to the available testing technologies

- 4 The roadside drug driving testing regime recently introduced through amendments to the Land Transport Act 1998 (the Act) was based on the alcohol breath testing regime, with some changes necessary because of the limitations in technology for testing oral fluid for the presence of impairing drugs.
- 5 The two testing regimes are outlined in Annex 1.
- 6 In summary, the roadside alcohol and drug testing regimes are well aligned, as they both:
 - 6.1 enable Police to randomly (that is, without having any cause to suspect a driver has consumed alcohol or drugs) stop drivers on any road to test for alcohol or drugs
 - 6.2 involve a sequence of steps before penalties are imposed, including screening and evidential testing
 - 6.3 allow enforcement action at the roadside (prohibiting a person from driving for 12 hours) to address immediate road safety risks presented by impaired drivers
 - 6.4 penalise drivers who refuse to engage with the testing processes. For both regimes, drivers can refuse to undergo the breath or oral fluid screening and

evidential tests, but they will be required to provide a blood sample. Failure to provide a blood sample is a criminal offence. For the drug testing regime, providing a blood sample could expose the driver to a higher criminal (as opposed to infringement) penalty, as blood testing determines the concentration levels of any qualifying drugs in the sample. Schedule 5 of the Act lists tolerance and high-risk blood concentration levels for the 25 most impairing qualifying drugs (which are called “listed qualifying drugs” in the Act). The maximum penalty for refusing to provide a blood sample aligns with the maximum penalty available for high-risk blood concentration levels of any listed qualifying drug (3 months imprisonment, \$4,500 fine and mandatory 6 month licence disqualification).

- 7 The key difference between the two regimes is that the device used at the roadside to screen and detect alcohol in a driver’s breath is more advanced than the available oral fluid testing options for impairing drugs. The evidential test used for alcohol can detect the concentration of alcohol in a driver’s breath. High level concentrations (over 400 micrograms of alcohol per litre of breath) attract criminal penalties, whereas lower concentrations (more than 400 micrograms of alcohol per litre of breath) attract infringement penalties.
- 8 For oral fluid, testing (using devices at the roadside and evidential testing in a laboratory) can only detect the presence of drugs in a person’s oral fluid (over determined thresholds). Only more invasive blood tests can detect drug concentration levels. As noted above, this means that most drivers who have impairing drugs in their system will only receive infringement penalties. Police do, however, have the option to undertake a compulsory impairment test where they have cause to suspect that the driver is impaired by drugs. Failing this test results in the driver being required to provide a blood sample, thereby exposing the driver to potentially higher penalties if the drug testing identifies high-risk levels of listed qualifying drugs in the person’s blood sample.

We recommend a new infringement offence is created for drivers who refuse to provide an oral fluid sample

- 9 It is currently not an offence for drivers stopped by police at the roadside to refuse to provide an oral fluid sample. Instead, these drivers are required to provide a blood sample. Refusal to provide a blood sample is a criminal offence, punishable by up to 3 months imprisonment, \$4,500 fine and mandatory 6 month licence disqualification.
- 10 For pragmatic and efficiency reasons, Police officials recommend that a new offence is created for drivers who refuse to provide an oral fluid sample. Justice officials agree with this proposal, provided the penalty is at the infringement level. Transport officials also support the proposal, provided there is no incentive for drivers to “opt out” of the testing regime (due to a lower penalty, for example), and any road-safety risk is addressed.
- 11 We recommend that the penalty level for the infringement offence should align with the maximum penalty available for a driver that provides an oral fluid sample and is subsequently found to have two or more qualifying drugs in their oral fluid. This penalty is an infringement fee of \$400, 75 demerit points, and being prohibited from driving for 12 hours (to address any potential road safety risk if the driver has recently consumed specified qualifying drugs). Setting the penalty at this level would mean there is no

incentive for the driver to not engage with the oral fluid testing process, which would be a risk if the penalty level was lower.

- 12 For drivers who refuse to provide an oral fluid sample, a police officer has the option of requiring the driver to undergo a compulsory impairment test if they have good cause to suspect the person has consumed a drug or drugs. Refusal to undergo this test is a criminal offence. More details are provided in Annex 1.
- 13 Justice notes that an infringement offence for refusing to undertake an oral fluid test engages the right to be presumed innocent until proven guilty (s25(c) New Zealand Bill of Rights Act 1990). The limit on the presumption of innocence rationally connects to the road safety objective of preventing drug-impaired driving. The consequence is an infringement offence, which does not carry a criminal conviction, and a short stand-down period to ensure that the person does not drive while potentially impaired. This is likely to represent a justifiable limit on the right to be presumed innocent until proven guilty.
- 14 Justice further advises that where a stand down period involves removing a person's keys, this could amount to a seizure (s21 Bill of Rights Act). Taking a person's keys to ensure they stand down from driving will not occur in every case. Police will have discretion as to how to ensure the person stands down from driving and could, for example, direct that a passenger drives the person home. Police would need to be satisfied that taking a person's keys was reasonable in the circumstances, and they would be returned following the 12 hour stand down. Therefore, this would likely constitute a reasonable seizure.

We also recommend enabling infringement offences to be established for any specified qualifying drug that is detected in an evidential laboratory test

- 15 As currently drafted, the Cabinet paper recommends that any positive roadside OFT results in an oral fluid sample being sent to the laboratory. The laboratory test would only test the oral fluid sample for the qualifying drug, or a qualifying drug in a family of drugs that is detected or detectable in a certain channel on the device, identified by the roadside oral fluid screening test. This was for fairness and cost reasons.
- 16 Police has advised that all oral fluid samples that are sent to the laboratory for testing will undergo evidential analysis. This will involve a standardised test for all specified qualifying drugs that the laboratory test can detect in oral fluid, at a standard cost (estimated to be around s 9(2)(b)(ii), s 9(2)(i)). This is the same approach taken to testing blood for drugs. Police further advise that testing individual samples only for the drugs that are detected at the roadside screening test would be a bespoke test that is likely to be less cost effective. In addition, the current technology available for roadside screening testing has limitations with accuracy and the range of qualifying drugs that can be identified.
- 17 Given this, Police recommend that infringement offences can be established for any specified qualifying drug that is detected in an evidential laboratory test of oral fluid, regardless of whether that drug was detected in the roadside oral fluid screening process. The qualifying drugs will be specified in a notice that approves the evidential test. This is similar to the approach used for approval of oral fluid screening devices.

The notice approving the devices must specify the qualifying drugs (or families of drugs that a qualifying drug is a member of) that will be screened at the roadside.

- 18 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' blood samples.
- 19 As the roadside oral fluid screening test is only the first step in the oral fluid testing process, with the evidential laboratory test determining whether an infringement offence has been committed, officials are of the view that the laboratory test should examine the oral fluid for any detectable specified qualifying drug. Infringement offences would then be issued for any specified qualifying drug detected.¹
- 20 Justice officials observe that while the second proposal constitutes a search, they consider it is reasonable. The roadside testing will indicate the presence of one or more drugs. Further laboratory testing to confirm the nature and number of drugs present in order to impose the appropriate infringement penalty connects to the objective of ensuring deterrence of drug-impaired driving. A final view will be determined when the bill is vetted for consistency with the Bill of Rights Act.

Next steps

- 21 We will amend the Cabinet paper to reflect any decisions you make on this briefing.
- 22 The paper will need to be submitted to Cabinet Office by 10am on Thursday (4 May 2023) to be considered by Cabinet Economic Development Committee next week (10 May 2023).

¹ If one listed qualifying drug is detected, the infringement fee is \$200, with 50 demerit points. If two or more qualifying drugs are detected, the infringement fee increases to \$400, with 75 demerit points.

ANNEX 1: COMPARISON

Alcohol testing regime

- 23 The police can breath test anyone driving a motor vehicle on the road without needing any cause to suspect that the driver has consumed alcohol. The authority is provided in the Land Transport Act 1998 (the Act, s68).
- 24 The first step in the testing procedure, which is optional under the Act but is usual practice, is to undertake a *preliminary passive breath test* (s68(4)). This preliminary test involves an approved Dräger handheld device which a driver speaks into. This device detects whether or not there is alcohol in the driver's breath. If the device detects no alcohol, the driver is usually free to go. Where alcohol is detected, the driver is required to undergo a breath screening test (s69). It is not an offence for a driver to refuse this test, but a refusal means the driver proceeds to the screening test.
- 25 A *breath screening test* uses the same device with a mouthpiece attached. The driver blows into the screening device, which indicates whether the driver's breath contains less than 250 micrograms of alcohol per litre of breath (the legal limit for most adult drivers,² in which case the driver is generally free to go), more than 250 but under 400 micrograms of alcohol per litre of breath (the infringement level offence) or more than 400 micrograms of alcohol per litre of breath (the criminal level offence). Again, it is not an offence to refuse a screening test, but refusal means the driver proceeds to the evidential test (s69(1)(c)). Those drivers that also blow over the legal limit proceed to the evidential test (s69(1)(a)-(ab)).
- 26 An *evidential breath test* can be undertaken using the same handheld device. The driver is again required to blow into the device through a new mouthpiece, which returns a reading of the number of micrograms of alcohol per litre of breath. Lower level evidential breath test results (251 to 400 mcg per litre of breath) result in infringement offences (a fee of \$200 is payable, plus the driver receives 50 demerit points. If a driver accumulates 100 or more demerit points within 2 years, they receive a 3 month licence suspension). These drivers don't have the right to elect a blood test.
- 27 For higher level evidential breath test results (over 400 mcg per litre of breath), the driver can be charged with the criminal-level offence (punishable by up to 3 months imprisonment, a fine of up to \$4,500 and a mandatory 6 month licence disqualification). The Act provides that these drivers can elect a blood test (s70A). Drivers who refuse an evidential breath test are required to undergo a blood test (s72(1)(a)). Blood specimens are taken by a medical practitioner or nurse. A result is provided some time later after analysis by a "approved analyst" (defined in s2 of the Act).
- 28 It is an offence for a driver to refuse a blood test when required. The penalty is the same as that for driving with excess breath or blood alcohol, or driving under the influence (maximum fine of \$4,500, maximum term of imprisonment of 3 month and mandatory 6 month licence disqualification, s60). In these cases, the police officer can take the keys off the driver, forbid the person to drive a motor vehicle for the period the officer specifies, and can take steps to render the vehicle immobile (s121). The police officer can also take these steps where the driver blows over the legal alcohol limit, but

² There is a zero alcohol limit for drivers under 20 years of age, and drivers on an alcohol interlock or zero alcohol licence.

the period that the police can forbid the person from driving is limited to a maximum of 12 hours (s121(3))

Drug testing regime

- 29 As with alcohol, there are two ways to test for drugs in drivers. Analysing blood in the laboratory is one option, which can determine drug concentration levels. The other option is analysing oral fluid, either in the laboratory or screening oral fluid at the roadside. Oral fluid testing (OFT), either at the roadside using a device or in the laboratory, cannot determine drug concentration levels. Instead, oral fluid can only be used to indicate the presence of a qualifying drug. This differs from alcohol testing, where analysing both blood (in the lab) and breath (at the roadside) can determine concentration levels.
- 30 Analysing *blood* in the lab for impairing drugs can result in infringement offences if the blood concentration level of a listed qualifying drug is found to be between the tolerance and high-risk levels, or criminal offences if the level of impairing drug is found to be at the high-risk level. These tolerance and high-risk levels are listed in Schedule 5 to the Act. Analysing *oral fluid* will only result in an infringement offence. The criminal and infringement penalties for drugs are the same as those for driving over the legal alcohol limit.
- 31 At the roadside, the Act enables a police officer to undertake a compulsory impairment test (CIT), or an oral fluid test (provided a device has been approved for this purpose by the Minister of Police).
- 32 Before a police officer can require a driver to undertake a CIT, the officer must first have good cause to suspect that a driver is impaired by drugs (s71F).
- 33 A CIT involves checking whether the driver's eyes are functioning normally, for example how they react to light and how they track objects, whether the driver can walk and turn, and stand on one leg. If the driver fails the impairment test, the police officer can require the driver to have a blood test. It's an offence to refuse a blood sample, or to refuse to undertake the CIT (maximum fine of \$4,500, maximum term of imprisonment of 3 months and mandatory licence disqualification of 6 months, s60). As noted above, depending on the concentration level of drugs found in the blood, the driver may be subject to an infringement or criminal offence.
- 34 The second avenue is the new roadside oral fluid drug testing (OFT) regime intended to mirror, as closely as possible, the alcohol testing regime. As noted above, OFT devices cannot determine the drug concentration levels in the driver's oral fluid. OFTs are therefore only going to result in infringement offences, as they can only detect the presence of qualifying drugs at a level that is accepted as indicative of recent use rather than historical use or accidental exposure.³
- 35 Commercially-available OFT devices typically test for THC (the main psychoactive constituent of cannabis), methamphetamine, amphetamines, benzodiazepine-type drugs (sedatives), cocaine and opiates (including morphine, codeine, methadone and fentanyl). Not all the impairing drugs listed in Schedule 5 to the Act can be detected by OFT devices. Ketamine and GHB, for example, cannot be detected using OFT devices.

³ Independent Expert Panel on Drug Driving : Recommending statutory limits for drug concentrations relating to impaired driving.

- 36 As with alcohol offences, Police can undertake an oral fluid test on anyone driving a motor vehicle on the road without first needing any cause to suspect that the driver has consumed drugs (s71A). If the test is negative, the person is usually free to go, similar to *preliminary passive breath test* and *breath screening tests* for alcohol. However, if, during the course of conducting the test, the police officer forms good cause to suspect that the driver is impaired by drugs, they can require the driver to undergo a CIT, even if the driver passes the OFT (s71F(5)(c)). This is because, as noted above, oral fluid testing devices cannot detect all impairing drugs.
- 37 If the first screening OFT indicates the presence of drugs, the driver must undergo a second test (s71B). If the first screening is negative, the driver is free to go, unless their behaviour raises concern and the police officer has good cause to suspect they are impaired (grounds for a CIT). A police officer can also undertake a CIT if the first oral fluid test is positive for multiple qualifying drugs.
- 38 A person is forbidden to drive for 12 hours if they have two positive oral fluid tests (s94A). The Act currently requires two positive OFTs for the driver to be issued an infringement at the roadside. We propose to change this so that if a driver fails the first screening test, their second screening test (regardless of the result) is sent to the laboratory for evidential analysis to determine if an infringement offence has occurred.
- 39 We propose to remove the right for a driver to elect a confirmatory blood test after two positive oral fluid tests. This is because an oral fluid sample will now be sent to the laboratory for analysis, so any false positive OFTs at the roadside will be uncovered, and the driver will not receive an infringement notice. Note that the right for a driver to elect a blood test after positive roadside breath tests is only available to drivers who blow over the criminal level alcohol limit (over 400 mcg per litre of breath), so this proposal brings the alcohol and drug testing regimes more into alignment.