

In Confidence

Office of the Associate Minister of Transport
Office of the Minister of Police

Chair, Cabinet Legislation Committee

INTRODUCING THE LAND TRANSPORT (DRUG DRIVING) AMENDMENT BILL

Proposal

- 1 This paper seeks Cabinet's agreement to introduce the Land Transport (Drug Driving) Amendment Bill (the Bill). The Bill gives effect to Cabinet's decision to introduce a compulsory random roadside oral fluid testing scheme in New Zealand. We are also seeking Cabinet's agreement to some outstanding policy matters on elements of the regime which will ensure its effective operation.

Executive Summary

- 2 In 2018, 95 people were killed in crashes where the driver had consumed drugs other than alcohol before driving¹. It is clear that our current approach is not effective in deterring drug driving on our roads.
- 3 In December 2019, following public consultation on several policy options, Cabinet agreed to introduce a new compulsory random roadside oral fluid testing scheme in New Zealand [DEV-19-MIN-0360 and CAB-19-MIN-0675 refer].
- 4 We are now seeking Cabinet's agreement to introduce the Bill.
- 5 Key elements of the Bill that have been agreed to by Cabinet include:
 - 5.1 a compulsory random oral fluid testing regime, under which two positive (failed) oral fluid tests showing the presence of drugs leads to an infringement offence (with an option to elect an evidential blood test)
 - 5.2 retention of the current 'compulsory impairment test' (CIT) regime, with some restrictions on police officers' ability to switch between the CIT and the proposed oral fluid testing processes
 - 5.3 limits for the presence of drugs in blood to be prescribed in legislation, based on advice from an independent panel of experts
 - 5.4 graduated sanctions, including infringement and criminal penalties for drug driving offences, based on the limits prescribed in legislation

¹ Indicative figures for 2019 show that 103 people were killed in crashes where the driver had consumed drugs other than alcohol before driving, representing 30 percent of all road deaths.

- 5.5 a medical defence for drivers who have consumed drugs in accordance with a prescription
 - 5.6 a harm minimisation approach to drug driving, providing both 'opt-in' and compulsory health referrals.
- 6 Some outstanding policy matters require further Cabinet decisions either because we indicated previously to Cabinet that these issues would be brought back to LEG, because the proposal in the Bill amends a previous Cabinet decision or because no previous Cabinet decision was made on the issue. These include:
- 6.1 the approach to combination offences for driving with multiple qualifying drugs, or alcohol and drug(s)
 - 6.2 the approach to offences for drugs without criminal limits
 - 6.3 enabling criminal limits to be added to the Bill or amended following enactment
 - 6.4 the approach to charging for the cost of evidential blood tests
 - 6.5 
 Under active consideration
- 7 Cabinet also authorised us to make decisions in relation to any minor, technical, procedural, transitional or consequential matters arising during drafting. These have been incorporated in the Bill.
- 8 A diagram of the proposed drug driving regime is set out in *Appendix 1*.

Background

Cabinet has agreed to introduce compulsory roadside oral fluid testing

- 9 In recognition of the increased road safety risk from drug-impaired driving, Cabinet agreed in December 2019 to introduce a new 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 [DEV-19-MIN-0360].
- 10 Cabinet agreed that this oral fluid testing regime will complement the current CIT² approach to drug driving.

² The CIT is a behavioural test of impairment, undertaken by a specially trained police officer. It comprises eye, walk and turn, and one-leg-stand assessments. A driver who fails a CIT is required to undertake an evidential blood test.

- 11 In developing the Bill that would give effect to the new scheme, Cabinet also:
- 11.1 noted that the Associate Minister of Transport would consider developing higher combination offences for drivers who drive with multiple drugs (or drugs and alcohol) in their system, in consultation with the Minister of Police
 - 11.2 authorised us to make decisions in relation to any minor, technical, procedural, transitional or consequential matters arising during drafting.

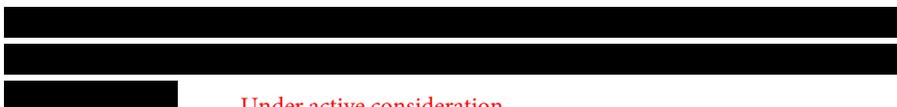
We are now seeking Cabinet's agreement to introduce the Bill

- 12 Most of the elements in the Bill have already been agreed to by Cabinet. These include:
- 12.1 a presence-based random oral fluid testing regime, comprised of:
 - 12.1.1 an infringement offence for two positive (failed) oral fluid tests for the presence of drugs
 - 12.1.2 an option to elect an evidential blood test after two failed oral fluid tests
 - 12.2 retention of the CIT, with:
 - 12.2.1 'good cause to suspect' a driver has consumed drugs as the testing threshold
 - 12.2.2 a failed CIT plus a blood test for evidential purposes
 - 12.2.3 some restrictions on switching between the CIT and oral fluid testing pathways
 - 12.3 limits to be specified in legislation for a criminal penalty threshold for illicit, recreational and prescription drugs in blood that are equivalent to a blood alcohol concentration (BAC) of 80mg/100ml
 - 12.4 graduated sanctions for drug-driving offences:
 - 12.4.1 infringement penalty for failing two oral fluid tests (no blood analysis)
 - 12.4.2 infringement penalty for drug levels in blood below an equivalent BAC of 80mg/100ml
 - 12.4.3 criminal penalty for drug levels in blood equal to or above an equivalent BAC of 80mg/100ml
 - 12.5 a medical defence for drivers who drive in accordance with their prescriptions (provided a blood test is undertaken)

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- 12.6 a harm minimisation approach to drug driving, including compulsory health referrals for recidivist drug drivers at sentencing
- 12.7 An independent expert medical science panel to provide advice to Government about:
 - 12.7.1 the low-level tolerance thresholds to be applied to the detection of drugs in blood
 - 12.7.2 legal limits for drugs in blood, equivalent to BAC levels of 80mg/100ml
 - 12.7.3 the detection 'cut-off' thresholds to be applied to oral fluid testing devices.
- 13 The following elements were agreed by Cabinet, and although not in the Bill, will be a part of the new drug-driving regime.
 - 13.1 Low-level tolerance thresholds to be applied to the detection of drugs in blood, to avoid penalising drivers who have accidental or passive exposure to drugs, low residual levels of a drug in their blood due to previous (but not recent) use and standard prescription doses of some medicines. The thresholds will not explicitly be expressed in the legislation, which is consistent with the detection thresholds applied to the drink driving regime.
 - 13.2 Information about drug-related health services to be provided with infringement notices. This information will be provided in addition to the infringement notice, and therefore does not need to be specified in legislation.

Further policy matters requiring Cabinet agreement

- 14 Some outstanding policy matters require further Cabinet decisions, either because we indicated previously to Cabinet that these issues would be brought back to LEG, because the proposal in the Bill amends a previous Cabinet decision or because no previous Cabinet decision was made on the issue. These include:
 - 14.1 the approach to combination offences for driving with multiple qualifying drugs, or alcohol and drug(s)
 - 14.2 the approach to offences for drugs without criminal limits
 - 14.3 enabling criminal limits to be added to the Bill or amended following enactment
 - 14.4 the approach to charging for the cost of evidential blood tests
 - 14.5 
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Combination offences for driving with multiple qualifying drugs (including alcohol)

15 As noted above, we indicated to Cabinet that we would consider developing higher combination offences for drivers who drive with multiple drugs (or drugs and alcohol) in their system. In 2017 and 2018, over 30 percent of deceased drivers and drivers that failed a CIT in New Zealand were found with a combination of drugs or drugs and alcohol in their system.³

16 A number of case-control studies indicate that consuming drugs and alcohol or more than one drug, significantly increases a driver’s risk of crashing or being seriously injured. These studies have shown that the combined use of alcohol and drugs increases the risk of being seriously injured or killed in a crash more than any one substance in isolation, except for alcohol at high levels. This is also the case for combining substances other than alcohol, however the associated risk levels are lower when alcohol has not also been consumed. We are seeking Cabinet agreement to the establishment of an infringement combination offence and a criminal combination offence, which would apply in different scenarios.

(1) Infringement combination offence

17 We propose that an infringement penalty for a combination offence be issued at the roadside when:

17.1 two failed oral fluid tests identify the presence of more than one qualifying drugs, or

17.2 two failed oral fluid tests identify the presence of one qualifying drug, and the driver also has any amount of alcohol under the criminal limit in their system (as ascertained by an evidential breath test).

18 An infringement combination offence will also be issued whenever an evidential blood test identifies multiple drugs at the infringement level, or one or more qualifying drug(s) at the infringement level, in combination with any presence of alcohol.

19 We propose that the infringement combination penalty will be set higher than the single drug infringement penalty previously agreed by Cabinet. We propose that the infringement combination penalty be set at a fee of \$400 (double the single-drug fee) and 75 demerit points (50 percent higher). We also propose doubling the associated fine.⁴

	Single drug infringement penalty	Combination infringement penalty
Fee / fine	\$200 fee or \$500 fine	\$400 fee or \$1000 fine

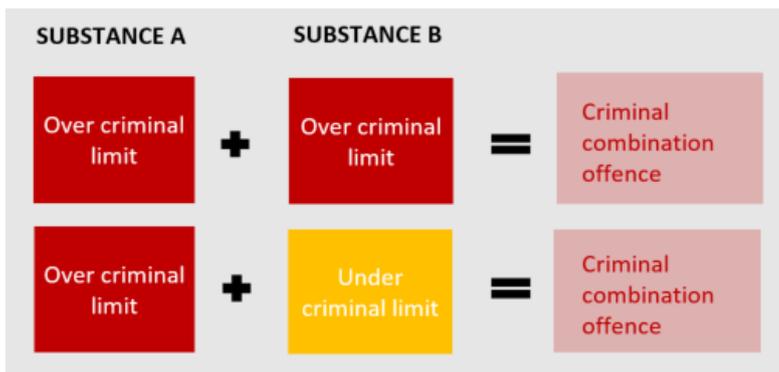
³ The most common combination of drugs observed in 2019 samples for deceased and hospitalised drivers was cannabis and methamphetamine (this combination was seen in close to 70 percent of the samples that showed the presence of more than one drug).

⁴ When a driver is issued an infringement notice the monetary penalty recorded on it is called an infringement fee. If the infringement fee is not paid in full by the due date it is referred to the Ministry of Justice for enforcement, when it becomes a 'fine'. The infringement fine is generally set at two to three times the infringement fee level.

Demerit points ⁵	50 demerits	75 demerits
Mandatory driving prohibition	12 hours	12 hours

(2) Criminal combination offence

- 20 We propose that the new criminal combination offence would apply to all drivers where there is at least one qualifying drug (or alcohol) above the criminal limit identified by blood test. Only blood specimens can be used to establish a criminal combination offence.⁶



- 21 We propose that the penalty associated with the criminal combination offence be set at a level between the penalty for a single drug criminal offence and the penalty for a third and subsequent offence⁷.

Type of Penalty	Single drug criminal offence (agreed by Cabinet)	Proposed combination criminal offence	Third and subsequent offence (aligned with existing penalty)
Prison time or fine	Up to three months or a fine of up to \$4,500	Up to six months or a fine up to \$4,500	Up to two years or a fine not exceeding \$6,000
Mandatory licence disqualification	Six months or more	Nine months or more	One year or more

- 22 Cabinet previously agreed that drivers 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/or alcohol use. However, they will remain liable for the substantive drink driving offences or drug driving offences.

(3) Ability to switch to the CIT process if combination of drugs (or drugs and alcohol) are detected through breath/oral fluid tests

⁵ If a person accumulates 100 or more demerit points in any two-year period, their drivers licence must be suspended for three months.

⁶ Under the new drug driving regime, a blood specimen may be required from a driver following a failed CIT, from a hospitalised driver, or from a driver that is involved in an accident which injures another person and who produces two positive oral fluid tests. A driver may also elect a blood test following two positive oral fluid tests.

⁷ Cabinet previously agreed there will be additional penalties for third and subsequent convictions for drug driving designed to target repeat offenders in the same way that the Land Transport Act 1998 currently imposes heavier penalties for repeated impaired driving offences (alcohol or otherwise).

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- 23 Cabinet agreed that police officers will be able to switch from the oral fluid testing process to the CIT process if:
- 23.1 a driver has passed the first oral fluid test, but the police officer has good cause to suspect the driver has consumed drugs that the device may not be able to test for
 - 23.2 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.
- 24 Cabinet also agreed that a police officer could require a driver whose oral fluid tests show the presence of a combination of drugs and/or alcohol to undertake an evidential blood test. We propose to reverse this decision, and have not included this power in the Bill.
- 25 Requiring every driver that has the presence of more than one substance at the roadside to undertake an evidential blood test will mean significantly more drivers undergoing blood tests, and more drivers becoming liable for criminal offences. This will have significant costs on the system both in terms of the blood testing fees and the justice sector impacts.
- 26 Instead we propose giving police officers the discretion to switch to a CIT if the driver fails the first oral fluid test where more than one drug is identified. This creates a pathway to a criminal offence that is predicated on proof of impairment. If the driver were to fail the CIT, they would be required to undergo a blood test and could become liable for a criminal level offence.
- 27 Giving Police officers the discretion to move to a CIT in this situation creates additional discrepancy in the regime in the outcomes for drivers in similar situations. Leaving the decision as to whether or not a driver should be escalated to a CIT may mean these decisions become a source of legal challenge and could raise equity concerns. Police will work to manage the issues that may result from this discretion by issuing operational guidance regarding when a driver should have to undergo a CIT following a failed oral fluid test for more than one drug.

Offences associated with drugs that do not have criminal limits

- 28 Cabinet agreed that where criminal limits are set for drugs they will be aligned with the impairment level associated with criminal limits for driving under the influence of alcohol.
- 29 Criminal limits will be established for the most prevalent drugs used by New Zealand drivers, subject to the available evidence and advice of the Expert Panel. This will include the drugs that Cabinet noted will be tested for in the oral fluid testing process: THC (the psycho-active ingredient in cannabis), methamphetamine, benzodiazepines (sedatives) MDMA (ecstasy), opiates (e.g. morphine) and cocaine. Within the drug class of benzodiazepines and opiates there are multiple drugs that will be able to be detected.

- 30 It is not the intention to set criminal limits for all impairing drugs that could potentially be consumed by drivers.⁸ There are more than 100 less prevalent impairing drugs available in New Zealand. It may not be possible to set criminal limits for all of these because there is insufficient evidence or research to establish the impairing effects of a drug, or because the drugs are new or quickly evolving (such as designer drugs).
- 31 The Bill proposes to create two separate offence pathways for drivers whose blood tests are positive for substances that do not have criminal limits specified in the legislation.
- 32 Drivers would continue to receive a criminal offence following a failed CIT where the driver's blood sample shows the presence of any qualifying drug without criminal limits set.
- 33 An infringement penalty would apply for the presence of any qualifying drugs that do not have any limits set when impairment has not been established through a CIT. This would apply to:
- 33.1 drivers who elect a blood test or are required to have a blood test after failing two oral fluid tests⁹
- 33.2 hospitalised drivers.¹⁰
- 34 Criminal and criminal combination offences would continue to apply to drivers who have not gone through the CIT process if any qualifying drugs with criminal limits were found in their system.

Enabling criminal limits to be added or amended to the Bill following enactment

- 35 Criminal limits will be added to the Bill by Supplementary Order Paper at the Committee of the Whole House stage. The Supplementary Order Paper will be provided to the Select Committee so it can scrutinise the limits before enactment. The Independent Expert Panel on Drug Driving (Expert Panel) will advise on the setting of these limits.
- 36 The limits are not included in this Bill due to delays in establishing, and therefore receiving advice from, the Expert Panel.
- 37 In order for the Bill as introduced to function without the criminal limits, it includes a power (with appropriate safeguards) that allows for criminal limits to be added and amended through Order in Council after the Bill is enacted.
- 38 Additionally, this provision would enable criminal limits to be altered following enactment without the need for an amendment bill:

⁸ For example, Norway has only set criminal limits for approximately 20 impairing substances.

⁹ The only situation where a driver could be required to provide a blood test after failing two oral fluid tests, is where the driver has been involved in an accident which has required the medical treatment or hospitalisation of a person involved in the accident (refer paragraph 51.2).

¹⁰ This refers to all drivers who receive medical treatment at either a hospital or medical centre.

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- 38.1 in response to the increasing availability or classification (under the Misuse of Drugs Act 1975 (MODA) of new drugs, such as designer drugs)
 - 38.2 if new research emerged to suggest a change to the existing limit for established or known drugs was appropriate
 - 38.3 to establish criminal limits for those drugs where criminal limits had not previously been established by the Expert Panel at the time that the Bill is being considered.
- 39 We believe this provision is appropriately limited and subject to safeguards, including:
- 39.1 only allowing a recommendation by the Ministers of Transport and Police to the Governor-General that an Order in Council be made following full Cabinet scrutiny
 - 39.2 requiring the Ministers of Transport and Police to take into account the overriding policy intent when making a recommendation
 - 39.3 requiring the Ministers of Transport and Police to seek independent technical advice from experts and to require their advice to be for the purpose of aligning the thresholds with blood-alcohol limits as far as practicable
 - 39.4 requiring any Order in Council to be approved by a confirmation process before being brought into force.¹¹
- 40 We would like Select Committee to review whether the Order in Council provision should remain in the Bill following the addition of the criminal limits via Supplementary Order Paper to provide flexibility to alter criminal limits, or whether the provision should be removed so that the final Bill before enactment properly accords with the principle that legislation defining criminal conduct should be in primary legislation.

Blood test fee for infringement level offenders

- 41 Cabinet previously agreed that drivers would be required to pay for the cost of a blood test, where one is required or elected, if they are liable for a criminal or infringement level penalty.
- 42 If a driver is found liable for a criminal offence, then the blood test fee will be included in sentencing.
- 43 If a driver is liable for an infringement level offence, then a separate infringement for the cost of the blood test (likely to be \$1000) would need to

¹¹ A confirmation process is a hybrid form of legislation (through a Confirmation and Validation Bill) where Parliament delegates a regulation-making power to the Executive, but the House of Representatives must then approve the use of that power before a regulation can have effect.

be issued to recover the costs of the test. This provision is not included in the Bill.

44 The Ministry of Justice has advised that the potential for a driver to be issued with a \$1000 infringement fee could deter individuals from challenging the results of an oral fluid test, which could limit access to justice. It would also create significant equity issues, as people's ability to challenge an infringement notice is significantly affected by their ability to pay.

45 However, not charging for the blood test fee for those who receive an infringement level penalty raises fairness issues, where some offenders are required to pay the costs of their blood test, while others are not.

46 We therefore propose to ask the Select Committee to consider whether a driver who has committed only an infringement level offence should be liable for the blood test cost, and what an appropriate cost recovery mechanism could be.

Under active consideration

[Redacted]

47 [Redacted]

48 [Redacted]

49 [Redacted]

50 We propose to direct officials from the Ministries of Transport, Justice, Health and Police to investigate the implications of the proposal and, if appropriate, to identify the appropriate mechanism to facilitate this change. If legislative amendments are required, these will be incorporated via Supplementary Order Paper at the Committee of the Whole House stage.

¹² [Redacted]

Detailed components of the regime incorporated into the Bill

- 51 Cabinet has also authorised us to make decisions in relation to any minor, technical, procedural, transitional or consequential matters arising during drafting. These proposals are reflected in the Bill, and the key matters are noted below. Further information about these proposals can be found in *Appendix 2*.
- 51.1 the offence and penalty regime for hospitalised drivers would be aligned with the oral fluid testing regime, meaning that blood samples from hospitalised drivers would be tested for all qualifying drugs, not just Class A controlled drugs.
 - 51.2 drivers involved in an accident would be required to take a blood test if:
 - 51.2.1 the accident has required the medical treatment or hospitalisation of at least one person involved in the accident
 - 51.2.2 the driver produces two failed oral fluid test results.
 - 51.3 a new offence would be included in the Land Transport Act 1998 for drivers with a blood-drug level at the infringement level, and who has caused the injury or death of a person
 - 51.4 evidential blood tests could test for any qualifying drug (not just those drugs able to be tested for on the oral fluid tests), consistent with the current CIT approach
 - 51.5 the definition of qualifying drug would be expanded to ensure drugs affecting driving ability are included in the regime (ie now includes Schedule 3 of MODA, except for Part 6).
- 52 There are also a range of clauses in the Bill that reflect minor and technical decisions to enable the regime to function effectively, including extending provisions relating to the existing alcohol regime to the new drug driving regime.

Implementation of oral fluid testing for drugs

- 53 A regime designed to create a deterrence effect requires a large number of tests. The proposed oral fluid testing regime can deliver a large number of tests cost effectively. Cabinet has agreed that the scheme is phased in over a three-year period, reaching 66,000 oral fluid tests per year. 33,000 oral fluid tests will be conducted in the first year, increasing to 50,000 tests in the second year and 66,000 tests in third and subsequent years.
- 54 The staggered rollout of testing will allow Police to phase in the new testing scheme and make adjustments as necessary. The Police will determine the most efficient and effective method of delivery for targeting drug driving risk, allowing the method to adapt to address new risks as they develop.

Alignment with work place drug testing and the Cannabis referendum

Work place drug testing

- 55 The policy underpinnings in the Cabinet paper are consistent with New Zealand's Health and Safety at Work Strategy, namely, that everyone plays their part to manage health and safety risks effectively and proportionately by focusing on what will make the biggest impact to reduce harm.
- 56 The proposed regime supports the expectations already placed on businesses to manage impairment risks from drug driving during work-related activities, where appropriate. Businesses are expected to have effective policies in place to identify and deal with risks that may arise from impairment, particularly in safety sensitive work activities.

Cannabis referendum

- 57 In this year's General Election, the public will vote in a referendum on whether the recreational use of cannabis should become legal. Some stakeholders have raised concerns that the legalisation of cannabis could lead to adverse road safety outcomes, and that additional action is needed to detect and deter drug driving.
- 58 The proposed drug driving regime is based on detecting and deterring the use of prevalent impairing substances in drivers, regardless of whether or not the substances are legal.
- 59 If cannabis was to be legalised, the proposed drug driving regime would continue to test for cannabis through oral fluid testing at the roadside, just as it would for other legal impairing substances such as benzodiazepines.

Need for legislation

- 60 The Bill is required to give effect to the policy decisions outlined above because they require changes to primary legislation.

Compliance

Te Tiriti o Waitangi

- 61 The Government has obligations under Te Tiriti o Waitangi to work in partnership with Māori, to ensure equal participation at all levels, to protect Māori interests, and to reflect the views and aspirations of Māori in decision-making that directly affects them.
- 62 In 2019, the Government released a discussion document for public consultation to facilitate possible approaches to improving our drug driving system. Two submissions from groups advocating for Māori health noted the specific challenges facing Māori who experience disproportionate harm through drug abuse and imprisonment rates. Both submitters strongly supported greater attention being given to increasing drivers' awareness of

the risks of drug-impaired driving, through public health promotion and media advocacy.

- 63 If enacted into law, a substantive public education and information campaign will accompany implementation. We consider it is important that this is developed in consultation with Māori and that it is particularly important for communications on the regime to speak to rangatahi Māori. We will direct officials to undertake targeted consultation with relevant groups in developing the communications approach.

Population implications

- 64 We acknowledge that new measures to address drug impaired driving could have disproportionate impacts for Māori and potentially exacerbate existing justice pipeline issues. The Ministry of Health's Cannabis Use 2012/13 New Zealand Health Survey found that Māori were 2.2 times more likely to report using cannabis in the last 12 months than non-Māori. The survey found that Māori were 1.2 times more likely to have driven under the influence of cannabis in the last 12 months than non-Māori.
- 65 Māori also tend to experience disproportionately more of the risk factors and vulnerabilities leading to offending and entry into the system. In 2016, Māori received 42% of all drug convictions and 42% of low-level convictions, despite making up only 15% of the population.
- 66 These factors have informed the development of the infringement offence scheme for both single and combination drug driving offending, which mitigates the risk of Māori receiving criminal penalties for drug-impaired driving. However, we recognise that infringement offences will still have an impact, particularly if they result in unpaid fines being referred to Courts for collection.
- 67 Police also acknowledge that Police practices can have a disproportionate impact on Māori and other ethnic minorities. This is important as in the new regime a CIT will only be required at the discretion of enforcement officers. Given acknowledged issues with the equitable application of discretion, there is a risk that Māori could be disproportionately affected by the proposed approach.
- 68 To partially mitigate some of the potential harms to Māori, Police is currently undertaking a programme of work to manage the potential for unconscious bias in police practices.
- 69 The Government has also committed to *Hāpaitia te Oranga Tangata: Safe and Effective Justice*, a broader programme of work to reform the criminal justice system, including working in partnership with Māori to address the over-representation of Māori in the criminal justice system.
- 70 In addition, we note that New Zealand is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples. Article 2 specifies that indigenous peoples and individuals have the right to be free from any kind of

discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

The rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993

- 71 Introducing a random oral fluid testing regime is likely to impact several rights affirmed and protected by the New Zealand Bill of Rights Act 1990 (BORA) – including the rights to freedom from discrimination (section 19), to be secure against unreasonable search and seizure (section 21), not to be arbitrarily arrested or detained (section 22), to be presumed innocent until proved guilty (section 25(c)) and to the observance of the principles of natural justice (section 27(1)).
- 72 However, on balance we consider this is justified under section 5 of the BORA as the proposed limitations on the rights of drivers through the new regime is proportionate to the road safety risk that is being addressed.
- 73 In addition, the Bill proposes safeguards that reduce the BORA impacts of random oral fluid testing. These include:
- 73.1 the proposed oral fluid testing process includes the procedural safeguard of two oral fluid tests, which establishes a reasonable basis for establishing liability at an infringement level and reduces the probability of false-positive test results
 - 73.2 the process will detain most people for a significantly shorter duration (estimated to be less than 10 minutes), than the current CIT process (which takes 52 minutes on average)
 - 73.3 a medical defence is available for drivers who have consumed drugs in accordance with a valid prescription and instructions from their health practitioner
 - 73.4 the initial sanction for failing two oral fluid tests is an infringement fee, not a criminal sanction
 - 73.5 drivers have the option of electing to provide an evidential blood sample if they wish to use a medical defence or dispute the results of oral fluid tests
 - 73.6 the proposal to issue an infringement penalty following two failed oral fluid tests reduces reliance on the more invasive blood test.

Disability Perspective

- 74 There are no disability implications arising directly from this paper. However, we note that there are people whose disabilities affect their speech and/or behaviour in a way that may make them appear to be under the influence of a substance, but they are safe to drive. These people may be impacted by this legislation in the same way as they are by the current legislation. NZ Police will mitigate these concerns through training and guidance to frontline staff.

Disclosure statement requirements

- 75 The Bill complies with the disclosure statement requirements (disclosure statement has been prepared and is attached to the paper).

The principles and guidelines set out in the Privacy Act

- 76 The principles and guidelines set out in the Privacy Act have been complied with.

The Legislation Guidelines (2018 edition)

- 77 The Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee, have been complied with.
- 78 We note that the provision that enables criminal limits to be added and amended through an Order in Council amounts to a Henry VIII power. As mentioned previously, we have proposed safeguards around this power as recommended in the Legislation Guidelines.

Impact Analysis

- 79 The Regulatory Impact Analysis (RIA) requirements apply to the proposals in this paper and a RIA has been prepared and is attached.
- 80 The RIA panel at the Ministry of Transport has reviewed the appendices that have been included in the RIA to support the recommendations in this Cabinet paper and considers that the additional impact analysis meets the quality assurance criteria but its inclusion does not alter its earlier assessment of the RIA content considered under DEV-19-MIN-0360 as partially meeting the quality assurance criteria.
- 81 The RIA panel recognises the limitations of the available evidence base, and for that reason, strongly recommends that before implementation, baseline evidence of drug driving should be established, including through undertaking a random roadside testing survey against which the efficacy of this policy can be monitored in future reviews.

Publicity

- 82 We intend to issue a media statement on the proposed oral fluid testing regime if Cabinet agrees to the recommendations in this paper.
- 83 A communications plan will be developed by the Ministry, in consultation with the Transport Agency and Police, to ensure the public is aware of the changes and the reasons for them.

Consultation

- 84 The following departments were consulted during the development of this paper: Waka Kotahi NZ Transport Agency, the Ministries of Justice, Health and Social Development, the Department of Corrections, ACC, the Treasury,

Te Puni Kōkiri and WorkSafe New Zealand. The Department of the Prime Minister and Cabinet was also informed.

Binding on the Crown

- 85 The Bill amends the Land Transport Act 1998, which binds the Crown.
- 86 The Bill will not create any new agencies and will not amend the existing coverage of the Ombudsman Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Allocation of decision making powers

- 87 The Bill does not involve the allocation of decision making powers between the executive, the courts and tribunals.

Associated Regulations

- 88 The Bill amends the Land Transport (Offences and Penalties) Regulations 1999, to include the infringement penalties, and associated demerit points, for the new infringement offences created by this regime.

Other Instruments

- 89 The Bill also includes a power that allows for criminal limits to be added and amended through Order in Council after the Bill is enacted.
- 90 This power is limited and subject to safeguards, including:
- 90.1 requiring the relevant portfolio Minister(s) to seek independent technical advice from experts and to require their advice to be for the purpose of aligning the thresholds with blood-alcohol limits as far as practicable
- 90.2 requiring any Order in Council to be approved by a confirmation process before being brought into force.
- 91 This power is required to give effect to the policy proposal as outlined in paragraphs 37 – 39.

Definition of Minister/department

- 92 The Bill does not contain definitions of a Minister, department, an agency, or a chief executive of a department.

Commencement of legislation

- 90 The Bill is expected to come into force one year after it receives Royal Assent. This time period is necessary to enable Police to confirm funding, procure oral fluid testing devices, and train frontline staff in the new regime. There is a risk that if there are delays in procuring oral fluid tests then Police may not be able to operationalise the Bill at the expected commencement date.

Parliamentary stages

- 91 We intend to introduce the Bill in July 2020 with the intention that it is passed, if possible, before August 2021.
- 92 To achieve this timeline, we will seek the House of Representatives' approval for the Bill to be considered by the Transport and Infrastructure Select Committee, and be reported back in the usual six month period.

Proactive Release

- 93 This paper (and the accompanying RIA) will be proactively released on the Ministry of Transport's website following the Bill's introduction into the House of Representatives, with any redactions in line with the Official Information Act 1982.

Recommendations

We recommend that the Cabinet Legislation Committee:

- 1 **Note** that in December 2019 Cabinet agreed to give effect to 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 [DEV-19-MIN-0360 and CAB-19-MIN-0675 refer]
- 2 **Note** that as indicated in the previous Cabinet decisions referred to in recommendation 1, we have considered higher penalties for drivers that test positive for a combination of impairing substances
- 3 **Note** that to support the effective operation of the roadside oral fluid testing regime we propose to amend the Land Transport Act 1998 to:
 - 3.1 create combination offences for the consumption of multiple substances
 - 3.2 establish the offences for qualifying drugs where no criminal limit has been set
 - 3.3 include a power (with appropriate safeguards) that allows for criminal limits to be added and amended through Order in Council
- 4 **Agree** to invite Select Committee to consider whether the power referred to in 3.3 should remain to provide flexibility to alter criminal limits, or be removed to align the final Bill with the principle that criminal conduct should be defined in primary legislation
- 5 **Note** that Cabinet previously agreed that a police officer can only switch to the compulsory impairment test process after the oral fluid testing process has commenced if:

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- 5.1 a driver has passed the first oral fluid test, but the police officer has good cause to suspect a driver has consumed drugs that the device may not be able to test for; or
- 5.2 a driver has failed the first oral fluid test and passed the second oral fluid test, but the police officer has good cause to suspect a driver has consumed drugs
- 6 **Note** that we propose to expand on Cabinet’s previous decision outlined in recommendation 5 by adding an ability for police officers to have the discretion to require a compulsory impairment test where multiple substances are identified through roadside oral fluid testing after the first failed oral fluid test
- 7 **Note** that Cabinet previously agreed that to support establishing any criminal offences arising from a driver consuming multiple substances, Police officers would 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
- 8 **Note** that we do not propose to include a provision in the Land Transport (Drug Driving) Amendment Bill (Drug Driving Bill) that enables Police officers to require a driver to undergo a blood test if multiple substances are identified, which will be replaced by recommendation 6
- 9 **Note** that Cabinet previously agreed that the blood test fee for drivers who elect to take a blood test be deferred until the result of the test is known
- 10 **Note** that we do not propose to include a provision in the Drug Driving Bill to require drivers to pay for the cost of a blood test, where one is required or elected, if they are liable for an infringement level offence only
- 11 **Note** that we intend to invite Select Committee to consider whether a driver who has committed only an infringement level offence should be liable for the blood test cost, and what an appropriate cost recovery mechanism could be
- 12 **Note** [REDACTED]
[REDACTED]
[REDACTED]
- 13 **Note** that we propose to direct officials from the Ministries of Transport, Justice, Health and Police to investigate the implications of the proposal, and if appropriate, to identify the appropriate mechanism to facilitate recommendation 12 and the implications associated with the change
- 14 **Note** that any required legislative amendments to implement recommendation 12 will be incorporated via Supplementary Order Paper at the Committee of the Whole House stage

Under active consideration

Introduction of the Drug Driving Bill

- 15 **Agree** to incorporate recommendations 3, 6 and 8 into the Drug Driving Bill

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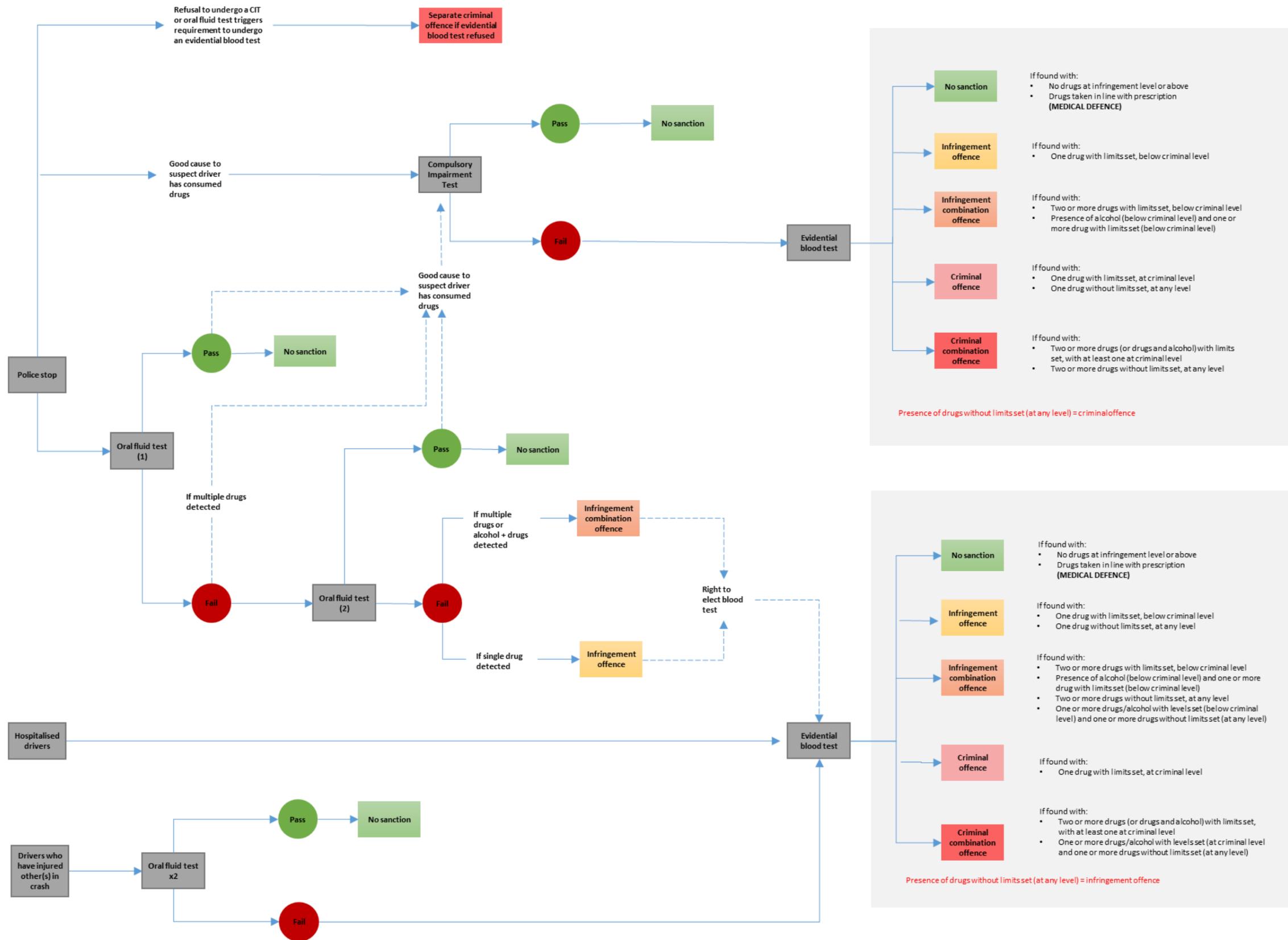
- 16 **Note** that the Drug Driving Bill does not hold a priority on the legislation programme
- 17 **Agree** that the Drug Driving Bill be given a priority of category 4 (to be referred to select committee in the year) on the 2020 Legislation Programme
- 18 **Approve** the Drug Driving Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives
- 19 **Agree** that the Parliamentary Counsel Office can continue to make technical or minor amendments to the Bill before introduction
- 20 **Agree** that the Drug Driving Bill be introduced in July 2020
- 21 **Agree** that the Government propose that the Drug Driving Bill be:
- 21.1 referred to the Transport and Infrastructure Select Committee for consideration
- 21.2 enacted before August 2021.

Authorised for lodgement

Hon Julie Anne Genter
Associate Minister of Transport

Hon Stuart Nash
Minister of Police

Appendix 1: Diagram of proposed drug driving testing process



Appendix 2: Further information on other components of the Bill

- 1 Appendix 2 outlines key proposals reflected in the Bill that have resulted from decisions we have made in relation to any minor, technical, procedural, transitional or consequential matters arising during drafting.

Approach to hospitalised drivers

- 2 Currently, a blood specimen can be taken from an injured driver in a hospital or medical centre under section 73 of the LTA 1998. The driver could be subject to a criminal penalty for drug driving if this specimen shows any presence of any Class A drug. This means that an injured driver whose blood shows the presence of a Class B (eg MDMA) or Class C (eg cannabis) drug is not liable for any drug driving offence. This is inconsistent with the new drug driving regime, which is based on an assessment against criminal limits.
- 3 The Bill therefore brings blood specimens taken from injured drivers into the new regime. This means that:
 - 3.1 blood specimens can continue to be taken from an injured driver in a hospital or medical centre
 - 3.2 blood specimens can be tested for all qualifying drugs (rather than just Class A drugs) and assessed against any blood-drug limits set in legislation, and for combination offences
 - 3.3 penalties would be aligned with the penalties for drivers have elected a blood test after two failed oral fluid tests.

Implications for drivers involved in an accident causing injury or death

- 4 If a driver has consumed a qualifying drug, and is involved in a vehicle crash which causes the injury or death of a person, appropriate accountability measures should be in place.
- 5 The Bill therefore proposes that drivers who are involved in a crash will be required to take a blood test if:
 - 5.1 the crash has required the medical treatment or hospitalisation of at least one person involved in the crash and
 - 5.2 the driver produces two positive oral fluid test results.
- 6 The results of this blood test will be admissible as evidence in a Court proceeding.
- 7 The Bill also proposes that if a driver has a blood drug level at the infringement level, and has caused the injury or death of a person, that a new offence be included in the LTA 1998.
- 8 This is incorporated into the existing offence of carelessly driving a motor vehicle causing injury or death (section 62), and carries a penalty that is

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higher than careless driving causing injury or death, but lower than drug driving causing injury or death where the driver has a blood drug limit at or above the criminal limit:

Careless driving causing injury or death (section 39)	Maximum 3 months imprisonment or \$4,500 fine Minimum 6 months disqualification
Careless driving causing injury or death where the driver has a blood drug level at the infringement limit but below the criminal limit	Maximum 3 years imprisonment or \$10,000 fine Minimum 1 year disqualification
Drug driving causing injury or death where the driver has a blood drug level at or above the criminal limit	Maximum 5 years imprisonment or \$20,000 fine Minimum 1 year disqualification

The blood testing process

- 9 Currently, if a driver fails a CIT, any qualifying drug identified during a blood test can be used as the basis for an offence. The new regime remains consistent with this approach. This means that blood specimens may be tested for any qualifying drugs, not just those drugs able to be tested for on the oral fluid tests.
- 10 The drugs able to be tested for on the oral fluid tests will be determined closer to implementation following the procurement process, noting that Cabinet has agreed for six drugs/drug types to be tested for through the oral fluid test process.

Expanding the definition of qualifying drug to ensure consistency

- 11 The Bill amends the definition of qualifying drug to include all of the drugs listed in Schedule 3 of the MODA 1975, except for Part 6.
- 12 This change adds all drugs in Part 2 (such as codeine) and the remaining drugs in Part 5 of Schedule 3 of the MODA 1975 to the definition of qualifying drug. It will also add drugs in Part 3 of Schedule 3, which are mostly not used as medicines in New Zealand, except for pholcodine, which is available in cough mixtures and has abuse potential. Part 6 of Schedule 3 is excluded because it relates to preparations and mixtures, and is not relevant to driving.
- 13 Dr Helen Poulsen (Expert Panel Chair) has indicated these drugs affect the central nervous system, or have a sedative or stimulant effect and can therefore affect driving ability. There is therefore no justification, on road safety grounds, to exclude them from the definition.