

OC210725

22 October 2021

[REDACTED]

Withheld to protect personal privacy

Tēnā koe [REDACTED] Withheld to protect personal privacy

I refer to your request of 6 September 2021, pursuant to the Official Information Act 1982 (the Act), seeking copies of the following:

Robertson, Wood MoT 3/05/2021 City Rail Link Limited - Special Resolution 3
Ardern, Hipkins, Wood MoT 4/05/2021 COVID-19 Vaccination Requirements
Ardern, Hipkins MFAT 5/05/2021 Travel by New Zealanders from Very High Risk countries
Wood MoT 5/05/2021 Supply Chain Strategy Work Programme
Wood MoT 6/05/2021 Background information on tolling
Wood MoT 10/05/2021 Hamilton to Auckland Intercity Connectivity – next stage of work
Wood MoT/Waka Kotahi/TSY 11/05/2021 NZ Upgrade Programme - Northern Pathway Options Summary
Wood, Robertson MoT/TSY 11/05/2021 NZ UP ADVICE ON THE REMAINING PROGRAMME OPTIONS
Wood, Williams MoT/Police 11/05/2021 LAND TRANSPORT (DRUG DRIVING) AMENDMENT BILL DEPARTMENTAL REPORT – COVER BRIEFING
Wood MoT 11/05/2021 Transport Accident Investigation Commission – Draft Statement of Intent 2021-2025 and Statement of Performance Expectations for 2021/22
Wood Waka Kotahi 12/05/2021 “make way” beacons for electricity utility vehicles
Hipkins, Wood MoT 12/05/2021 COVID-19 Vaccination Requirements - Tranche 2 Advice
Wood MoT 14/05/2021 UPDATE ON THE DEVELOPMENT OF A NATIONAL ELECTRIC VEHICLE CHARGING INFRASTRUCTURE PLAN
Wood Waka Kotahi 18/05/2021 Query on Waka Kotahi Quarterly Report on Borrowing Facilities and PPPs
Wood MoT 18/05/2021 Clean Car Discount - finalising outstanding decisions (talking points)
Wood MoT 20/05/2021 International Maritime Organisation - Climate Change Negotiation Mandate
Wood MoT 20/05/2021 PTOM Review Discussion Paper
Robertson cc. Wood TSY 21/05/2021 Further advice on funding NZUP Transport
Wood MoT 24/05/2021 NEW ZEALAND UPGRADE PROGRAMME - PROGRAMME OPTIONS
26/05/2021 Detailed Breakdown of NZUP Cost Increases

Wood Waka Kotahi 26/05/2021 Comments on FTC application: George Street Mixed Use Development
Wood Waka Kotahi 26/05/2021 Innovating Streets projects
Wood Waka Kotahi 26/05/2021 Wellington bus depot
Wood MoT 26/05/2021 LET'S GET WELLINGTON MOVING - MONITORING AND SUPPORT
Wood KiwiRail 26/05/2021 North Island Passenger Rail Service Update
Wood Waka Kotahi 27/05/2021 Implications of Recommended Investment levels on Continuous Allocations
Wood Waka Kotahi 27/05/2021 Baseline wage data for bus drivers
Wood Waka Kotahi 27/05/2021 Concerns raised by Rail and Maritime Transport Union (RMTU)
DPMC 28/05/2021 Pre-Departure Testing for Travellers from Australia who Have Been in Victoria
Wood Waka Kotahi 28/05/2021 NZ Upgrade Programm
Wood MoT 31/05/2021 Extension of light EV exemption

On 29 September we notified you of an extension to the time period for responding to your request, as consultations necessary to make a decision on the request were such that a proper response to the request could not reasonably be made within the original time limit. We have now completed the necessary consultations and our response is detailed below.

Thirty-one documents fall within the scope of your request. As outlined in our email of 8 September and extension letter of 29 September, twenty-two of the requests for papers are duplicate requests from your previous request dated 23 August (our reference OC210691). As such, decisions were made and provided to you on these documents in our response to your August request (OC210691), dated 18 October.

For clarity and completeness, all thirty-one of the documents that fall within the scope of this request are listed in Table 1 below. The table refers you to OC210691 where the requests were duplicates.

For the nine non-duplicated requests, and one duplicated request where the decision under the Act was advised to you on 18 October, the table details how each has been treated under the Act. As you are aware, three have been transferred to Waka Kotahi New Zealand Transport Agency. You will see that certain information has been withheld or refused under the following sections of the Act:

- Section 9(2)(a), to protect the privacy of natural persons
- Section 9(2)(b)(ii), to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information
- Section 9(2)(ba)(i), to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied
- Section 9(2)(f)(iv), to maintain the constitutional convention for the time being which protects the confidentiality of advice tendered by Ministers of the Crown and officials

- Section 9(2)(g)(i), to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty
- Section 9(2)(h), necessary to maintain legal professional privilege.
- Section 9(2)(j), to enable a Minister of the Crown or any public service agency or organisation holding the information to carry on, without prejudice or disadvantage, negotiations
- Section 18(d), as the information requested is or will soon be publicly available.

With regard to the information that has been withheld under section 9 of the Act, I am satisfied that the reasons for withholding the information at this time are not outweighed by public interest considerations that would make it desirable to make the information available.

You have the right under section 28(3) of the Act to make a complaint about the withholding and refusal of information to the Ombudsman, who can be contacted at: info@ombudsman.parliament.nz

This letter, attached table and documents completes our response to your requests of 23 August (OC210691) and 6 September (OC210725).

The Ministry publishes our Official Information Act responses and the information contained in our reply to you may be published on the Ministry website. Before publishing we will remove any personal or identifiable information.

Nāku noa, nā


Hilary Penman
Manager, Ministerial Services

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Table 1

	Document	Description of information withheld
1	OC210257 Robertson, Wood MoT 3/05/2021 City Rail Link Limited - Special Resolution 3	Refer to OC210691
2	OC210341 Ardern, Hipkins, Wood MoT 4/05/2021 COVID-19 Vaccination Requirements	As per our letter of 18 October (Reference OC210691) the decision was made to provide you with a copy of this paper, which we now attach. Some information withheld under Sections 9(2)(a), 9(2)(b)(ii), 9(2)(ba)(i), 9(2)(f)(iv) and 9(2)(h). For clarity we re-iterate that this document dated 4/05, was cancelled, and replaced by the briefing dated 12/05, reference OC210396 – refer to Document 12 below.
3	Ardern, Hipkins MFAT 5/05/2021 Travel by New Zealanders from Very High Risk countries	Refer to OC210691
4	OC210240 Freight and Supply Chain Strategy Work Programme Wood MoT 5/05/2021	Withheld in full under Section 18(d). This document has been proactively released on our website. It can be found, as part of a previous Official Information Act request, from page 12 at: www.transport.govt.nz/assets/Uploads/OIA-response/RequestForTwoSupplyChainBriefings.pdf
5	OC210340 Background Information on Tolling Wood MoT 6/05/2021	Some information withheld under Section 9(2)(a).
6	OC210227 Hamilton to Auckland Intercity Connectivity – next stage of work Wood MoT 10/05/2021	Some information withheld under Sections 9(2)(a), 9(2)(g)(i) and 9(2)(j). Please note the Cabinet Paper referred to in the first recommendation, on page 2 of this paper, can be found online at: www.transport.govt.nz/assets/Uploads/Cabinet/Investing-in-Rapid-Rail-in-the-Hamilton-to-Auckland-Corridor.pdf
7	OC210427 Wood MoT/Waka Kotahi/TSY 11/05/2021 NZ Upgrade Programme - Northern Pathway Options Summary	Refer to OC210691
8	OC210362 Wood, Robertson MoT/TSY 11/05/2021 NZUP Advice on the Remaining Programme Options	Refer to OC210691

9	<p>OC210365 Land Transport (Drug Driving) Amendment Bill Departmental Report – Cover Briefing Wood, Williams MoT/Police 1105/2021</p>	<p>Some information withheld under Sections 9(2)(a) and 9(2)(j).</p> <p>Please note the attachment – the <i>draft Land Transport (Drug Driving) Amendment Bill Departmental Report</i> – was provided to Ministers with this cover briefing before it was finalised. As such, there are minor differences between the draft and the final version, which is available through the Parliament website, at: www.parliament.nz/resource/en-NZ/53SCTI_ADV_99686_TI1035/cb6704bce5d1e0b665894541f57c976569058859.</p> <p>For completeness, please also note the two Appendices mentioned in the draft Report as Appendix One and Two were not sent to the Minister’s office with this cover briefing and therefore are not provided here. They can be found online, through the link above, as Appendices Two and Three of the final Report (pages 41 and 45 respectively).</p> <p>The cover briefing contains views of the Ministry of Transport and NZ Police regarding whether blood tests should only test for those drugs that an oral fluid test indicates a positive result for, or test for all drugs. The Bill currently before the House of Representatives allows blood tests to test for all drugs, provided anyone who elects to have a blood test is fully aware of the consequences of doing so.</p>
10	<p>OC210372 Transport Accident Investigation Commission: Draft Statement of Intent 2021-2025 and Statement of Performance Expectations for 2021/22 Wood MoT 11/05/2021</p>	<p>Some information withheld under Sections 9(2)(a), 9(2)(f)(iv) and 9(2)(g)(i).</p>
11	<p>Wood Waka Kotahi 12/05/2021 “make way” beacons for electricity utility vehicles</p>	<p>Transferred to Waka Kotahi, 8 September 2021.</p>
12	<p>OC210396 Hipkins, Wood MoT 12/05/2021 COVID-19 Vaccination Requirements - Tranche 2 Advice</p>	<p>As per our letter of 18 October (Reference OC210691) this paper was withheld in full under Section 18(d). It has now been published and can be found online at: www.transport.govt.nz/assets/Uploads/OC210396-COVID-19-Vaccination-Requirements-at-the-Border.pdf</p>

		As above (Document 2) we re-iterate that this document dated 12/05, replaced that briefing dated 4/05, reference OC210341.
13	OC210328 Wood MoT 14/05/2021 Update on the Development of a National Electric Vehicle Charging Infrastructure Plan	Refer to OC210691
14	Wood Waka Kotahi 18/05/2021 Query on Waka Kotahi Quarterly Report on Borrowing Facilities and PPPs	Refer to OC210691
15	OC210369 58 Wood MoT 18/05/2021 Clean Car Discount - finalising outstanding decisions (talking points)	Refer to OC210691
16	OC210133 International Maritime Organisation - Climate Change Negotiation Mandate Wood MoT 20/05/2021	Withheld in full under Section 18(d). This document has been proactively released on our website, and can be found at: www.transport.govt.nz/assets/Uploads/Redacted-International-Maritime-Organisation-Climate-Change-Negotiation-Mandate-Cabinet-Paper.pdf
17	OC210271 65 Wood MoT 20/05/2021 PTOM Review Discussion Paper	Refer to OC210691
18	Robertson cc. Wood TSY 21/05/2021 Further advice on funding NZUP Transport	Refer to OC210691
19	OC210394 Wood MoT 24/05/2021 New Zealand Upgrade Programme - Programme Options	Refer to OC210691
20	26/05/2021 Detailed Breakdown of NZUP Cost Increases	Refer to OC210691
21	Wood Waka Kotahi 26/05/2021 Comments on FTC application: George Street Mixed Use Development	Transferred to Waka Kotahi, 8 September 2021.
22	Wood Waka Kotahi 26/05/2021 Innovating Streets projects	Transferred to Waka Kotahi, 8 September 2021.
23	Wood Waka Kotahi 26/05/2021 Wellington bus depot	Refer to OC210691
24	OC210398 Wood MoT 26/05/2021 Let's Get Wellington Moving - Monitoring and Support	Refer to OC210691

25	Wood KiwiRail 26/05/2021 North Island Passenger Rail Service Update	Refer to OC210691
26	Wood Waka Kotahi 27/05/2021 Implications of Recommended Investment levels on Continuous Allocations	Refer to OC210691
27	Wood Waka Kotahi 27/05/2021 Baseline wage data for bus drivers	Refer to OC210691
28	Wood Waka Kotahi 27/05/2021 Concerns raised by Rail and Maritime Transport Union (RMTU)	Refer to OC210691
29	DPMC 28/05/2021 Pre-Departure Testing for Travellers from Australia who Have Been in Victoria	Refer to OC210691
30	Wood Waka Kotahi 28/05/2021 NZ Upgrade Programme	Refer to OC210691
31	Wood MoT 31/05/2021 Extension of light EV exemption	Refer to OC210691

**BRIEFING**

4 May 2021

OC210341

Rt Hon Jacinda Ardern
Prime Minister

Hon Chris Hipkins
Minister for COVID-19 Response

Hon Michael Wood
**Minister of Workplace Relations & Safety
& Minister of Transport**

Action required by:
Thursday, 6 May 2021

COVID-19 Vaccination Requirements at the Border (Tranche 2 advice)**Purpose**

This paper seeks your direction about whether to impose mandatory vaccination requirements on private sector and public sector workers at the border who perform specified work. This advice follows your previous decisions to impose these requirements on workers at Managed Isolation and Quarantine Facilities (MIQFs) and core public services workers at affected airports, ports, and ships. These decisions are reflected in the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Vaccinations Order).

Subject to your direction, officials may need to provide a further paper that seeks agreement to any outstanding detailed policy design matters not covered in this paper. We will work with your offices to provide this advice, should it be required.

Executive Summary

The Government has prioritised vaccinations of the border workforce as, alongside MIQFs, the border setting carries the greatest risk of exposure to, and transmission of, COVID19.

The Ministry of Health has previously advised that there is a public health rationale for requiring that specified work only be undertaken by vaccinated people, in response to the current pandemic. This is because there is a risk that these individuals may be exposed to, and infected by, COVID-19 in the course of their work and may potentially transmit the disease to others. There are a range of factors that can affect the risk of being exposed to COVID-19 including: the number of international travellers (potentially infected people) the border worker may come in contact with, the ability of the border worker to maintain physical distancing from international travellers, the length of interactions the border worker may have with international travellers, and whether the interaction is inside or outside.

Currently, in addition to MIQFs, the Vaccinations Order applies to core government workers who work at affected airports, ports and ships. Further decisions are needed in relation to wider public sector workers (e.g. Healthcare workers and AVSEC) and private sector PCBUs

operating at these locations and are subject to the COVID-19 Public Health Response (Required Testing) Order 2020 (an estimated workforce of 7,000-10,000).

Bringing the wider public sector workers under the Order is relatively straightforward. The key policy considerations are in relation to private sector PCBUs operating at the border.

The paper recommends an approach to mandatory vaccination for these border workers using different strata of risk. The options have been developed taking into account public health rationale (with the Required Testing Order the frame of reference), economic and social impacts, and legal risk. The options are cumulative, with each option bringing more border workers under the Vaccinations Order, starting with those with higher public health risk (aircrew members) under Option 1, through to all workers covered by the Required Testing Order under Option 3.

Due to the nature of roles performed by the private sector at the border the potential impacts of decisions on this paper differ materially from earlier decisions. Specifically, Ministers need to be aware of the potential for significant disruption to New Zealand's supply chain (which is already under pressure) and greater potential job losses than seen to date. The specific impacts will vary depending on which workers may be brought under the Vaccinations Order. However, in lieu of detailed data, in general terms the wider the coverage of the Vaccinations Order to private sector PCBUs, the greater these risks.

There are a number of factors that give rise to these risks, which point to different policy responses, as described below.

- **Different PCBUs are at different stages of vaccination uptake amongst their staff.** For a range of reasons, including barriers to accessing vaccination, private sector PCBUs are at very different stages of vaccination uptake and are generally further behind than MIQFs and Government agencies were when the vaccination requirement was applied to their workers. It is important barriers are addressed to enable maximum vaccination uptake, with access to accurate information about who is or isn't vaccinated an essential part of this. Officials understand this will be available for all employers following an IT update on 13 May 2021. If this does not occur, there is a risk in PCBUs ability to comply with any requirement.
- **Specialist skills and qualifications.** There will invariably remain a number of people who will choose not to, or are unable to be vaccinated (as we have seen at MIQFs and Government agencies). Private sector PCBUs have a range of roles which require specific skills and qualifications. Some roles may be able to be filled in the relatively short term (e.g. 2–3 months), but require adequate lead time in order to mitigate supply chain/economic consequences. Provision of a reasonable lead time before any vaccination requirement applies could help address this issue.

A smaller number of roles/workers may be unable to be replaced in the medium term as existing skills shortages, and the training and qualifications to bring in someone new, make this impractical (e.g. ship pilots, who take 3 or more years to train). If these workers are unvaccinated and unable to continue to perform their role, it is likely they will not be replaced in the medium term. The sector advises where this occurs, it will disproportionately reduce port activity with flow on supply chain impacts. We recommend Ministers consider an exemption regime to manage these risks.

- **Limited capacity to redeploy.** Private sector PCBUs highlight that due to the specialist nature of their businesses, and lack of vacancies held, they have very little

ability to redeploy staff who are unvaccinated. This suggests higher rates of job losses are likely amongst private sector PCBUs than seen in Government workforces. We note that both the aviation and maritime sectors are heavily unionised, and while we understand at a national level there has been support for the overall vaccination strategy, we are unsure how local union delegates will respond to individual cases.

In order to enable the successful implementation of the options in this paper, we need to ensure that:

- PCBUs have an accurate understanding of which members of their workforce have and haven't been vaccinated; and
- PCBUs and workers can get easy access to vaccination and know how to access more information.

The Ministry of Health considers that the Border Worker Testing Register programme of work will respond to the challenges that PCBUs have had in accessing information on the vaccination status of their workforce. An interim solution is currently available, and an automated system will be available from 13 May 2021.

The Ministry of Health and DHBs have been working to ensure that border workers can access vaccination as efficiently as possible. This includes the establishment of an 0800 number for PCBUs and workers to call to arrange appointments or ask questions. Furthermore, the Ministry of Health recently wrote to DHBs to make it clear that they should take a more generous interpretation to Group 1

To ensure PCBUs were appropriately supported to implement Options 2 and/or 3 in this paper, it is likely that DHBs would need to maintain or re-establish vaccination sites at certain workplaces (based on our current understanding of vaccination uptake rates of these workforces), This would divert resources, and momentum, away from the wider rollout of the COVID-19 Immunisation Programme. The scale of the impacts of diverting resources is dependant on the Options you chose and the number and locations of those workers who are still to be vaccinated. Officials will report back to you on the implications of the options chosen, on the COVID-19 Immunisation national rollout plan.

In light of the above factors, the Ministry of Transport recommends adopting a staggered approach to mandatory vaccination of private sector border workers (**Option 1**). In essence, this provides for:

- a time limited extension of the Vaccination Order now, applying to wider government workers and New Zealand domiciled aircrew who travel on international flights
- a time-limited extension of the Educate, Expect, Support approach, with measures to address barriers to access and vaccination data
- completion of a further public health assessment (based on the Required Testing Order, but also addressing any specific questions Ministers may have) of work that should be brought under the Vaccinations Order (noting the risk profile of different work can vary considerably)

Should Ministers wish to pursue **Options 2 or 3** now (which impose broader requirements earlier), we consider there is an essential need for an exemption regime to provide some flexibility to manage supply chain risks, if critical roles are unable to be performed by

vaccinated workers. We also suggest consideration is given to variable in-force dates for workers, and would provide further advice in respect of these matters.

Recommendations

The Ministry of Transport recommends you:

General

- | | | |
|---|--|----------|
| 1 | indicate if you wish to discuss this advice with officials | Yes / No |
| 2 | agree to proactively publish this paper, with appropriate redactions, once decisions are made and announced | Yes / No |

Part 1 – Context

- | | | |
|----|---|-------|
| 3 | note the public health advice provided by the Ministry of Health (Annex One) | Noted |
| 4 | <div style="background-color: black; height: 1.2em; width: 100%;"></div> <p style="color: red; font-size: small; text-align: center;">Withheld under section 9(2)(h) of the Official Information Act 1982</p> | Noted |
| 5 | note that the Ministry of Health advises that approximately 75 percent of airline, airport and port border workers have received at least their first vaccination (with caveats as listed) | Noted |
| 6 | note feedback from the aviation and maritime sector has highlighted barriers to accessing vaccination for employees and an inability to receive comprehensive information about vaccination uptake rates from Government | Noted |
| 7 | note that the Ministry of Health and DHBs have taken steps to ensure that: <ul style="list-style-type: none"> • PCBUs can have an accurate understanding of which members of their workforce have and haven't been vaccinated; and • PCBUs and workers can get easy access to vaccination appointments and know how to access more information if they need it. | Noted |
| 8 | note the factors limiting this advice, specifically the quality of data currently available and limited sector engagement | Noted |
| 9 | note the feedback from stakeholders with regard to making vaccination of border workers that has been provided alongside this briefing (Air NZ, Qantas, E Tū, Stevedores) | Noted |
| 10 | note the Ministry of Health advises that: <ul style="list-style-type: none"> • DHBs are currently shifting their focus from vaccination sites at border locations to community vaccination sites, consistent with the Government's COVID-19 Immunisation rollout plan • If you agree to the Options in this paper, the Ministry of Health will work with DHBs to ensure that affected workers have adequate opportunity to be vaccinated | Noted |

- any request to maintain or grow vaccination capacity at airports and ports is expected to have impacts on the speed and momentum associated with the wider COVID-19 Immunisation rollout

Part 2 – Policy Options

EITHER

Option 1 [Recommended by the Ministry of Transport]:

- 11 **agree** to amend the Vaccinations Order to include:
- wider Government workers (employees of the Aviation Security Service, Maritime New Zealand, the New Zealand Police, the New Zealand Defence Force and Health workers) Yes / No
 - New Zealand domiciled aircrew under the Vaccinations Order alongside wider Government workers Yes / No
- 12 **agree** wider Government workers be required to have received: Yes / No
- their first dose of the Pfizer/BioNTech vaccine by 1 June 2021, if they are subject to a testing requirement under the COVID-19 Public Health Response (Required Testing) Order 2020, to continue operating in that role;
 - their second dose of the Pfizer/BioNTech vaccine by 6 July 2021, if they are subject to a testing requirement under the COVID-19 Public Health Response (Required Testing) Order 2020, to continue operating in that role
- 13 **indicate**, with respect to New Zealand domiciled aircrew operating international flights, whether the mandatory vaccination requirement should apply to:
- New Zealand domiciled aircrew that operate international flights, excluding persons involved in quarantine free travel (consistent with definition of aircrew under Required Testing Order); **OR** Yes / No
 - All New Zealand domiciled aircrew that operate international flights, without exclusion of persons involved in quarantine free travel (preference of airlines, but which is inconsistent with public health advice from the Ministry of Health) Yes / No
- 14 **note** that Air New Zealand has suggested 3 months' lead time would be required to ensure compliance with this requirement Noted
- 15 **agree** the in-force date for New Zealand domiciled aircrew operating international flights (agreed under Recommendation 10) as:
- 1 June 2021 (first vaccination) and 6 July 2021 (second vaccination) (consistent with the proposed requirement for wider Government workers); **OR** Yes / No
 - 1 August 2021 (first vaccination) and 5 September 2021 (second vaccination) (which would provide three months lead time as requested by Air New Zealand); or Yes / No
 - another timeframe as selected by Ministers

- 16 **agree** to maintain the encourage, expect, support approach with respect to the vaccination of non-government aviation (excluding New Zealand domiciled aircrew that operate international flights) and maritime border workers until 13 June 2021 (4 weeks from the time comprehensive vaccination status data, which addresses all known data issues, is expected to be made available to all employers through the enhanced Border Worker Testing Register (BWTR)) Yes / No
- 17 **direct** the Ministry of Transport and Ministry of Health to provide advice on bringing remaining non-government aviation and maritime border workers under the Vaccinations Order Noted

OR

Option 2:

- 18 **agree**, to bring under the Vaccinations Order:
- wider Government workers (employees of the Aviation Security Service, Maritime New Zealand, the New Zealand Police, the New Zealand Defence Force and the Health workers as defined under the Required Testing Order); and Yes / No
 - New Zealand domiciled aircrew that operate international flights; and Yes / No
 - all other persons that are part of a group that is subject to required testing every seven days (under the Required Testing Order). Yes / No
- 19 **agree** wider Government workers (as above) be required to have received:
- their first dose of the Pfizer/BioNTech vaccine by 1 June 2021, if they are subject to a testing requirement under the COVID-19 Public Health Response (Required Testing) Order 2020, to continue operating in that role; Yes / No
 - their second dose of the Pfizer/BioNTech vaccine by 6 July 2021, if they are subject to a testing requirement under the COVID-19 Public Health Response (Required Testing) Order 2020, to continue operating in that role Yes / No
- 20 **indicate** with respect to aircrew, whether the requirement should apply to:
- New Zealand domiciled aircrew, excluding persons involved in quarantine free travel (consistent with definition of aircrew under current required testing order); Yes / No
- OR
- All New Zealand domiciled aircrew that operate international flights, without exclusion of persons involved in quarantine free travel (preference of airlines, but which is inconsistent with public health advice from the Ministry of Health) Yes / No
- 21 **agree** the in-force date for New Zealand domiciled aircrew operating international flights (agreed under Recommendation 17) as:
- 1 June 2021 (first vaccination) and 6 August 2021 (second vaccination) (consistent with the proposed requirement for wider Government workers); or Yes / No
 - 1 August 2021 (first vaccination) and 5 September 2021 (second vaccination) [which would provide three months' lead time as requested by Air New Zealand]; or Yes / No

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- another timeframe as selected by Ministers

22 **indicate** if:

- you would like further advice on potential in-force dates for persons requiring testing every seven days under the Required Testing Order, that would be subject to the vaccination requirement; OR Yes / No
- your preferred in-force date for these workers

OR

Option 3:

23 **agree** to bring under the Vaccinations Order:

- wider Government workers (employees of the Aviation Security Service, Maritime New Zealand, the New Zealand Police, the New Zealand Defence Force, and the Health workers); and Yes / No
- New Zealand domiciled aircrew that operate international flights; and Yes / No
- persons that handle affected items removed from managed isolation or quarantine facility (within 72 hours of removal from that facility), or removed from an affected aircraft (within 24 hours of removal from that aircraft), or removed from an affected ship (within 72 hours of removal from that facility); and Yes / No
- all other persons that are part of a group that is subject to required testing (under the Required Testing Order) Yes / No

24 **agree** wider Government workers (as above) be required to have received:

- their first dose of the Pfizer/BioNTech vaccine by 1 June 2021, if they are subject to a testing requirement under the COVID-19 Public Health Response (Required Testing) Order 2020, to continue operating in that role; Yes / No
- their second dose of the Pfizer/BioNTech vaccine by 6 July 2021, if they are subject to a testing requirement under the COVID-19 Public Health Response (Required Testing) Order 2020, to continue operating in that role Yes / No

25 **note** if the Vaccination Order was extended to apply to persons that handle affected items that are not subject to testing under the Required Testing Order it could risk undermining the coherency and effectiveness of the required testing and vaccination measures, and the wider health response. Noted

26 **indicate** with respect to persons that handle affected items removed from managed isolation or quarantine facility (within 72 hours of removal from that facility), or removed from an affected aircraft (within 24 hours of removal from that aircraft), or removed from an affected ship (within 72 hours of removal from that facility), whether the requirement should apply:

- Only to persons specified in Part 6 of Schedule 2 to the Required Testing Order; OR Yes / No

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- All persons who handle those items, regardless of whether they are subject to required testing under the Required Testing Order Yes / No
- 27 **indicate** with respect to aircrew, whether the requirement should apply to:
- New Zealand domiciled aircrew, excluding persons involved in quarantine free travel (consistent with definition of aircrew under current Required Testing Order); **OR** Yes / No
 - All New Zealand domiciled aircrew that operate international flights, without exclusion of persons involved in quarantine free travel (preference of airlines) Yes / No
- 28 **agree** that aircrew, persons that handle affected items, and other persons that are part of a group that is subject to required testing (as agreed under recommendation 22), be required to have received:
- 1 June 2021 (first vaccination) and 6 August 2021 (second vaccination) (consistent with the proposed requirement for wider Government workers); or Yes / No
 - 1 August 2021 (first vaccination) and 5 September 2021 (second vaccination) [which would provide three months' lead time as requested by Air New Zealand]; **or** Yes / No
 - another timeframe as selected by Ministers
- Part 3**
- 29 **agree** that the Minister for COVID-19 Response be authorised to issue exemptions (either for a class of persons, or an individual person) if the Minister is satisfied that,
- it is necessary or desirable in order to promote the public interest to issue the exemption (whether on economic, social, national security, or other grounds), and Yes / No
 - the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption. Yes / No
- 30 **agree** that, in determining whether to make an exemption on public interest grounds, the Minister for COVID-19 response must consider advice provided by the Director-General of Health, and the Secretary of Transport, and any other Official the Minister considers appropriate Yes / No
- 31 **agree** that when issuing an exemption the Minister for COVID-19 response, may impose a condition (or conditions) on the exemption as the Minister considers necessary. Yes / No
- 32 **agree** that the Minister for COVID-19 Response be authorised to issue exemptions (either for a class of persons, or an individual person) if the Minister is satisfied that the public health risk relating to the person or class of persons covered by the exemption is reasonably mitigated without vaccination, having regard to the proposed conditions; Yes / No
- 33 **agree** that, in determining whether to make an exemption on public health mitigation grounds, the Minister for COVID-19 response must consider advice provided by the Director-General of Health on whether the public health risk relating to the person or class of persons covered by the exemption can be reasonably mitigated without vaccination Yes / No

- 34 **agree** that, and, when issuing an exemption on public health mitigation grounds, the Minister for COVID-19 response, may impose a condition (or conditions) on the exemption as the Minister considers necessary. Yes / No

Human Rights

- 35 [Redacted] Noted
- 36 **note** the Minister for COVID-19 Response must take be satisfied that the approach to the Order recommended in this briefing does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990, as part of issuing an Order.
Withheld under section 9(2)(h) of the Official Information Act 1982 Noted

Development of the COVID-19 Public Health Response (Vaccinations) Amendment Order

- 37 **note** that, subject to Ministers making decisions, the Ministry of Health and the Ministry of Transport will work closely with Parliamentary Counsel Office to develop a Vaccinations Amendment Order as soon as possible, subject to any issues raised in Ministerial consultation (required by the Act) or agency consultation. Noted
- 38 **note** that, once this consultation is complete, the Ministry of Health will provide a paper enabling the issuing of the Amendment Order recommended in this briefing, including advice from the Director-General of Health on public health matters. Noted
- 39 **note** that the Minister for COVID-19 response must consult with the Prime Minister, Minister of Justice and Minister of Health prior to making any Order. Noted
- 40 **agree** to refer this briefing to COVID 19 Vaccine Ministers, Border Ministers, the Attorney-General and Ministers of Social Development and Employment, and Justice. Yes / No

[Redacted]

Withheld under section 9(2)(a) of the Official Information Act 1982

 Brent Johnston
 Policy Director
 Ministry of Transport
 4 / 5 / 21

 Rt Hon Jacinda Ardern
 Prime Minister
 / /

 Hon Chris Hipkins
 Minister for COVID-19 Response

Hon Michael Wood
**Minister for Workplace Relations &
 Safety & Minister of Transport**

..... / /

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

Comments

Contacts

Name	Telephone	First contact
Brent Johnston, Acting Policy Director	[REDACTED]	✓
Peter Mersi, Chief Executive	[REDACTED]	

Withheld under section 9(2)(a) of the Official Information Act 1982

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COVID-19 VACCINATION REQUIREMENTS AT THE BORDER (TRANCHE 2 ADVICE)

Background

- 1 On 13 April 2021 you met with Border Executive Board Chief Executives to discuss your preferred approach to requiring that high-risk work at the Border be performed only by workers who have been vaccinated. You indicated that:
 - a. priority should be given to preparing a COVID-19 Public Health Order (s11 Order) covering specified work performed at Managed Isolation and Quarantine Facilities (MIQFs) and affected airports, ports or ships
 - b. further advice should be provided on options for additional support mechanisms for workers who are not vaccinated
 - c. further advice should be provided on preparing a s11 Order that covers specified work performed at the remainder of the Border.
- 2 Following officials' advice [MBIE 2021 3276 refers], your decisions in relation to (a) were implemented through the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Vaccinations Order), that came into force at 11.59 pm on 30 April 2021. The Vaccinations Order requires all work performed at MIQFs (irrespective of employer), and specified work undertaken by government officials at affected airports, ports or ships, to be undertaken by vaccinated persons.
- 3 The Ministry of Business, Innovation and Employment (MBIE) has provided Ministers Hipkins and Wood's offices with further information in relation to (b). Following that advice, officials have been directed to progress work on the following options, with a decision paper to be provided to Ministers later this week:
 - 0A: Require no redundancy of public service direct employees
 - 1A: MSD support to help find unvaccinated workers new employment and provide income support where required
 - 1B: Facilitate opportunities for employment within the broader public sector
 - 1C: Facilitate transfer for private sector workers to other work in the private sector
 - 2A: Ex-gratia payments to private sector employees in lieu of redundancy compensation
 - 2B: Redundancy compensation entitlements.
- 4 This paper deals with outstanding matters in relation to Paragraph 1 (c) above. As agreed following feedback on the earlier MBIE briefing, this includes advice on including workers that regularly handle items removed from an MIQF, aircraft or ship.
- 5 The advice has been prepared in consultation with Border Executive Board (BEB) agencies, MBIE, Ministry of Health (MoH), Ministry of Justice (MoJ), Ministry of Social Development (MSD), Crown Law and Parliamentary Counsel Office (PCO). Other

agencies have been consulted on the aspects relevant to them. There has been some limited engagement with aviation and maritime private sector PCBUs.

Limitations to this advice

- 6 There are a number of limitations to this advice that Ministers should be aware of:
- Data availability and quality. As discussed with Ministers previously, we have very limited data about uptake of vaccinations amongst the non-government border workforce. We have sought to utilise official data held by the Ministry of Health, however, only highly aggregated information is available at this time and this has significant caveats. Better data is expected to be progressively available over the next couple of weeks as PCBUs come onto the now mandatory Border Working Testing Register (BWTR).
 - Sector engagement. The Ministry of Transport has held two online sessions with aviation and maritime sector PCBUs to discuss the potential impacts of requiring workers performing work at the border to be vaccinated. Discussions have necessarily been at a high level given time constraints in preparing this advice. We received feedback from a number of PCBUs (substantive submissions have been provided with this paper). Some, but not all, feedback has been able to be incorporated into this paper in the time available.
- 7 These limiting factors mean we are unable to advise with any specificity on the breadth of work across this broad and diverse workforce, or provide detailed assessment of the impacts and risks of options presented in this paper.

Overview of this paper

- 8 The remainder of the paper is broken down into three sections as described below.

Part 1: Context

This section provides an overview of the key contextual information Ministers need to be aware of in taking decisions on this paper. This includes an assessment of the public health rationale for decisions, [REDACTED] the nature of the workforce within scope of this advice (including economic and social considerations) and an overview of what we know about vaccination uptake to date and the reasons for this.

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Part 2: Options for bringing different workers under the Vaccinations Order

This section provides three options for bringing additional workers under the Vaccinations Order. The Options are cumulative, framed around workers subject to the COVID-19 Public Health Response (Required Testing) Order 2020.

Part 3: Options for mitigating potential supply chain and economic consequences

This section discusses the potential need, and options for mitigating supply chain and economic consequences. This includes consideration of an exemptions regime.

9 The paper does not discuss requirements of the Vaccinations Order that will continue to apply to any workers brought under it. This includes Duties Regarding Vaccination Status and Infringement Offence regime.

Part 1: Context

Public Health rationale

10 The Ministry of Health has previously advised that there is a public health rationale for requiring that specified high-risk work only be undertaken by vaccinated people, in response to the current pandemic. This is because there is a risk that these individuals may be exposed to, and infected by, COVID-19 in the course of their work and may potentially transmit the disease to others.

11 However, it is important to note that not all border work carries the same level of public health risk. Factors that have a role in increasing the risk of being exposed to COVID-19 include the following:

- the number of international travellers (potentially infected people) the border worker may come in contact with (the more travellers, the higher the risk)
- the ability of the border worker to maintain physical distancing from international travellers (the less physical distancing, the higher the risk)
- the length of interactions the border worker may have with international travellers (the longer the interaction, the higher the risk)
- whether the interaction is inside or outside (inside is higher risk).

12 MIQF workers are likely to be higher risk when assessed against the above criteria, however a port worker who does not interact with people needing to quarantine is unlikely to be higher risk.

13 Requiring vaccination for high-risk work is considered an appropriate response at this time to the current pandemic, but it may not be required indefinitely into the future, as information about disease transmission and population immunity may change.

14 The risk of exposure for border workers is recognised in the Required Testing Order. The Required Testing Order focusses on high risk workers at the border, and even within this group, not all workers are tested to the same frequency. Some border workers are not required to be tested at all because of the low risk nature of their work. Therefore, while all options canvassed in this paper can be justified on public health grounds, the specific risk of different work varies.

15 The Ministry of Health's full advice is attached as **Annex One**.

[REDACTED]

[REDACTED]

Withheld under section 9(2)(h) of the Official Information Act 1982

Withheld under section 9(2)(h) of the Official Information Act 1982

Workforces under consideration to be brought under the Vaccinations Order

- 18 In addition to MIQFs, the Vaccinations Order currently applies to workers of core public service agencies, working at an affected airport, port or ship. Further decisions are needed in relation to wider public sector workers at these locations. This includes: NZ Police, NZ Defence Force (NZDF), Healthcare workers¹, Maritime NZ, Civil Aviation Authority and Aviation Security Service.
- 19 Decisions are also required in relation to private sector PCBUs operating at these locations. The BWTR currently records 465 private sector PCBUs that are potentially affected by a mandatory vaccination requirement.
- 20 Officials previously estimated there were 7,000–10,000 private sector workers working at the border and subject to the Required Testing Order. This covers a diverse workforce spanning airlines, airports (incl. baggage handlers, retailers etc.) and ports (port companies, port logistics and stevedores etc.) However, it is difficult to establish a clear baseline, given the changeable nature of the workforce and recent extensions to the scope of work covered by the Required Testing Order.
- 21 In broad terms, the sector is characterised by a small number of very large employers (e.g. Air NZ), and a large number of smaller employers with fewer than 50 staff. Unlike MIQF and core public servants operating at the border (who mainly perform regulatory roles), the majority of work that is of critical importance to the operation of the supply chain is carried out by private sector PCBUs.
- 22 Feedback from the sector has highlighted that due to the often small and specialist nature of their businesses, they have very little ability to redeploy staff who are unvaccinated (and significantly less when compared to options Government may have across the public service). Furthermore, there are a range of roles which require specific skills and qualifications. While some of these workers may be able to be replaced in the short term (~2 months), for others this is not practical due to skills shortages and the time required to train someone from scratch.
- 23 Consequently, there is a real risk that if these workers are unvaccinated and unable to perform their roles, it will be difficult if not impossible to replace them in the short to medium term. The maritime sector advises that this would have a disproportionate impact on port operations, with flow on effects for the national supply chain which is already under significant pressure. In lieu of detailed vaccination status data, we are unable to provide an accurate assessment of the scale of this risk at this time.
- 24 It follows that Ministers should expect a far greater level of turnover amongst this workforce than has occurred with MIQFs and core public service agencies – the number of people affected by this will grow the wider the application of a mandatory vaccination requirement. In the absence of Government intervention, the protections and financial support available to employees in these situations is likely to be highly variable across the sector.

¹ As defined under the Required Testing Order

- 25 While we do not have a detailed assessment of the scale of this risk, a number of examples are provided below that demonstrate this. It is important to note that these examples do not account for the aggregate disruptions that might occur if multiple key roles are affected at a particular location.

Example: Stevedores

We estimate that New Zealand has around 1,500 stevedores operating at ports.

Stevedores are specialised roles where it can be challenging to replace these workers, noting in particular that they work as part of units undertaking specialised functions. If these workers are unable to continue in their roles.

Data from the sector highlights relatively low rates of vaccine uptake [REDACTED]

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Furthermore, feedback from the sector suggests a significant number of stevedores are unlikely to be vaccinated irrespective of a mandatory requirement to do so. Many have questioned the need to do so, given the effectiveness of other health measures in place. The sector has submitted that it considers its risk profile as low and a mandatory vaccination requirement is therefore unnecessary.

As with many parts of the maritime sector, stevedores are heavily unionised and there is the potential for a collective response to any requirement to be vaccinated.

Any stevedore vacancies are unlikely to be replaced in the immediate term, which will likely have a disproportionate impact on port operations, and cause disruption to the supply chain to/from New Zealand.

Example: Ship pilots

New Zealand has around 65 ship pilots operating at ports, with only 1 or 2 in some locations. Based on feedback from Maritime New Zealand, at least 10 pilots are unlikely to be vaccinated. At one port, we understand two out of four pilots will not be vaccinated (knowing this may impact their ability to carry on performing their role).

If these workers are unable to continue, they will be unable to be replaced in the short term. This is because ship pilots are in short supply to begin with, and take approximately 3 years to train. Even a trained ship pilot, if available from overseas, must be rated to operate at a specific location (local knowledge and experience is essential to the role) and this takes a number of months to complete. We understand the Navy would be unable to perform these roles for the same reasons.

Each Port has its own complexities and some, are more complex than others. The training plan for Pilots are developed by the port company and Harbourmaster for each Port. Training and supervision over a number of ship movements is required and normally training is graduated from smaller to larger vessels.

[REDACTED]

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What we currently know about uptake of vaccinations amongst private sector and wider government workforces at the border

- 26 The Ministry of Health has provided the following information about vaccine uptake amongst the border workforce.

Table 1: Uptake of vaccinations amongst border workforce


Source: Ministry of Health, Friday 30 April

	# of workers	1 st vaccination	2 nd vaccination	No vaccination
Aircrew	3,048	2,326 (76%)	1,708 (56%)	722 (24%)
Airports	4,961	4,129 (83%)	3,372 (68%)	832 (17%)
Ports	3,845	2,425 (63%)	2,128 (55%)	1,420 (37%)
Total	11,854	8,880 (75%)	7,208 (61%)	2,974 (25%)

- 27 The Ministry of Health advises:

- the above figures do not include border workers outside of those three categories, or border workers who have presented for vaccination without a booking (“walk-ins”) and therefore do not have a direct link to information about their employer. Including these groups, of the 26,324 people currently active on the BWTR or have received a vaccination and self identified as a border workers, 22,656 are recorded as vaccinated
- the data does not distinguish Government and non-Government workers
- the data is limited to those employees who are currently loaded to the BWTR by their employer
- it was unable to disaggregate information further at the time of the request

- 28 The information from Ministry of Health above can be supplemented by feedback received from employers. Two examples are provided below:

- 
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- Air New Zealand has advised that its confirmed vaccination data, recently provided by the Ministry of Health, demonstrates that at least 72 percent of its border workers have received their first vaccination. This is considered a minimum number, because it only includes those staff who expressly permitted their employer be notified of their vaccination. Air NZ understands that staff who were vaccinated during ‘walk in’ appointments are also not included in this total.

Wider public sector workers

- 29 NZ Police advise that 100 percent of staff working at the border are vaccinated. This outcome has been achieved through very strong uptake of vaccinations amongst staff and the ability to return unvaccinated MIQF staff to home workgroups. A very small

number of officers working at airport locations have been redeployed due to their decision not to be vaccinated.

- 30 NZDF advise that first vaccination of uniformed staff working in MIQF is 100 percent complete and it is expected that the second vaccination will be complete by 31 May. The wider NZDF uniformed workforce, not specifically employed at the border, is following a similar trajectory. It is important to note that this information relates specifically to NZDF uniformed staff and not civilian employees or contractors who may be impacted under a broader application of the order. Specifically, ships maintenance workers and civilian base staff at international border locations such as Devonport Naval Base, Whenuapai Air Base and Ohakea Air Base potentially have several staff that may be impacted by the changes suggested herein, though the extent of those impacts are not able to be estimated until greater specificity on the requirement is achieved.
- 31 The Ministry of Health advises that 100 percent of DHB border workers have already received their first dose, and they expect to be able to administer all second doses by mid-May.
- 32 Maritime New Zealand advises that it has 63 frontline workers that require vaccination. 53 of these workers have had at least their first vaccination. Of those not yet vaccinated, three have appointments booked in May (having experienced difficulties getting bookings throughout April, one will make a booking on return from leave, and three people are unable to be vaccinated at present due to medical reasons but intend to be vaccinated once they are able. Two people do not want to be vaccinated and one person is undecided at present.
- 33 The Civil Aviation Authority (CAA) and Aviation Security Service (AVSEC) advise that if the current order were to be applied to the wider government sector there are around 30 CAA regulatory staff who would be affected, and all operational AVSEC staff would be affected. Potential for aircraft diversions, response scenarios, and other on board issues, creates a risk of exposure for all operational AVSEC staff. Within Auckland airport there are approximately 40 unvaccinated staff. Both medical reasons and refusal have been cited as the cause, though AVSEC expect that the numbers of unvaccinated staff will decline over the next week. While application of the Order would not halt current operations, it would significantly affect service delivery including queue times. The number of unvaccinated staff in Christchurch is 18 and in Queenstown and Wellington, fewer than five each. AVSEC noted that while they largely carry out out-bound screening, they have response obligations under the Civil Aviation Act which could potentially bring them into closer contact with 'red zone' people and crew.

Reasons for vaccination uptake to date and actions to improve the quality of data

- 34 Employers have been working to maximise uptake of vaccinations amongst staff, following the 'Educate, Expect, Support' approach. However, a number of factors have influenced progress to date. We have received considerable feedback from the sector highlighting barriers to uptake, including:
- Vaccination site locations have commenced progressively as part of the Government's rollout plan. Workers eligible for vaccination in Auckland have had access to vaccination appointments since the end of February 2021. However,

staff and their families based outside of Auckland have only been able to access vaccination as the COVID-19 Immunisation Programme has been rolled out across the country. Generally, locations came on-stream over March and April 2021, with Queenstown opening to airlines on 10 April 2021. Air New Zealand notes it continues to experience difficulties getting staff appointments at some locations.

- Delays getting vaccination bookings. A number of employers have provided feedback indicating their staff have experienced delays in getting bookings. This includes DHBs not contacting the employer to obtain employee lists at the outset, staff being unable to get bookings or resolve bookings through the 0800 helpline, and priority now being given to vaccinating tier 2 workers over border workers at some locations.
- Some PCBU's consider that vaccination sites at maritime port locations being removed prematurely, when significant numbers of Tier 1A staff still require vaccination (while community locations are available, the logistical challenge of getting staff to these locations has been raised as a concern). The maritime sector has also highlighted inconsistent approaches by DHBs, with some vaccinating non-Tier 1A workers (predominantly smaller ports) with others not. This is problematic for companies that work across multiple locations, as their staff are being treated differently.

35 The Ministry of Health advises that the COVID-19 Immunisation Programme has begun to shift its effort from its initial focus at the border (Group 1) to move to other at-risk frontline workers and people (Group 2) as per the rollout plan. This means that more community-based vaccination centres have been established, and the number of workplace vaccination sites at the border have been reducing. This could mean that some people, who have been slower to be vaccinated, are now finding that they have to be vaccinated away from their workplace.

36 As evident above, officials have little quantitative data to determine with confidence vaccination uptake rates, and where any significant gaps are. This is because:

- Employers were initially told they would be able to request vaccine status information from the Ministry of Health. The approach then changed to require them to speak to staff individually to gain this information (or request authority to ask for the information from the Ministry of Health, despite approval already having consent being given in many cases). Many employers have been extremely frustrated and chosen not to do this.
- The Ministry of Transport requested employers to submit data to us about vaccine uptake rates (based on 1-1 conversations with staff). However, this was a voluntary process and many employers chose not to engage in this process (citing that without information from the Ministry of Health, they did not have a verifiable source of information; they also noted the scale of this task would take considerable time).

37 The Ministry of Health notes steps have been taken to address these issues, both from technology and a privacy statement perspective. This issue is on track to be comprehensively resolved by May 13 2021.

- 38 Changes to the BWTR to enable better access by officials and employers to information about vaccination status have begun, but are not yet completed. The Ministry of Health advises that it is working with a number of sources of information in the mean time that need to be manually reconciled which mean comprehensive information is not yet available. Consequently, employers who have not been using the centralised BWTR until recently will not have consistent visibility of which of their workers have been vaccinated and when they should expect this information. Better information will progressively become available over the next few weeks.

Part 2: Options for bringing different workers under the Order

- 39 We have identified a number of options for Ministers to consider with respect to amending the Order to require additional workers (private sector and wider government) operating at the border to be vaccinated to continue performing their roles. The options are discussed below and an assessment has been provided in **Annex Three**.
- 40 The options have been developed taking into account the following considerations:
- Public health rationale (with the Required Testing Order the starting frame)
 - Economic and social impacts
 - Legal risk
- 41 The Options are cumulative – each option would progressively bring a wider group of border workers under an Order. We have not proposed specific exceptions in the time available. However, this is something that can be considered to mitigate some of the risks identified.

[Option 1: Amendment to bring wider government and aircrew under the Order now, while deferring decision on private sector workers](#)

- 42 In light of knowledge gaps about the rate of vaccination uptake (particularly amongst the private workforce) barriers to uptake, and potential supply chain risks, Ministers may wish to continue the Educate, Expect, Support approach for a limited time (proposed 4 weeks) for most private sector border workers.
- 43 Alongside this, we would propose an initial amendment to the Order to bring New Zealand domiciled aircrew travelling on international flights (with an option to include QFT aircrew), and the wider public sector workforce (see paragraph 18) under its requirements.

Wider government workers

- 44 Bringing wider government workers under the Order would ensure all Government are treated the same, irrespective of whether they are part of the core public service or wider public service (e.g. Crown Entities).
- 45 Based on uptake rates to date, we consider wider Government border workers could be brought under the order according to the following timeframes:
- First vaccination – 1 June 2021

- Second vaccination – 6 July 2021

46 The key risk to be aware of relates to AVSEC airport workers. Specifically within Auckland airport as the rates of unvaccinated staff are relatively high, options for redeploying staff out of Auckland are limited as many staff work in specialised or technical roles, and the likelihood of deploying additional resources in to Auckland is low due to vacancies in other locations.

Aircrew members

47 A decision to bring aircrew under the Order reflects public health advice that this group of workers is a higher risk category of workers who have close contact with potentially infectious persons. This is due to the length of time they may be exposed, close proximity, and the enclosed nature of the workplace.

48 Based on the Required Testing Order, it is proposed that aircrew members² would be brought under the Vaccinations Order. However, a specific decision is required whether Ministers want aircrew involved in quarantine free travel to be covered.

49 The Vaccinations Order currently excludes Government officials and cabin crew who interact with QFT passengers. This reflects the RTO and lower risk profile of QFT compared to other international travel. However, airlines have indicated a preference that should a requirement be made that aircrew are vaccinated, this apply to all international aircrew.

50 Airlines note that aircrew rostering is not clearly split based on QFT/non-QFT, QFT aircrew interact with non-QFT aircrew, and concerns about risks of creating inequitable access to duties.

51 Therefore, including all international aircrew is likely to be more practicable for airlines, but is inconsistent with public health advice. It would also raise issues of consistency with the Required Testing Order and questions about whether other workers that only interact with QFT flights and passengers should or shouldn't be covered by a mandatory vaccination requirement. Particular consideration will also need to be given as to how this accords with the public health risk, and the extent Ministers consider it to be a justified limitation on section 11 of the New Zealand Bill of Rights Act 1990 to require QFT aircrew to be vaccinated in order to perform that role.

52 Based on uptake rates to date, and feedback from the aviation sector on the time needed to practically implement this requirement, we consider aircrew could be brought under the Order according to the following timeframes:

- First vaccination – 1 August 2021
- Second vaccination – 5 September 2021

Improving vaccination uptake amongst the private sector (relevant under all Options)

53 In order to improve vaccinations amongst the private sector workforce, some PCBU's have suggested the following measures:

² As per the definition of an 'aircrew member' under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

- the District Health Boards maintain, re-establish, or establish vaccination sites at all international ports and airports to support accessibility (noting that some of these sites have been decommissioned, or are about to be decommissioned, in order to scale up the vaccination programme to deliver vaccinations to vaccination Groups 3 and 4) – *except where there is only a small number of persons to be vaccinated at that location, and the DHB can provide a more efficient method of vaccination for those persons*
- the District Health Boards prioritise the vaccination of persons in vaccination Group 1 (which includes border workers), over all other vaccination groups (noting that the Ministry of Transport has been advised by some stakeholders that at least some DHBs are currently prioritising Group 2 over Group 1 and it can be challenging for border workers to access the vaccination in certain areas). The Ministry of Health is developing a process to enable PCBUs to make urgent vaccination appointments for their employees (including new border workers) directly with their respective DHBs. This is an interim process and will likely change with introduction of the national booking system.
- the District Health Boards vaccinate any border worker that requests vaccination regardless of whether that worker resides or works within that DHB area. This has been a particular barrier to vaccination for aircrew that reside and work in different DHB areas (note aircrew are issued 'red cards' by the Civil Aviation Authority; and a general approach could be any person who requests vaccination, and can produce a CAA issued red card, is given a vaccination);

54 The focus of the Ministry of Health in supporting the Government's vaccination rollout programme is to ensure:

- PCBUs have an accurate understanding of which members of their workforce have and haven't been vaccinated; and
- PCBUs and workers can get easy access to vaccination and know how to access more information.

55 Additionally, the Ministry of Health considers that the Border Worker Testing Register programme of work will respond to the previous challenges that PCBUs have had in accessing information on the vaccination status of their workforce. An interim solution is currently available, and an automated system will be available from 13 May 2021.

56 The Ministry of Health and DHBs have been working ensure that border workers can access vaccination as efficiently as possible. This includes the establishment of an 0800 number for PCBUs and workers to call to arrange appointments or ask questions. Furthermore, the Ministry of Health recently wrote to DHBs to make it clear that they should take a more generous interpretation to Group 1

57 To ensure support PCBUs were appropriately supported to implement Options 2 and/or 3 in this paper, it is likely that DHBs would need to maintain or re-establish vaccination sites at certain workplaces (based on our current understanding of vaccination uptake rates of these workforces), This would divert resources, and momentum, away from the wider rollout of the COVID-19 Immunisation Programme.

58 The scale of the impacts of diverting resources is dependant on the Options you chose and the number and locations of those workers who are still to be vaccinated.

Officials will report back to you on the implications of the options chosen, on the COVID-19 Immunisation national rollout plan.

- 59 Many aviation and maritime sector participants have specifically highlighted that employees have asked questions around why they need to get the vaccine when current health measures that they comply with have been effective. They have asked if there is any scope for amendments to current infection prevention control measures or testing requirements i.e. if they are vaccinated could there be less frequent testing, or less invasive testing (e.g. saliva testing), under the Required Testing Order. Many staff believe this would be an added incentive for them to vaccinate. The public health advice at this time is that vaccination status should not impact on testing requirements.
- 60 If 4 weeks was provided to enable the collection of better data, we suggest officials' could be asked to investigate and report back to Ministers on options for small adjustments to the mix of health measures to provide such an incentive. The intent of this option would be to incentivise frontline border workers to be vaccinated, while at the same time still maintaining key health measures, and overall health outcomes.

Economic and social impacts (including any supply chain impacts)

- 61 Under this option there is expected to be some limited economic impact, largely related to the inclusion of aircrew.
- 62 For workers captured under this option, and who refuse vaccination or who are unable to take it for genuine health reasons, redeployment opportunities will be extremely limited. This will have significant social and economic impact for these workers and their families. Data is not available to assess the number of people this would affect. With respect to aircrew, even if they are redeployed, their income may be negatively impacted as domestic short-haul, and long-haul routes have different allowance rates.

Consistency of how the Vaccination Order applies to employers

- 63 Option 1 provides the least consistent outcome across employers. Only persons who work in MIQ, or who are employed by a government agency in a border role, or who are international airline crew, are subject to the Vaccination Order. Consequently under this option there is a risk of inconsistent treatment by employers; for example under this option an Aviation Security Officer who works in an airside environment is required to be vaccinated, but an airline ground crew member who also works in an airside environment (and interacts with passengers) is not required to be vaccinated.

[Option 2: Vaccination of frontline border workers that are part of a group required to be tested every 7 days under the Required Testing Order](#)

- 64 In addition to workers covered by Option 1, this would bring border workers who would be generally regarded as a **close contact** of a person subject to the managed isolation requirements, or of an international (non-QFT) airline crew that are not subject to the managed isolation requirements, under the Vaccinations Order.
- 65 Examples of workers this would include are: on-board aircraft cleaners, maritime ship pilots and some stevedores.

- 66 From a public health perspective, the 7 day testing frequency is a proxy for public health risk.
- 67 It is important to note that within this group, the risk for particular work can still vary significantly. Public health advice is that some persons within this group are at higher risk than others. For example, a person who has sustained proximity within an enclosed space to an aircrew member, for more than 15 minutes, versus an aircraft cleaner that is simply in an enclosed space for more than 15 minutes but does not have sustained proximity.
- 68 The assessment to date does not include a detailed public health analysis, and instead uses the Required Testing Order as a proxy for public health risk. Ministers may wish to seek further detailed public health advice from the Ministry of Health.

Vaccination dates

- 69 Based on uptake rates to date, and feedback on time needed to practically implement this requirement, we consider relevant border workers under this option (other wider Government border workers) could be brought under the Order according to the following timeframes:
- First vaccination – 1 August 2021
 - Second vaccination – 5 September 2021

Economic and social impacts (including any supply chain impacts)

- 70 This option, and all subsequent options, give rise to significant supply chain risks, particularly by virtue of including ship pilots and stevedores.
- 71 Similar to Option 1, redeployment opportunities may be extremely limited for some of the workers captured under this option who refuse vaccination or who are unable to take it for genuine health reasons. This will have social and economic impact for these workers and their families. Data is not available to assess the number of people this would affect. However, we note because of the larger number of people captured by the Vaccination Order under Option 2 (compared to Option 1), it is reasonable to expect that the cumulative negative impact on workers and their families will be larger under Option 2 compared to Option 1.
- 72 Some of the roles captured by this option are specialised roles where the labour market is tight, and the roles cannot be easily replaced. Because of this, and because these roles facilitate the operation of international flights/sailings to and from New Zealand, it is reasonably possible that there will be a substantial disruption to New Zealand's supply chain if this option is pursued. Further detail, about particular roles is provided in **Annex 3**.

Consistency of how the Vaccination Order applies to employers

- 73 Option 2 provides a more consistent outcome across employers than Option 1. There is consistency across employers with respect to roles requiring testing every seven days. However, persons who are employed by the private sector, and who work in roles requiring testing every 14 days, would not be subject to the Vaccination Order – whereas government employees who work in roles requiring testing every 14 days,

would be subject to the Vaccination Order. Consequently under this option there is a risk of inconsistent treatment by employers; for example, a Customs Officer that boards ships (for 15 minutes or less) is required to be vaccinated, but a stevedore who boards ships (for 15 minutes or less) would not be required to be vaccinated.

Option 3: Vaccination of frontline border workers that are part of a group required to be tested every 14 days under the Required Testing Order

- 74 In addition to workers covered by Options 1 and 2, this option would see all border workers covered by the Required Testing Order required to be vaccinated to perform their role. This would bring under the Vaccinations Order:
- border workers who would generally be regarded as a **casual contact** of a person subject to the managed isolation requirements, or of an international (non-QFT) airline crew that are not subject to the managed isolation requirements;
 - some particular border workers who are **in contact with items** handled by an overseas person or a person subject to the managed isolation requirements;
 - border workers who are **in contact with items** handled by an overseas person or a person subject to the managed isolation requirements, within a specified time period, and who are a contact of a person subject to the Required Testing Order;
- 75 Examples of workers this would include are: airport airside retail, food and beverage workers, baggage handlers, airside workers handling baggage trolleys, most (if not all) stevedores, some drycleaners and caterers, some logistics operators (including truck drivers).

Workers who handle items

- 76 Officials previously recommended that workers who handle affected items and are subject to the Required Testing Order should not be required to be vaccinated to perform that work [MBIE 2021-3276 refers]. However, the Prime Minister has indicated through feedback on the briefing that she wishes to include workers where they regularly handle items removed from an MIQF, aircraft or ship.
- 77 The Required Testing Order was recently amended so that from 11.59pm on Wednesday 21 April 2021 workers who handle affected items are required to be tested if:
- the handling occurs within 72 hours of their removal from managed isolation and quarantine facilities and ships, or 24 hours of their removal from affected aircraft; and
 - the workers have had contact (defined as face-to-face contact, or being in a confined space, both within 2 metres of each other for 15 minutes or more) with members of specified other groups that require testing, while both are working.
- 78 In practice, this means that the trigger for the testing requirement is “having contact”, not the duration or frequency of “handling affected items”. If applied to vaccination, this requirement would mean that the difference between what vaccinated and

unvaccinated workers are permitted to do, could be several seconds of contact. The duration of their time spending handling affected items would not have an impact.

79

[REDACTED]

you could choose to extend the vaccination requirement to a wider group of workers than those under the Required Testing Order (ie, removing the condition of “having contact”). However, if vaccination is to be mandatory for roles that handle affected items, officials recommend retaining the “having contact” condition of the Required Testing Order.

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80 Public health advice is that contact or proximity to infectious people results in a higher risk of exposure to SARS-CoV-2 than contact with physical surfaces that may have been contaminated with the virus. Given that people who work at MIQFs, affected airports, affected ports, or affected ships will be vaccinated, the risk presented by coming into contact with a contaminated surface is relatively low, assuming that other public health measures (such as hand hygiene, appropriate PPE use) are also adhered to.

81 The decisions for required testing of workers who handle affected items and have contact were made very recently. To depart from this policy approach in respect of vaccination is likely to draw scrutiny. An inconsistent approach to testing and vaccination could also risk undermining the coherency and effectiveness of these measures and the wider health response.

82 Government does not have a direct relationship with the workers that handle affected items or the businesses that employ them. They are subcontracted by private companies (which may operate MIQFs, airlines or other relevant businesses) and in many cases do not go through the same operational checks or records of activity that other workers subject to testing requirements do, as their work is largely performed away from affected border and MIQ sites. It will not be possible for government to provide assurance of compliance with the Order, whether or not the “having contact” condition is kept.

83 Note that under the Required Testing Order some specified roles require testing if they come into contact with some specified affected items, even if they do not have contact with a person subject to the Required Testing Order (e.g. baggage handlers that work at affected airport³ and who handle baggage from affected aircraft⁴). The intent is for these persons to be vaccinated under this option (and for the groups that require vaccination to match the groups that require testing, regardless of whether they have contact with a person subject to the Required Testing Order).

Vaccination dates

84 Based on uptake rates to date, and feedback on time needed to practically implement this requirement, we consider relevant border workers under this option (other wider Government border workers) could be brought under the Order according to the following timeframes:

³ As per the definition of an ‘affected airport’ under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

⁴ As per the definition of an ‘affected aircraft’ under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

- First vaccination – 1 August 2021
- Second vaccination – 5 September 2021

Economic and social impacts (including any supply chain impacts)

- 85 Similar to Option 2, redeployment opportunities may be extremely limited for some of the workers captured under this option who refuse vaccination or who are unable to take it for genuine health reasons. This will have social and economic impact for these workers and their families. Data is not available to assess the number of people this would affect. However we note because of the larger number of people captured by the Vaccination Order under Option 3 (compared to Option 2), it is reasonable to expect that the cumulative negative impact on workers and their families will be larger under Option 3 compared to Option 2.
- 86 Some of the roles captured by this option are specialised roles where the labour market is tight, and the roles cannot be easily replaced. Because of this, and the fact that many roles are captured under this option, and because these roles facilitate the operation of international flights/sailings to and from New Zealand, it is probable that there will be disruption to New Zealand's supply chain if this option is pursued. Further detail, about particular roles is provided in **Annex 3**.

Consistency of how the Vaccination Order applies to employers

- 87 Option 3, provides for consistent outcomes across all employers. All persons who work in roles that are subject to the Required Testing Order are subject to the Vaccination Order (regardless of whether they are employed by the private sector or a government agency).

Part Three: Options to mitigate potential economic and social impacts

- 88 As identified within the prior two sections, there are significant risks to the supply chain, even though a transitional period, if a range of roles are brought under the Vaccinations Order. There are a mix of options to mitigate, in part, these risks.
- 89 The need for, scope and mix of options recommended will differ depending on Ministerial decisions about which workers may be brought under the Vaccinations Order.

Exceptions and exemptions

- 90 The current Order provides a framework for exceptions in limited circumstances, which would remain unchanged. In earlier decisions, Ministers decided not to provide for any exemptions due to the risk of undermining the public health objectives of the policy.
- 91 The Ministry of Transport considers that the workers that could be brought under the Vaccinations Order through options in this paper, carry different and more significant risks, than were apparent with MIQF and core public service workers. Notably, the specialist nature of the workforce, and impracticality to replace workers in some roles in the medium term, gives rise to potentially critical supply chain risks. In addition, we consider there may be circumstances where public health advice may be that a

specific person poses no health risk if they undertake the existing infection prevention control measures.

We recommend that in order to make Options 2 or 3 workable, while providing for some mitigation of these risks, there will need to be an exemption power. We suggest that the Minister for COVID-19 response should be able to issue exemptions (either for a class of persons, or an individual person) if the Minister is satisfied that:

91.1 it is necessary or desirable in order to promote the public interest to issue the exemption (whether on economic, social, national security, or other grounds), and the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption; or

91.2 the public health risk relating to the person or class of persons covered by the exemption is reasonably mitigated without vaccination, having regard to the proposed conditions;

and, before an exemption is issued:

91.3 on the grounds of public interest, the Minister for COVID-19 response must consider advice provided by the Director-General of Health, and the Secretary of Transport, and any other Official the Minister considers appropriate;

91.4 on the grounds that the public health risk relating to the person or class of persons covered by the exemption can be reasonably mitigated without vaccination, the Minister for COVID-19 response must consider advice provided by the Director-General of Health;

and, when issuing an exemption the Minister for COVID-19 response:

91.5 may, in the case of any exemption issued, impose a condition (or conditions) on the exemption as the Minister considers necessary.

Financial support

92 The Ministry of Social Development (MSD) advises that there are a range of existing MSD products that can be used to support workers who may be impacted (or are at risk of redundancy, termination of contract, or unable to be redeployed) as a result of extending the scope and application of the Vaccinations Order. This includes:

- Employment support - such as job matching services, the suite of flexi-wage (wage subsidy) products, and Rapid Return to Work services.
- Income support - such as main benefits, supplementary assistance (including accommodation and childcare), and hardship assistance.

93 People applying for income support with MSD are unlikely to have an initial stand-down period as income stand-downs have been temporarily removed until 24 July 2021. Workers whose employment is terminated because they cannot or will not get vaccinated are also unlikely to have a non-entitlement period (due to voluntary unemployment provisions) under current settings.

94 Targeted support through MSD's Rapid Response Teams has been offered to MIQF employers / workers impacted by the initial vaccination order. [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Withheld under section 9(2)(h) of the Official Information Act 1982

[REDACTED]

[REDACTED]

[REDACTED]

Withheld under section 9(2)(h) of the Official Information Act 1982

Next steps

103 Subject to your direction, officials may need to provide a further paper that seeks agreement to any outstanding detailed policy design matters not covered in this paper. We will work with your offices to provide this advice, should it be required.

104 A key issue Ministers may wish to give early consideration to is your willingness to communicate decisions, in advance of any Amendment Order being signed. We recommend this course of action to ensure DHBs and PCBUs have clarity over the scope of requirements and maximum lead time to achieve compliance. This will also afford the maximum time for employers to commence recruitment, where this may be required.

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Annex 1 – Public Health Rationale

- 1 The Ministry of Health has previously advised that there is a public health rationale for requiring that specified high-risk work only be undertaken by vaccinated people, in response to the current pandemic. This is because there is a risk that these individuals may be exposed to, and infected by, COVID-19 in the course of their work and may potentially transmit the disease to others.
- 2 The key public health consideration is that vaccines offer a high degree of protection for individuals who are vaccinated, alongside a range of other public health measures designed to protect those vaccinated and others they have contact with. A worker who has been vaccinated will have a very high likelihood that they will be protected from serious illness or death. Evidence of the efficacy of vaccines in preventing person-to-person transmission is still evolving, however, it suggests that the vaccine is also likely to be effective in preventing wider transmission.
- 3 Real-world evidence suggests that people vaccinated with the Pfizer-BioNTech COVID-19 vaccine who develop COVID-19 have a four fold lower viral load than unvaccinated people. This observation may indicate reduced transmissibility, as viral load and symptomatic infection has been identified as a key driver of transmission.
- 4 Vaccines offer a high degree of protection for individuals who are vaccinated, alongside a range of other public health measures. A worker who has been vaccinated will have a very high likelihood that they will be protected from serious illness or death and are more likely to be asymptomatic if infected.
- 5 Therefore, while vaccination does not prevent all possible episodes of transmission, vaccination has a clinically relevant impact on reducing the risk of transmission. The risk of COVID-19 infection in New Zealand is currently highest amongst those in high-risk roles at the border. Ensuring that such workers are vaccinated will therefore substantially protect the wider community.
- 6 It is important to note that Infection Prevention and Control practices (such as the use of personal protective equipment and safe distancing) provide another layer of protection. As a result, it is imperative that other public health measures remain in place presently.

What is the definition of high-risk work?

- 7 It is important to note that not all border work is high-risk. Factors that have a role at increasing the risk of being exposed to SARS-COV-19 include the following:
 - The number of international travellers (potentially infected people), the border worker may come in contact with (the more travellers, the higher the risk)
 - The ability of the border worker to maintain physical distancing from international travellers (less physical distancing, the higher the risk)
 - The length of interactions the border worker may have with international travellers (the longer the interaction, the higher the risk)
 - Whether the interaction is inside or outside (inside is higher risk).
- 8 MIQF workers are likely to be higher-risk when assessed against the above criteria, however a port worker who does not interact with people needing to quarantine is unlikely to be higher-risk.

- 9 Requiring vaccination is considered an appropriate response at this time, but it may not be required indefinitely into the future, as information about disease transmission and population immunity may change.

[REDACTED]

- [REDACTED]

- [REDACTED]

 - [REDACTED]

 - [REDACTED]

- [REDACTED]

 - [REDACTED]

 - [REDACTED]

 - [REDACTED]

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Annex 3 – Options Summary

Status Quo – Groups Subject to the Vaccinations Order	Examples of roles within group	Economic and social impacts (including any supply chain impacts)	Consistency across employers
Workers at managed quarantine facilities.	Not applicable, already covered by Vaccinations Order	Not applicable, already covered by Vaccinations Order	Maintaining the status quo provides a substantially inconsistent outcome across employers. Only persons who work in MIQ, or who are employed by a core government agency in a border role, are subject to the Vaccination Order.
Workers who transport to or from managed quarantine facilities persons required to be in isolation or quarantine under COVID-19 order.			
Workers at managed isolation facilities. ⁵			
Workers who transport to or from managed isolation facilities persons required to be in isolation or quarantine under COVID-19 order.			
Airsides government officials.			
Government officials who interact with international arriving or international transiting passengers (other than passengers arriving on QFT flights).			
Government officials who spend more than 15 minutes in enclosed space on board affected ships.			
Government officials who board, or have boarded, affected ships ⁶ .			
Government officials who transport persons to or from affected ships.			
Government officials (other than those specified in items 4.1-4.3 in Schedule 2 of the Vaccination Order) who work at an affected port and who interact with persons required to be in isolation or quarantine under COVID-19 order.			

⁵ This includes health practitioners working at managed isolation facilities (which are listed separately under the Required Testing Order).

⁶ As per the definition of an 'affected ship' under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

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Air cabin crew who travel on domestic flights within New Zealand that carry international arriving or international transiting passengers (other than QFT persons) who have not yet completed isolation or quarantine at managed isolation facilities or managed quarantine facilities.			
Groups that would be added under Option 1	Examples of roles within group	Economic and social impacts (including any supply chain impacts)	Consistency across employers
<p>Health practitioners working at accommodation services (other than private dwelling houses) where relevant aircrew members are self-isolating</p> <p>Airside non-core government officials (other than excluded airport persons⁷).</p> <p>Airside district health board workers (other than excluded airport persons).</p> <p>Health practitioners carrying out work airside.</p> <p>Non-core government officials (other than excluded airport persons) who interact with international arriving or international transiting passengers (other than passengers arriving on QFT flights).</p> <p>Non-core government officials (other than excluded port persons⁸) who spend more than 15 minutes in enclosed space on board affected ships.</p> <p>Non-core government officials (other than excluded port persons) who board, or have boarded, affected ships.</p> <p>Non-core government officials who transport persons to or from affected ships.</p> <p>Non-core government officials (other than those specified groups above) who work at an affected port and who interact with persons required to be in isolation or quarantine under COVID-19 order.</p>	<ul style="list-style-type: none"> Aviation security officers that work airside, or in an area where they interact with international arriving or transiting passengers (other than passengers arriving on QFT flights). Maritime officers (MNZ staff) that board ships subject to isolation in order to carry out an inspection required by maritime law. Healthcare practitioners working at Heartland Hotel where Air New Zealand crew are undertaking self-isolation. New Zealand domiciled air cabin crew that work on an international non-QFT flight. 	<p>There is expected to be some limited economic impact, largely related to the inclusion of aircrew.</p> <p>For workers capture under this option, who refuse vaccination or who are unable to take it for genuine health reasons, redeployment opportunities will be extremely limited. This will have significant social and economic impact for these workers and their families. Data is not available to assess the number of people this would affect. With respect to aircrew, even if they are redeployed, their income may be negatively impacted as domestic, short-haul, and long-haul routes have different allowance rates.</p> <p>Additionally airlines have advised that it could be challenging to roster crew on non-QFT, or QFT, routes</p>	<p>Option 1 provides the least consistent outcome across employers of the three options. Only persons who work in MIQ, or who are employed by a government agency in a border role, or who are international airline crew, are subject to the Vaccination Order.</p>

⁷ As per the definition of an 'excluded airport person' under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

⁸ As per the definition of an 'excluded port person' under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

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<p>Non-core government officials who interact with relevant aircrew members (other than those arriving on QFT flights)</p> <p>New Zealand domiciled air cabin crew who work on international flights that are not operating under QFT.</p> <p>Persons who are domiciled in New Zealand, and who are on the crew manifest of flight that is not operating under QFT, and who have an international layover (airside or landside) during that international travel.</p>	<ul style="list-style-type: none"> New Zealand domiciled aviation pilots, operating (or being repositioned) on an international non-QFT flight; and who have a layover (landside or airside) during that travel. 	<p>based on vaccination status – the airlines expect that they will incur a financial cost in doing this (Air New Zealand has indicate a preference that if non-QFT staff need to be vaccinated, all QFT staff should need to be vaccinated as well – Officials note however, that Ministers should consider whether requiring QFT aircrew to be vaccinated is justifiable (particularly when no other QFT border workers need to be vaccinated).</p> <p>Air New Zealand has requested a lead time of 3 months is required.</p>	
<p>Groups added under Option 2 (in addition to those added under Option 1)</p>	<p>Examples of roles within group</p>	<p>Economic and social impacts (including any supply chain impacts)</p>	<p>Consistency across employers</p>
<p>All other persons (other than excluded airport persons) who spend more than 15 minutes in enclosed space on board affected aircraft.</p> <p>All other persons (other than excluded port persons) who spend more than 15 minutes in enclosed space on board affected ships.</p> <p>Pilots (other than excluded port persons) carrying out work on or around affected ships.</p> <p>All other workers who transport crew to or from affected ships.</p>	<ul style="list-style-type: none"> Persons who clean the cabin of an aircraft (used for a non-QFT flight) after its arrival in New Zealand. Persons that remove and replace items (such as food trays, headsets, or laundry) the cabin of an aircraft (used for a non-QFT flight), after its arrival in New Zealand – <i>if on board an affected aircraft for more than 15 minutes.</i> Maritime pilots. Stevedores and provodores – <i>if in an enclosed space on board an affected ship for more than 15 minutes (note in most</i> 	<p>Similar to Option 1, redeployment opportunities may be extremely limited for some of the workers captured under this option who refuse vaccination or who are unable to take it for genuine health reasons. This will have significant social and economic impact for these workers and their families. Data is not available to assess the number of people this would affect. However we note because of the larger number of people captured by the Vaccination Order under Option 2 (compared to Option 1), it is reasonable to expect that the cumulative negative impact on workers and their families will be larger under Option 2 compared to Option 1.</p>	<p>Option 2, provide for more consistent outcome across employers than Option 1. There is consistency across employers with respect to roles requiring testing every seven days. However, persons who are employed by the private sector, and who work in roles requiring testing every 14 days, are not subject to the Vaccination Order – whereas government employees who work in roles requiring testing every 14 days, are subject to the Vaccination Order</p>

	<p><i>situations stevedores and provadores do not go on board an affected ship for more than 15 minutes).</i></p> <ul style="list-style-type: none">• Maintenance and engineering staff undertaking work on in an enclosed space an affected ship for than 15 minutes (e.g. an electrician undertaking repair work)• Ship's agents – <i>if in an enclosed space on board an affected ship for more than 15 minutes (note in most situations ship's agents do not go on board an affected ship for more than 15 minutes).</i>• Seafarer Welfare Board representatives <i>if in an enclosed space on board an affected ship for more than 15 minutes (note in most situations SWB representatives do not go on board an affected ship for more than 15 minutes).</i>	<p>If an insufficient number of aircraft cleaners (<i>and other workers that go on board an affected aircraft for more than 15 minutes</i>) were vaccinated there may be some disruption to international flights until persons in those roles could be replaced.</p> <p>There are very few maritime pilots in New Zealand, these are highly skilled roles (that are generally unique to each port in New Zealand) We are aware that some maritime pilots are vaccine hesitant. If these workers are required to be vaccinated to work as a marine pilot, but elect not to be vaccinated (and their employment is consequently terminated), then there will be significant medium-long term disruption New Zealand's international maritime supply chain (and significant consequential impacts to the New Zealand economy and the supply of critical goods and services in New Zealand). An exemption, or exemption regime, would be required to mitigate this risk.</p> <p>Stevedores are specialised roles where it can be challenging to replace these workers, noting in particular that they work as part of units undertaking specialised functions. If no stevedore that was vaccinated was available to</p>	
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		<p>undertake tasks where vaccination was required (which is a reasonable possibility), there would be significant disruption to the international maritime supply chain to/from New Zealand.</p> <p>Many maintenance staff that undertake work on ships are not specialised to the maritime sector. The work they undertake on ships may be irregular and unexpected. Other than anyone who is routinely servicing ships, it is likely that these workers have not the opportunity to be vaccinated until the vaccine is readily and widely available throughout the general population. Because of this, disruption to the international maritime supply chain to/from New Zealand.</p>	
Groups added under Option 3 (in addition to those added under Options 1 and 2)	Examples of roles within group	Economic and social impacts (including any supply chain impacts)	Consistency across employers
Airside retail, food, and beverage workers (other than excluded airport persons).	<ul style="list-style-type: none"> • Airside workers that work in a duty free retail store in a non-QFT zone (a red zone). • Airside cleaners work in a non-QFT zone (a red zone). • Baggage handlers that remove baggage from non-QFT flights. • Persons that remove and replace items (such as food trays, headsets, or laundry) 	<p>Similar to Option 2, redeployment opportunities may be extremely limited for some of the workers captured under this option who refuse vaccination or who are unable to take it for genuine health reasons. This will have significant social and economic impact for these workers and their families. Data is not available to assess the number of people this would affect. However we note because of the larger number of people captured by the Vaccination Order under</p>	<p>Option 3, provides a consistent outcome across all employers. All persons who work in roles that are subject to the Required Testing Order are subject to the Vaccination Order (regardless of whether they are employed by the private sector or a government agency).</p>
Airside workers (other than excluded airport persons) who handle baggage trolleys used by international arriving or international transiting passengers.			
Airside airline workers (other than excluded airport persons) who interact with passengers.			
Airside airport workers (other than excluded airport persons) who interact with passengers.			
Airside cleaning workers (other than excluded airport persons).			
All other airside workers (other than excluded airport persons).			

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<p>All other landside workers (other than excluded airport persons) who interact with international arriving or international transiting passengers (other than those arriving on QFT flights).</p>	<p>from the cabin of an aircraft (used for a non-QFT flight), after its arrival in New Zealand – <i>regardless of the time spent on board the aircraft</i></p>	<p>Option 3 (compared to Option 2), it is reasonable to expect that the cumulative negative impact on workers and their families will be larger under Option 3 compared to Option 2.</p>	
<p>Baggage handlers who work at affected airports⁹ and who handle baggage from affected aircraft¹⁰.</p>	<ul style="list-style-type: none"> • Stevedores that work on or around an affected ship - <i>regardless of the time and location spent on board or around the ship (note this will capture most, if not all, stevedores).</i> 	<p>Stevedores are specialised roles where it can be challenging to replace these workers, noting in particular that they work as part of units undertaking specialised functions. If no stevedore that was vaccinated was available to undertake a necessary task (which is probable), there would be significant disruption to the international maritime supply chain to/from New Zealand.</p>	
<p>Persons (other than excluded airport persons) who spend no more than 15 minutes in enclosed space on board affected aircraft.¹¹</p>	<ul style="list-style-type: none"> • Provadores – <i>if they board an affected ship, regardless of the time and location spent on the ship.</i> 	<p>There is currently a tight labour market for logistic workers (e.g. truck drivers with a class 5 licence) where it can be challenging to replace these workers. If no logistic worker that was vaccinated was available to undertake tasks where vaccination was required (which is a reasonable possibility), there would be disruption to New Zealand's supply chain.</p>	
<p>All other landside workers who interact with relevant aircrew members (other than those arriving on QFT flights).</p>	<ul style="list-style-type: none"> • Maintenance and engineering staff undertaking work on an affected ship, regardless of time and location on ship (e.g. an electrician undertaking repair work). 	<p>If an insufficient number of other workers (required to be vaccinated</p>	
<p>Stevedores (other than excluded port persons) carrying out work on or around affected ships.</p>	<ul style="list-style-type: none"> • Ship's agents – <i>if they board an affected ship, regardless of the time and location spent on the ship.</i> 		
<p>All other persons (other than excluded port persons) who board, or have boarded, affected ships.</p>	<ul style="list-style-type: none"> • Seafarer Welfare Board representatives – <i>if they board an affected ship, regardless of</i> 		
<p>All other workers who transport persons (other than crew) to or from affected ships.</p>			
<p>All other port workers (other than excluded port persons) who interact with persons required to be in isolation or quarantine under COVID-19 order.</p>			
<p>Workers at accommodation services (other than private dwellinghouses) where relevant aircrew members are self-isolating.</p>			
<p>Workers who handle affected items within 72 hours of their removal from managed quarantine facilities and who have contact with members of groups specified in Part 1 or 2 (of Schedule 2 of the Required Testing Order) while both are working.</p>			
<p>Workers who handle affected items within 72 hours of their removal from managed isolation facilities and who have contact with members of groups specified in Part 1 or 2 (of Schedule 2 of the Required Testing Order) while both are working.</p>			

⁹ As per the definition of an 'affected airport' under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

¹⁰ As per the definition of an 'affected aircraft' under clause 4 of the COVID-19 Public Health Response (Required Testing) Order 2020

¹¹ Note government officials that perform this activity are included in the status quo as 'airside government officials', and non-core government officials that perform this activity are included in option one as 'airside non-core government officials'.

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<p>Workers who handle affected items within 24 hours of their removal from affected aircraft and who have contact with members of groups specified in Part 3 or 5 (of Schedule 2 of the Required Testing Order) while both are working.</p>	<p><i>the time and location spent on the ship.</i></p> <ul style="list-style-type: none">• Drycleaners or caterers that handle affected items from:<ul style="list-style-type: none">○ affected aircraft (within 24 hours of removal from the aircraft), and interacts with persons that is subject to the required testing order○ A MIQ facility (within 72 hours of removal from the MIQ facility) and interacts with a person that is subject to the required testing order.• Logistics operators (e.g. truck driver with a class 5 licence) that handle affected items removed from an affected ships (within 72 hours of removal from the ship)• Port crane operators may be included in this group (<i>we note some PCBUs are uncertain on how the Required Testing Order applies to the duties of port crane operators, and have taken the cautious approach of having their crane operators tested – however this position may be reviewed if people that are required to be tested are also required to be vaccinated</i>).	<p>were vaccinated) there may be some disruption to international flights or international ship movements until persons in those roles could be replaced.</p>	
<p>Workers who handle affected items within 72 hours of their removal from affected ships and who have contact with members of groups specified in Part 4 (of Schedule 2 of the Required Testing Order) while both are working.</p>			

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6 May 2021

OC210340

Hon Michael Wood
Minister of Transport

BACKGROUND INFORMATION ON TOLLING

Purpose

This briefing responds to your verbal request for information about road tolling when you met with officials in January 2021. It provides background information about tolling in general but is **not** advice on any particular tolling proposal you may receive.

Key points

- Tolling is not widely used in New Zealand. Tolls are currently collected on three roads. Tolling, together with a loan, brought forward the construction of the roads, which would have otherwise been delayed.
- Our hypothecated revenue system of road user charges and fuel excise duty provides an efficient and effective way to raise revenue from road users at this time. In other countries, tolling has a much more important role in land transport funding than in New Zealand. Many of the reasons why tolling is more widely used in other countries are not relevant to New Zealand.
- Tolling can face challenges in New Zealand, including raising only a modest amount of revenue each year and having relatively high administrative costs. There is also a very limited social licence for tolling, which is reflected in current legislative settings.
- As Minister of Transport you decide whether a new road (local or State highway) is tolled, and you must be satisfied that the statutory criteria in the Land Transport Management Act 2003 (LTMA) have been met. Each tolling proposal must be considered on a case-by-case basis in accordance with the LTMA. The Ministry is your advisor when you consider a tolling proposal from any road controlling authority. We can provide detailed advice when you come to consider a proposal.

Recommendations

This briefing responds to your request for information about tolling and has no recommendations.



Withheld under section 9(2)(a) of the Official Information Act 1982

Marian Willberg
Manager, Demand Management and Revenue

Hon Michael Wood
Minister of Transport

..... / /

...6/05/2021.

Minister's office to complete:

- Approved
- Declined
- Seen by Minister
- Not seen by Minister
- Overtaken by events

Comments

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BACKGROUND INFORMATION ON TOLLING

This paper responds to your request for advice on tolling

- 1 On 25 November 2020, we provided you with a briefing on our proposed land transport revenue work programme (OC200794 refers). That briefing mentioned tolling and provided high level information about your role in regards to tolling.
- 2 On 27 January 2021, we met with you to discuss our proposed land transport revenue work programme and you indicated you would like further advice from the Ministry on tolling.
- 3 This briefing provides context and background information about tolling policy in general but is **not** advice on any particular tolling proposal you may receive. Each tolling proposal you receive needs to be considered on a case by case basis in accordance with the statutory requirements, which we can advise you on separately.

There are three toll roads in New Zealand

- 4 Tolling was used on the Auckland Harbour Bridge (from 1959 until 1984), the Lyttelton Tunnel (between 1963 and 1979) and the Tauranga Harbour Bridge (between 1988 and 2001). Tolling was integral to the business cases for these projects as the revenue brought forward and paid for, their construction. These toll roads all provided significant time savings over their existing alternative routes.
- 5 There are currently three tolling schemes in place in New Zealand and all of them are on State highways. Tolling and loans brought forward the construction of the roads. The three toll roads, and their financial performance, are detailed below.



Northern Gateway: in 2005, the Crown loaned \$158 million to supplement funds available for the project in the National Land Transport Fund (\$180 million) to bring forward the construction of the project by ten years. Tolling was introduced to repay the Crown loan.

In 2019/20, the total loan balance (including interest) was \$213 million and total toll revenue collected since 2009 was \$94 million. In 2019/20, toll revenue was \$10.5 million (excluding GST) and around \$5 million was collected to fund the costs of the tolling back office. The tolling equipment and set up costs were \$28 million.

The road is 7.5km long and the toll is \$2.40 for a light vehicle and \$4.80 for a heavy vehicle one-way. The road un-tolled had a benefit cost ratio (BCR) of 2.05. Tolling the road resulted in a BCR of 1.4 to 1.7 (reduction relates mainly to cost increases from tolling infrastructure and a reduction in benefits due to diversion of traffic).



Tauranga Eastern Link: In 2010, Waka Kotahi borrowed \$107 million from the Crown to bring forward the construction by around seven years and tolling was introduced to repay the loan. In 2019/20, the balance of the loan was \$107 million. In 2019/20, around \$5 million was collected in toll revenue and around \$2.5 million was collected to operate the back office. The tolling equipment and tolling set up costs were \$19 million.

The road is 23km long and the toll is \$2.10 for a light vehicle and \$5.20 for a heavy vehicle one-way. Toll revenue now covers the yearly interest costs of the loan, which are around \$5 million per year. The road un-tolled had a BCR of 1.7 to 2.2. Tolling the road resulted in a BCR of 1.4.



Takitimu Drive in Tauranga (also known as Route K): In 2003, Tauranga City Council borrowed money to build the road as a toll road at a cost of \$44 million. A manual collection system was originally in place, yet the revenue collected was not covering the collection and financing costs of the road. In 2015, around \$65 million from the National Land Transport Fund was used to purchase the road (including interest on the loan) from Tauranga City Council. Revenue from the tolls is reimbursing the National Land Transport Fund for the purchase of the road. Currently, toll revenue is around \$8 million per year, of which just under \$3 million funds the costs of the tolling back office. At 2019/20, around \$41 million is still to be raised by toll revenue to pay for the purchase. Waka Kotahi's set up costs, including electronic tolling equipment, were \$6 million.

The road is 6.8 km long and the toll is \$1.90 for a light vehicle and \$5.00 for a heavy vehicle one-way. Public reports suggest that the road, when constructed, had a BCR under 1.¹

- 6 Revenue from the existing toll roads is modest. However, the schemes are relatively young. Traffic volumes and therefore revenue is increasing, but the schemes are not self-supporting (all have been dependent on funding contributions from the National Land Transport Fund including for operating and maintenance costs).

¹ This is based on anecdotal public reports, we can do more research to confirm this if you wish.

Tolling in New Zealand has a different role than in other countries

- 7 Our hypothecated funding system, utilising road user charges (RUC) and fuel excise duty, provides an efficient and effective way to raise revenue from road users at this time. However, in other countries, tolling has a much more important role in land transport funding compared to New Zealand. Some of the reasons for this are:
- **land borders** – tolling allows jurisdictions to collect revenue from non-residents. We do not have any land borders.² This means we do not need to raise revenue from out-of-state or out-of-country vehicles that are utilising our roads, but not purchasing fuel.
 - **recovering the greater costs imposed by heavy vehicles** – other countries do not have an equivalent system to New Zealand's RUC that accounts for the greater costs heavy trucks impose on our roads (which fuel taxes poorly reflect). Most jurisdictions are limited in how they recover the cost of extra damage caused by heavy trucks on the road, other than road tolls.
 - **federal and state division of funding and infrastructure provision** – in other countries, such as the United States and Australia, fuel taxes are set nationally, but much of the road infrastructure is managed regionally or locally. In these countries, tolls can be used by state or regional authorities to raise revenue to pay for projects that have not been prioritised by federal governments.
 - **declining revenue from fuel tax** – in some jurisdictions, there has been a lack of willingness to raise fuel taxes, often for a period of decades. As a consequence, revenue from fuel taxes is declining and tolling has been used as an alternative means to raise revenue.³ In contrast, revenue from fuel excise duty and RUC in New Zealand is *actually increasing*, as rates have been regularly raised over the past twenty years.
 - **revenue not hypothecated to transport** – in many jurisdictions, revenue from fuel taxes is paid into the general account and funds may be used for non-transport activities. In New Zealand, revenue from RUC and fuel excise duty is hypothecated to land transport (hypothecation also means that there may be less public resistance to road tax increases, as all revenue is reinvested in the land transport system).

Tolling can have advantages, including bringing forward projects that would otherwise be delayed

- 8 To date, tolling in New Zealand has allowed roads to be constructed ahead of the scheduled construction date based on project evaluation, prioritisation and funding available. This broader objective (rather than just raising revenue) has helped to make the case to the public to pay an extra amount above the fuel excise duty or RUC that they already contribute. Also in New Zealand, tolling revenue is tied to the

² There are, however, local government boundaries in New Zealand.

³ For example, petrol tax in New South Wales (collected by the Federal Government) is only about 60 percent of that in New Zealand (AUD \$0.47 cents per litre vs NZ\$0.80 incl GST). However the average Sydney resident is reported to face over AUD \$80 per week of costs for road tolls, which are collected for the State government or private sector road operators. See www.budgetdirect.com.au/car-insurance/research/car-owner-cost-statistics.html.

costs of the specific road project, and the revenue can only be applied to the particular project from which it is collected.

- 9 Other advantages of tolling are that it provides:
- **supplementary revenue** – tolling creates a supplementary source of revenue for a particular road project that can be steady, on-going and helpful.
 - **a direct link between revenue and an individual project** – tolling can create a link between where funds are generated and where they are spent, which does not exist in our national funding system where revenue is aggregated into the National Land Transport Fund and allocated to the highest priority projects
 - **familiarisation with paying for roads in different ways** – tolling potentially gets road users used to paying for roads in different ways (which could be helpful if there is a move away from fuel tax in the future).
- 10 Tolling has garnered public support in New Zealand when it is explicitly used to bring forward projects that were not otherwise able to be funded or would be delayed (for example, around 78 percent of the surveyed public supported bringing forward the Tauranga Eastern Link by tolls).

Tolling in New Zealand can also face challenges

- 11 There are several challenges to tolling in New Zealand:
- **Low traffic volumes and modest revenue** – under existing legislation, tolling is restricted to new roads. In recent time, major new roads have mostly been constructed in outer-urban and rural areas that have relatively low traffic volumes, especially compared to some existing urban motorways. As a consequence, the revenue raised from our existing three toll roads is modest.
 - **Diversion of traffic** – the requirement to have a feasible, un-tolled, alternative route means road users decide whether they want to use the toll road (and pay the toll) or use the free alternative, which is often of a much lower safety rating. This can obviously reduce the amount of revenue raised, but could be mitigated by emphasising the benefits of the toll road (relative to the un-tolled route).
 - **Relatively high administrative costs** – tolling has relatively high administrative costs (compared to fuel excise duty and RUC). This, combined with our low traffic volumes, can mean administrative costs are much higher relative to other revenue raising options. Very large transaction volumes are needed to drive down administrative costs and achieve efficiencies. Waka Kotahi's accounts indicate that up to a third of tolling revenue collected (\$9.9 million of \$31.5 million collected in 2019/20 financial year⁴) is used for administrative purposes. For comparison, the RUC system is reported to cost less than \$20 million to administer annually and collects nearly \$1.8 billion in revenue.⁵ Administration costs (as a proportion of revenue) may, however, decrease as more tolling schemes are added, given large fixed costs of the tolling back office would be spread across more schemes.

⁴ Page 164, Waka Kotahi Annual Report 2020 Financial Statements and Audit Reports

⁵ Fees for collection of road user charges \$12.3M + Crown grant of \$4.3 million for road user charges collection, investigation and enforcement + a number of smaller fees to fund other services (Waka Kotahi Annual Report 2020)

- **Unwillingness to pay** – because of our relatively high levels of fuel taxes (compared to the United States and Australia, where tolling is more common), there is little expectation that motorists will need to pay an additional amount for using a specific road. Annual survey data from the New Zealand Automobile Association (AA) suggests that many members are not willing to pay a toll that is more than a few dollars.
- 12 Many of these issues shaped current legislative settings which, in large part, reflect the very limited social licence or expectation for the general use of tolling in New Zealand. Waka Kotahi and local government continue, through their business case processes, to assess all funding sources for new roads. In recent times, tolling has not been the favoured option to pay for the full construction costs of a new road.⁶ For State highways, the National Land Transport Fund is typically the favoured funding source. However, tolling is being explored by Waka Kotahi to pay for part of the construction, operating and maintenance costs for some new roads.
- 13 The use of tolling for general revenue raising is precluded. Tolling revenue is tied to an individual road. There is a view that currently tolling cannot be undertaken for demand management or specifically to reduce emissions. Waka Kotahi also notes that using tolling revenue to pay for public transport is also precluded and that the redirection of tolling revenue into alternative modes has received some public support in other jurisdictions.
- 14 Some commentators have seen tolling as a potential stepping stone to road pricing or congestion pricing in New Zealand. We are not aware of evidence that tolling schemes on individual roads strengthens the case or public support for other forms of pricing either locally or more widely across a network. In Australia, the tolling of roads has effectively crowded out the potential for congestion pricing in cities.
- 15 Several stakeholders have stated positions on tolling. For example, the AA publicly opposes tolling for general revenue raising but is open to it when it brings forward individual projects that would otherwise be delayed.⁷ The Road Transport Forum opposes tolling for public-private partnerships.⁸
- 16 We know one of your key priorities is reducing emissions from the transport system. Tolling is very unlikely to have any real impact on emissions from land transport under its current legislative settings. Equity is another important consideration in tolling and in transport policy in general. Tolling has the potential to increase the cost of transport which can disproportionately impact lower income households, hence an argument for requiring a feasible untolled alternative.

⁶ Business cases for new roading projects have identified that tolling is unlikely to be viable to recover the full construction costs. Due to this, tolling is increasingly being explored in regard to operation and maintenance costs, or part of the construction costs of a new road.

⁷ www.aa.co.nz/about/newsroom/media-releases/infrastructure/safe-and-sensible-decision-made-on-transmission-gully-tolling/

⁸ www.nztruckdriver.oncentre.co.nz/road-transport-forum-news/aug-20-rtf-opposes-tolling-for-public-private-partnerships?A=WebApp&CCID=30817&Page=4&Items=1

You are the key decision maker for the tolling of new roads under the Land Transport Management Act

- 17 The main legislation for creating toll roads is the Land Transport Management Act 2003 (the LTMA). The LTMA enables tolling of both local roads and state highways, and all vehicle types. You are the key decision maker on establishing proposed tolling schemes under the LTMA and Cabinet has a role as tolling schemes are put in place by Order in Council. The LTMA's tolling provisions were amended in 2012 to simplify the making of toll roads.
- 18 In addition to the LTMA, the Local Government Act 1974⁹ allows the Minister of Local Government (by notice in the Gazette) to collect tolls at any bridge, tunnel or ferry¹⁰. The Land Transport Act 1998 also allows for a road controlling authority to establish tolls on any of the roads under its jurisdiction, but these tolls are limited to heavy vehicles. These powers are not currently utilised.
- 19 All three existing toll roads in New Zealand are State highways and were established under the LTMA. The LTMA is used because it applies to both light and heavy vehicles and provides a framework for establishing tolling schemes, public engagement, operation of the scheme – namely, privacy and enforcement.

The criteria for putting in place a proposed tolling scheme are set out in the LTMA

- 20 Funds collected through a road tolling scheme may only be used for the planning, design, supervision, construction, maintenance or operation (or any combination of these activities) of the new road (on which the toll is being placed).
- 21 Section 46(1)(a) of the LTMA states that you may only recommend a toll for a 'new road'. A road is considered a new road if it has not previously been open to the public. Once a road has been opened to the public, it is an 'existing road' and cannot be tolled. If a new lane is added to an existing road, only the additional lane itself will be considered a new road.
- 22 The Governor-General may, by Order in Council made on the recommendation of the Minister of Transport, establish a road tolling scheme for a new road. Road controlling authorities submit proposed tolling schemes to you for consideration.
- 23 Section 48(1) of the LTMA states that to recommend an Order in Council the Minister of Transport must be satisfied:
- that the relevant public road controlling authority or authorities have carried out adequate consultation on the proposed tolling scheme
 - with the level of community support for the proposed tolling scheme in the relevant region or regions
 - that a feasible, un-tolled, alternative route is available to road users
 - that the proposed tolling scheme is efficient and effective.

⁹ Section 361(1)(a) "...authorises a council to establish, by using the special consultative procedure, toll gates and collect tolls at any bridge, tunnel or ferry within the district or under the control of the council."

¹⁰ Although there are several car/vehicle ferries in New Zealand, these are commercial services and not operated as toll roads.

- 24 The Ministry is your advisor when you consider a tolling proposal from any road controlling authority. We can provide further advice on these criteria should you receive a tolling proposal.

Work on congestion pricing and the future of the revenue system will have relevance for tolling

- 25 The tolling provisions in the LTMA were last reviewed and amended in 2012. That review was aimed at simplifying and streamlining requirements rather than fundamentally re-writing tolling policy in New Zealand. We understand that legislative change regarding tolling is not a priority for you at this time. However, if you did want officials to explore legislative change then you may wish to inform Cabinet of this, as tolling policy can be contentious. This is the approach by previous Ministers who wished to explore potential changes to tolling legislation.
- 26 As part of the congestion pricing work in Auckland, we have undertaken a review of the legislative settings required for congestion pricing, including how the current tolling provisions might be used. This work found it is very unlikely that the current legislative framework could be used to deploy congestion pricing because the existing provisions are limited to new roads and there is a need for a feasible, un-tolled, alternative route. Congestion pricing would need to be deployed across a network of existing roads to be effective, and not on individual stretches of new State highway. New legislation, or most likely an amendment to the LTMA, would be required to implement congestion pricing. If a decision was made to implement congestion pricing there would need to be further consideration of potential legislative design options. This could occur following the Transport and Infrastructure Select Committee's inquiry into congestion pricing in Auckland.
- 27 As you are aware, we are undertaking work on the future of the revenue system to assess the medium-to-long-term sustainability of the revenue system. This project may need to consider the role of tolling in any future system.

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10 May 2021

OC210227

Hon Michael Wood
Minister of Transport

Hamilton to Auckland Intercity Connectivity - next stage of work

Purpose

Seek your agreement to complete the assessment of Hamilton to Auckland intercity connectivity through an indicative-level business case.

Key points

- Work to date on the Hamilton to Auckland Intercity Connectivity business case has demonstrated the value of investigating faster intercity passenger transport between these two cities.
- This work is a key initiative in the Hamilton to Auckland Corridor (the Corridor). It provides a useful case study to advance our understanding of how interregional passenger transport could be planned and funded, and what policy and governance changes would be needed to achieve the outcomes that Government might seek from interregional and faster rail. This is important to advance our thinking around New Zealand's approach to long-term, enabling and intergenerational investments.
- Completion of key elements of an indicative-level business case will consider the need for investment, the benefits of the Hamilton to Auckland Intercity Connectivity project (the Project) and enable decisions to be made about the preferred way forward.

- Cabinet directed us to consider an extension of the business case to include Hamilton to Tauranga. [REDACTED]

However, there is still value in doing some work on the Hamilton to Tauranga connection where it supports the Project (such as understanding wider interregional passenger demand).

- The cost of faster rail in the Corridor will be high, and further work is needed to demonstrate the case for investment. The value of faster rail has not been comprehensively analysed or compared with other interventions in the Corridor on a value for money or cost-benefit basis.

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Act 1982

- This work represents an opportunity to investigate how interregional passenger transport can transform patterns of housing and economic growth, urban development, and travel behaviour in the Corridor and beyond.

Recommendations

We recommend you:

- 1 **note** that the Ministry of Transport has prepared a project outline to advance the Hamilton to Auckland Intercity Connectivity project as directed by Cabinet [DEV-20-MIN-0156 refers];
- 2 **agree** to the Ministry of Transport proceeding with the proposed work required to complete an Indicative-level Business Case for Hamilton to Auckland Intercity Connectivity, subject to obtaining the necessary funding; and Yes / No
- 3 **agree** to **one** of the following options to investigate a possible extension of Hamilton to Auckland rapid rail to Tauranga, either:
 - no further work at this time; or Yes / No
 - continue to investigate a possible extension, where this is important for informing the Hamilton to Auckland business case work or does not require additional resource; or Yes / No
 - progress the Hamilton to Tauranga investigation towards an indicative-level business case alongside Hamilton to Auckland, subject to obtaining the required funding. Yes / No
- 4 **agree** to meet with officials to discuss the contents of this briefing. Yes / No

Gareth Fairweather
**Manager, Placemaking and Urban
Development**

..... / /

Hon Michael Wood
Minister of Transport

..... / /

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Minister's office to complete:

Approved

Declined

Seen by Minister

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Comments

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Hamilton to Auckland Intercity Connectivity - next stage of work

Background

- 1 The Hamilton to Auckland Corridor (the Corridor) connects two of New Zealand's fastest growing cities through an area of high natural and cultural importance and value. The parallel road and rail alignments, as well as the Waikato River, secure its position as New Zealand's most significant transport corridor, and as a natural focus for transit oriented development.
- 2 The absence of a long term, coordinated approach to managing land use and transport infrastructure provision has contributed to increased emissions from vehicles, poor access for communities and unreliable travel times. This has negative impacts on the economy and the environment, as well as on the ability of vulnerable members of the Corridor's communities to access employment and other opportunities.

Hamilton to Auckland Intercity Connectivity is a key initiative in the Corridor

- 3 From December 2018 to July 2020, the Ministry of Transport led the development of an Indicative Business Case (IBC) on the potential for rapid rail to help deliver the Government's aspirations for growth and economic development in the Hamilton to Auckland Corridor.
- 4 The work was in response to Hei Awarua ki te Oranga (also known as the Shared Spatial Intent) which recommended that fast rail services between Hamilton and Auckland be considered to help integrate and strengthen the two economies, and support the Corridor as a whole.
- 5 This complements other transport initiatives being taken forward from recommendations of the Future Proof Partnership¹ to ensure the Corridor thrives as it grows, including introducing the Hamilton to Auckland 'start-up' passenger rail service – Te Huia, the Hamilton-Waikato Mass Transit Plan, and the electrification of the Auckland metropolitan rail network between Papakura and Pukekohe.
- 6 Funding constraints meant that an interim IBC was produced. Further work is necessary to complete all aspects of a full IBC, as outlined in this paper.

The interim Indicative Business Case shows the value of faster rail

- 7 The IBC work to date has highlighted the critical role that rapid rail could play in securing the future prosperity of the Corridor and its communities. It presents a strong case for further investigation of rapid rail in the Corridor.
- 8 While the interim IBC has started to investigate these benefits, there is still more work to do to build a full picture. It also does not provide any information on the commercial viability, affordability and deliverability of the Project.

¹ The Future Proof Partnership includes: Ngā Karu Atua o te Waka, Waikato-Tainui, Tainui Waka Alliance, Waikato Regional Council, Waipa District Council, Waikato District Council, Hamilton City Council, Waka Kotahi and Waikato District Health Board. For Hamilton-Auckland corridor matters, the partnership is expanded to include Central Government, Mana Whenua Kaitiaki Forum and Auckland Council.

- 9 The interim IBC offers four possible scenarios for a rapid rail connection between Hamilton and Auckland, including extending electrification of the existing route, and building an entirely new rail line. It also describes how phased investment in rapid rail in the Corridor could be used to:
- significantly reduce journey times and improve journey reliability;
 - better connect the Corridor's metropolitan hubs, improve access and strengthen the economic interactions between the two cities to support the metropolitan areas to reach their full potential and harness the benefits of agglomeration;
 - encourage increased rail mode share and reduce the impact that existing intercity travel has on emissions; and
 - reduce the number of deaths and serious injuries resulting from road crashes.
- 10 Reimagining transport connectivity in the Corridor, with a particular emphasis on rail, offers an opportunity to enable more efficient and successful growth. Land brought forward for development around rail can be of higher density, using stations as a focus for more compact, vibrant and healthier communities.


Current system-wide limitations of interregional passenger rail

- 11 There is currently no consolidated policy framework to support and guide interregional passenger rail planning in New Zealand. Such a framework would be necessary to enable the Government to plan for the future of current services in the long term rather than on an ad hoc basis (such as with the current questions about the future of the Capital Connection).
- 12 Both of the existing interregional passenger rail services Te Huia and the Capital Connection, have bespoke funding arrangements. There are system challenges with funding services that span local authority boundaries as the current planning and funding system is built around a single region's services. The current approach requires ad hoc workarounds where regions need to negotiate at length their roles, responsibilities and funding for the service. It is unlikely that these types of services can easily be developed further without a more consistent funding and policy framework.
- 13 A clear policy framework would also help us to manage the growing interest from a range of local authorities for passenger rail services. The Government could use the framework to articulate what it sees as the role of interregional passenger rail in achieving other goals such as transport emissions reductions.
- 14 While the Project is not intended to answer all these questions, it provides a useful case study to inform the development of such a framework. For example, the Project will support our understanding of how a national approach to aspects like procurement and service operation could work, as well as matters of governance, funding and finance. If there is direction from Government to expand interregional passenger rail services or further demand from communities for services, the Project could assist in answering some of these questions.

Advancing the Project through an indicative-level business case

- 15 In July 2020, Cabinet agreed that the Ministry of Transport develop the next stages of the Project, working with the Ministry for Housing and Urban Development, the Treasury, KiwiRail, Waka Kotahi New Zealand Transport Agency and Treaty partners in the Corridor.
- 16 Cabinet also included a mandate to initiate an investigation of a separate indicative business case for extending rapid rail to Tauranga, and how that would fit with the proposal.
- 17 The Ministry has been working closely with its consultants to develop a project plan for the next stage of work, including the programme of work, timescales, funding, governance arrangements, risks to decision makers and a stakeholder plan.
- 18 Part of this process has been identifying the gaps in the interim IBC, when measured against the requirements for a Treasury approved indicative-level business case.

Considering a business case for Hamilton to Tauranga

- 19  Additionally, there is no defined urban growth corridor between Hamilton and Tauranga, with both planning to expand in different directions rather than towards each other.
- 20 We have considered these findings and developed three options for how to proceed:
- Option One: do nothing. The Ministry will not do any further work on a Hamilton to Tauranga business case.
 - Option Two (recommended): Include consideration of Hamilton to Tauranga where it supports the development of the Hamilton to Auckland business case.
 - Option Three: start a Hamilton to Tauranga business case investigation. This would be in conjunction with the Hamilton to Auckland business case. This work could be accelerated to complete an IBC at the same time as the Hamilton to Auckland IBC.
- 21 We recommend Option Two because it takes a pragmatic approach to continuing with an investigation of a Hamilton to Tauranga connection where that work can bring value but the amount of resource dedicated to this work will be small. It recognises that a future Hamilton to Tauranga connection could influence demand in the Corridor, but little is currently known about this.
- 22 Option One would preclude any work being done that could inform the case for investment in the Hamilton to Auckland Corridor, and Option Three would require additional resourcing. The strategic benefit of investigating the Hamilton to Tauranga connection and how it could inform rail policy is currently limited.

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The Corridor and system stewardship benefits of further work on the Project

- 23 Taking forward work on this initiative holds real value in articulating a long-term vision for intercity connectivity, and for clarifying the links between this and other initiatives in the Corridor.
- 24 Furthermore, using this work to develop our understanding of the potential for future intergenerational investments like rapid rail is a key stewardship function for the transport system.
- 25 There is an opportunity to use this work to shape the Government's wider approach to regional spatial planning as well as the reform of the Resource Management System. The proposed Spatial Planning Act could have a key role in how rail corridors such as Hamilton to Auckland could be managed for future development.
- 26 Continuing our work on all aspects of an IBC will also inform our wider work on how interregional passenger rail should be planned, funded and regulated in New Zealand, and the role of central government in this.

Understanding the future pathway for the Hamilton to Auckland Corridor

- 27 A project of this scale will have a long lead time before implementation. Doing further work on the technical and other aspects of the Project will help us understand the need for the Project and what is required to deliver it.
- 28 Understanding the conditions that are needed to support this type of transport intervention will both inform, and be informed by, the land use and transport planning activities underway in the Corridor by the Future Proof Partnership.
- 29 By doing this work, we can better articulate to our Corridor partners about when key choices are needed around associated land use planning, upgrades to existing infrastructure, route protection and mode. We can also consider any decisions for development in the Corridor that might limit future implementation of, or reduce the case for, rapid intercity rail.
- 30 Through the IBC we will gain a better understanding of the timing and conditions that would support faster rail services in the Corridor (and elsewhere), and develop critical success factors that can be used to guide planning for future investment. The strategic nature of the Project means that route protection needs to happen well in advance of any scheme being implemented, and it will be necessary to know the triggers (such as rezoning, greater demand or population increase) for moving to the next stage of development.
- 31 The IBC work would also benefit from further transport modelling including the Ministry's work to develop a new national transport model called Project Monty. There currently is not an easy or comprehensive way to model passenger transport demand across two or more regions, and so Project Monty is critical to support our understanding of the role of public transport and in particular faster rail in the Corridor and elsewhere.

- 32 Using Project Monty to develop the IBC will mean that both projects can develop an understanding of how rapid rail interventions can increase public transport mode share, provide access to social and economic opportunities and increase the attractiveness of interregional public transport, which will have spin off benefits for other projects.

Relationship to Te Huia and other Corridor initiatives

- 33 The Hamilton to Auckland IBC is looking beyond the current scope and timeframe of Te Huia start up service, and thinking strategically about how rail could serve the Corridor in the long term. The IBC will benefit from data coming from Te Huia in terms of patronage and demand for public transport in the Corridor.
- 34 Recently completed transport and land use planning initiatives that have come out of the Future Proof Partnership such as the Hamilton-Waikato Metro Spatial Plan have placed rail/rapid transit at the core of future urban development. The growth trends and pressures faced by the Future Proof sub-region² and the Hamilton to Auckland Corridor are increasing. The key focus of the Partnership is currently on housing and infrastructure to support growth.

Risks and Constraints of doing further work on the Project

- 35 The Ministry will need to continue to manage stakeholder expectations around rapid rail. There is high interest both in the Corridor and in other regions about the potential for rapid transit (both in terms of services within a region, but also interregional rail passenger services) to play a role in achieving key transport outcomes including emissions reductions, mode shift, safety and good urban form.
- 36 We need to be clear that the next phase of work is not a commitment to delivering a rapid rail scheme, and that progression to a detailed business case is not necessarily the next logical step. Progressing this work is not a commitment to funding any large passenger rail investment. Corridor planning and route protection is a more likely outcome.

Indicative timeline for the next phase of work

- 37 We intend to complete the work over a six-month timeframe. This provides for a continuous workflow rather than continuing with start-stop work that is less efficient and more costly. The indicative timeline is:
- Project set-up from May 2020 to July 2021
 - procurement from May 2021 to June 2021
 - engagement with Stakeholders from July 2021 to November 2021
 - Project delivery from July 2021 to March 2022
 - IBC delivered early to mid 2022.

² Hamilton City, Waipa District, and Waikato District.

- 38 The objective is to build upon the value created by the previous work through addressing gaps in information identified in the interim IBC. Overall value will be achieved by completion of the IBC. If only parts of the recommended scope are undertaken, a further phase will be needed to complete the IBC, thereby delaying the overall usefulness of the Project.

Funding needed to progress the indicative business case

- 39 When Cabinet directed the Ministry to undertake the first stage of work, it allocated \$300k of the estimated \$2.3m needed to complete an indicative business case. We sought the remaining \$2m funding through Budget 2019 and Budget 2020 but this was not successful.
- 40 The Ministry anticipates that the next stage of work to complete the indicative business case is likely to require a minimum of [REDACTED]. This level of funding reflects the minimum amount needed to make meaningful progress on developing the interim IBC and filling the remaining gaps in the indicative-level components of the business case.
- 41 In the absence of another confirmed funding source, we consider that the most appropriate funding source is through the Ministry's baseline (i.e. Crown funding) given the Project is driven by Crown priorities. However, as you are aware, the Ministry's baseline is already committed to delivering your other priorities for the transport work programme.
- 42 We would like to discuss with you the priority of the Project relative to other initiatives in the transport work programme, including initiatives that could be de-prioritised should you wish to prioritise the next stage of the Project.
- 43 Alternatively, officials can explore other funding options, including seeking funding through Section 9(2)(c) of the Land Transport Management Act 2003 (LTMA) (which allows the Crown to use land transport revenue to fund certain investment strategy and policy activities) or the Budget 2022 process.
- 44 We acknowledge that the NLTF is highly constrained and that choosing to fund this project will mean the money is not available for other work identified in the National Land Transport Plan. The value of prioritising this work is that interregional passenger rail may be increasingly important to reducing New Zealand's transport emissions. Having a good understanding of the value of faster interregional rail will support evidence-based decisions about Crown investment in transport.
- 45 The Ministry is currently working through a prioritisation process for projects seeking funding through section 9 of the LTMA. You can expect joint advice to you and the Minister of Finance on which projects to fund in the week commencing 24 May 2021.
- 46 If the request for funding for this project is unsuccessful, we will need to investigate alternative funding options such as submitting a budget bid in June 2021.

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Input from other agencies, Treaty partners, and stakeholders

- 47 Treasury, Te Waihanga Infrastructure Commission, Ministry for Housing and Urban Development, KiwiRail, Waka Kotahi New Zealand Transport Agency and Waikato mana whenua have been engaged as part of preparing this advice.
- 48 We have delayed contacting the Tāmaki Makaurau Auckland mana whenua (individually or via the Mana Whenua Forum) to manage the amount of Ministry engagement happening simultaneously in their rohe. Once a decision is made about how the Project progresses, we will make contact with these groups as part of an overall engagement strategy.
- 49 The Ministry wrote to the mana whenua groups in the Waikato section of the Corridor in March 2021 to update them on the Project, express our desire to work with them as the Project continues, and to offer to meet with them to discuss the Project in greater detail. Ngāi Tai ki Tāmaki, Ngāti Tamaoho, and Waikato-Tainui (on behalf of the Hamilton mana whenua) replied.
- 50 We have met with Ngāi Tai ki Tāmaki and have arranged to meet with the remaining Waikato groups in the coming weeks. Ngāi Tai ki Tāmaki are broadly supportive of better transport options in the Corridor and stressed the importance of getting ahead of demand. They want to see a future proofed transport system in the Corridor that provides more flexibility and more inclusive access for existing communities.

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NEW ZEALAND
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BRIEFING

11 May 2021

OC210365 / BR/21/51

Hon Michael Wood
Minister of Transport

Action required by:
Thursday, 13 May 2021

Hon Poto Williams
Minister of Police

LAND TRANSPORT (DRUG DRIVING) AMENDMENT BILL DEPARTMENTAL REPORT - COVER BRIEFING

Purpose

This briefing attaches the draft Departmental Report for the Land Transport (Drug Driving) Amendment Bill. The draft Report identifies the key matters raised by submitters and the Transport and Infrastructure Select Committee (the Committee) and our response to these matters. This briefing proposes two changes to the Bill for your consideration.

Key points

- The Land Transport (Drug Driving) Amendment Bill (the Bill) is currently before the Committee. Public submissions on the Bill closed on 23 April 2021.
- The Committee received 188 submissions from a total of 173 submitters. The Committee also heard 23 oral submissions.
- In our capacity as departmental advisers, we are scheduled to present a Departmental report to the Committee on 20 May 2021. This will need to be lodged by Friday 14 May 2021. These timeframes will enable the Committee to report back to Parliament by 22 June 2021.
- We have attached the draft Departmental Report (the draft Report) for your consideration (refer **Appendix 1**).
- The Committee and submitters raised a number of issues with the Bill. The most commonly cited issues were in relation to the oral fluid testing regime. In particular, submitters raised issues around the sensitivity of oral fluid tests to certain drugs, their inability to test for impairment, the accuracy of these tests (i.e., primarily the risk of false positives) and people's ability to challenge a positive oral fluid test result.
- The Bill includes some safeguards to mitigate the above concerns.
- However, we are proposing two further changes, one of which requires your consideration.

- We will include a recommendation in the draft Report to amend the criteria for the approval of oral fluid testing devices. This would ensure the Minister of Police has regard to the cut off thresholds specified in any relevant New Zealand Standards. This could go some way to mitigating the public's concerns about the sensitivity of oral fluid tests. We are working with the Parliamentary Counsel Office (PCO) on how to best give effect to this proposal.
- We are seeking your guidance on whether to progress an option that specifies in the Bill that elected blood tests only test for the drug(s) or class(es) of drug that return a positive result on an oral fluid test (rather than testing for the full panel of potentially impairing drugs). If you agree, we will put this option before the Committee in the Departmental Report for its consideration.
- Police and Transport have divided views on the benefit of this second proposal and have provided separate comment in this briefing.

Recommendations

We recommend you:

- 1 **note** we will provide a final version of the Departmental Report to the Committee by 14 May 2021;
- 2 **note** officials will include a recommendation to amend the Bill in the Departmental Report to ensure the criteria for the approval of oral fluid testing devices includes reference to any relevant New Zealand Standards;
- 3 **Agree or disagree** that the scope of elective blood tests is narrowed to only test for the drugs or classes of drug that return a positive result on an oral fluid test. Agree/disagree

 Helen White
Manager, Mobility & Safety
 11 / 5 / 2021

 Hon Michael Wood
Minister of Transport
 / /

 Bruce O'Brien
Assistant Commissioner: Deployment & Road Policing
 11 / 05 / 2021

 Hon Poto Williams
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	[REDACTED]	✓
Jenny Cross, Manager, Criminal Justice Policy, New Zealand Police	[REDACTED]	✓

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LAND TRANSPORT (DRUG DRIVING) AMENDMENT BILL DEPARTMENTAL REPORT - COVER BRIEFING

Passage of the Bill

- 1 In July 2020, the Government introduced the Bill. The proposed compulsory random roadside drug testing regime allows Police to conduct random oral fluid tests at the roadside to detect the most prevalent impairing illicit and prescription drugs. Delivery of this regime is a key action under Road to Zero, the Government's road safety strategy for 2020-2030.
- 2 The Bill is currently before the Committee, which is due to report back to Parliament on 22 June 2021.
- 3 Public submissions on the Bill closed on 23 April 2021. The Committee received 188 submissions from a total of 173 submitters (15 submitters provided two-part submissions or sent an attachment through as a second submission). The Committee also heard oral submissions from 23 submitters.
- 4 As advisers to the Committee, we are preparing a Departmental Report (the draft Report), which is attached for your consideration. This currently includes:
 - a summary of submissions
 - key issues raised in submissions
 - departmental advisers' response to these issues, including recommendations for amendments to the Bill
 - advice on the two matters Ministers asked Select Committee to consider, and on which we have briefed you previously [OC210026 / BR21/09 refers]:
 - the Order in Council process in the Bill to set and amend criminal limits and blood infringement thresholds
 - whether drivers liable for an infringement offence following a blood test should contribute towards the cost of the blood test.
- 5 We heard a number of oral submissions on 6 May 2021 and Dr Helen Poulsen spoke to the Committee again on 10 May 2021. We will therefore continue to refine the draft report before lodging with the Committee by Friday 14 May 2021. This deadline is to enable the Committee to report back to Parliament by 22 June 2021.
- 6 The draft Report does not currently include a clause-by-clause analysis (which breaks down submitters' comments and our responses by clause). We will add that prior to lodging with the Committee. This will be included as an appendix and will reflect the key issues in the main report.

Submitters raised a number of concerns around oral fluid testing

- 7 Submitters raised a number of concerns with the Bill. One commonly cited group of issues was in relation to the oral fluid testing regime, including concerns about:

- the accuracy of oral fluid testing devices
- oral fluid testing devices not establishing impairment
- the sensitivity of oral fluid tests i.e. the cut-off thresholds in available devices may be too sensitive to certain drugs
- the risk of false-positive test results, and the concern that any disproportionate impacts on vulnerable road users could be exacerbated by this
- the risks of false-negative results and allowing impaired drivers to continue to drive after a negative result
- people's access to justice following a positive oral fluid test result (given the risk of false positives).

Two changes to the Bill are proposed

- 8 Two changes to the Bill are proposed as a way of partially addressing these issues.
- 9 The first proposed change, to amend the criteria for approving oral fluid testing devices, will be reflected in the Departmental Report.
- 10 However, we require your consideration of the second proposed change. Police and Ministry of Transport have differing views on the proposal.

Advice from the Expert Panel on oral fluid testing devices

- 11 The Expert Panel on Drug Driving (the Panel) has assessed five oral fluid testing devices commercially available in New Zealand that may be suitable for roadside testing. These devices can detect the most prevalent drugs used by New Zealand drivers, including THC and methamphetamine. As the Panel has advised, these devices do not definitively prove the use of a drug or capture every instance of drug use, and false positives and false negatives are possible.
- 12 In addition, often an oral fluid test will test for a class of drugs through a single channel. For example, the oral fluid testing devices that detect opiates and sedatives (benzodiazepines) have cut-off thresholds for each class of drug even though drugs within this class may have different potencies. An oral fluid device could return a positive 'opiate' result for a number of opiates, but it will not indicate which specific drug caused this result (e.g. morphine or codeine). Only a blood test will be able to establish the specific drug in the driver's system.
- 13 The Panel has advised that oral fluid testing technology has advanced to a point that some oral fluid testing devices might now be too sensitive for the purposes of the proposed regime. However, this will depend on the device procured.

Proposed change - amend the criteria for the approval of oral fluid testing devices to reference consideration of any relevant New Zealand Standards for oral fluid cut-off thresholds

- 14 The Panel has advised that there is an Oral Fluid Standard AS/NZS 4760:2019¹ that recommends detection cut-off thresholds for oral fluid testing devices. These Standards are most commonly applied to workplace safety but the Expert Panel notes they may have relevance for roadside testing. The recommended cut-off thresholds are generally accepted as indicative of recent drug use, rather than historical use or accidental exposure that is unlikely to cause impairment.
- 15 Some commercially available oral fluid testing devices, although not all, are aligned to oral fluid drug concentrations set in this Standard. Officials will include a recommendation to amend the Bill in the draft Report. This recommendation will ensure the criteria for the approval of oral fluid testing devices reference consideration of any relevant New Zealand Standard approved under the Standards and Accreditation Act 2015. Officials are working with PCO to determine how to best give effect to this proposal.
- 16 This would strengthen the criteria for the approval of a device, which could go some way to mitigating concerns about the sensitivity of oral fluid tests. A device with cut-off thresholds significantly below those recommended in the current Standard are likely to be too sensitive and would not align with the policy intent.

Proposed change - specify in the Bill that elected blood tests only test for the drug or class of drug that returned a positive result on the oral fluid test

- 17 The oral fluid testing regime is an infringement regime based on an oral fluid test result at the roadside. Given the concerns around the accuracy of oral fluid testing devices and the risk that they may produce false positive test results, an evidential blood test was built into the proposed regime as a safeguard.
- 18 Under the proposed regime, a person can elect to take an evidential blood test if they wish to challenge the result of their oral fluid test. The regime also has mandatory blood tests, for example, if a driver does not satisfactorily complete a Compulsory Impairment Test (CIT), after a crash or if a driver cannot undertake or refuses a CIT, or a driver refuses an oral fluid test. Depending on their blood test results, the test could expose a driver to infringement or criminal sanctions for any qualifying drug and blood test costs, or no sanction at all.
- 19 One option that could be put before the Committee is to narrow the scope of the elective blood test, when a driver wishes to challenge the outcome of their oral fluid test. This elective blood test could be narrowed to test for only the drug(s) or class(es) of drugs that returned a positive result on the oral fluid test.
- 20 We provide separate Transport and Police comments on this proposal. We would only provide this advice to the Committee if you both supported this proposal. We would present it as an option for the Committee to consider reporting back on, rather than a recommendation from advisers. It is unclear whether this change is within the scope of existing Cabinet decisions.

Transport comment

- 21 Transport considers this proposal to be an option for mitigating concerns about false positives.

¹ AS/NZS 4760:2019 Australian/New Zealand Standard - *Procedure for Specimen Collection and the Detection and Quantification of Drugs in Oral Fluid.*

- 22 The primary purpose of this elective blood test is to provide a safeguard for drivers against incorrect oral fluid testing outcomes (i.e., devices are known not to be 100% accurate). If oral fluid testing were as accurate as blood testing the elective blood test may not form part of the regime.
- 23 We acknowledge this proposal would create two different approaches to blood testing within the regime. However, we consider these tests are already serving very different purposes in the regime.
- 24 Given a blood test can expose drivers to much harsher sanctions drivers may be discouraged from electing a blood test. We expect most drivers will not challenge the results of the oral fluid test and accept the \$200 infringement fee and 50 demerit points. Even with an information campaign about the regime it may be difficult for drivers to fully understand the decision about whether to elect a blood test within minutes of failing an oral fluid test.
- 25 Transport supports specifying in the Bill that elected blood tests would test only for the drug(s) or class(es) of drugs that returned a positive result on the oral fluid test. This would remove some of the disincentive and increase the likelihood of people challenging the OFT results, which could go some way to addressing the concerns about the accuracy of oral fluid testing devices and the risk of false positives.
- 26 We also acknowledge this would prevent Police from identifying through an elective blood test a driver who has consumed multiple impairing drugs not tested for, or identified by, an oral fluid test. However, we do not expect a driver who has taken multiple drugs to elect a blood test under the current regime either, given the harsher sanctions the driver would be likely to face if they elected a blood test. The CIT pathway (followed by a blood test) remains available if a Police officer has good to suspect a driver is impaired.

27 [REDACTED]

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Police Comment

- 28 Police is concerned that this proposal may undermine the road safety benefits delivered by the regime, and will not necessarily address the issue of false positive results.
- 29 The Bill recognises that drivers who have consumed multiple drugs pose a much higher road safety risk than those with a single drug, and Police does not think that the proposal aligns with Cabinet’s intent to provide greater penalties to reflect this.
- 30 It is well established that the oral fluid test will only test for a maximum of six drug classes, whereas the blood test analysis can identify a greater number of the most prevalent impairing drugs. Restricting liability for the presence of multiple drugs because a driver elects a blood test, ignores the greater road safety risk posed by drivers who have consumed multiple drugs.

- 31 It is unclear to what extent there may be an issue around driver reluctance to elect blood tests due to the risk that other drugs may be detected. We do not have an evidence base to enable us to understand the extent of the problem (if any) and to assess this against the trade-off for road safety outcomes.
- 32 The regime is already complex and will be challenging for some drivers to understand when the consumption of drugs and the combination of driving will make them liable for an offence. We acknowledge that it may be difficult for drivers to decide to elect a blood test within minutes of producing a positive result. However, we also recognise that drivers face the same challenge under the alcohol regime.
- 33 Limiting blood testing to only one drug detected through an oral fluid test is likely to impact on the effectiveness of our planned research and evaluation of the outcomes achieved with the drug driving regime. By restricting the ESR analysis to only the results of the failed OFT (1 drug type) will potentially undermine the ability to build a comprehensive data set to understand the extent and nature of drug use in drivers. This could have consequential impacts in terms of fully understanding what interventions are required for drug affected drivers or what changes or enhancements are needed to the regime informed by such data.
- 34 Police believes that the Bill provides sufficient safeguards to ensure that any oral fluid test used in delivering the regime will be as accurate as possible, and will be designed to avoid detecting those drivers who have inadvertently or passively consumed drugs or whose consumption is not recent and is unlikely to impair driving. The additional proposal outlined in this briefing will provide greater assurance around this.
- 35 It is unclear what, if any, cost efficiencies this proposal may have, including the impact on the costs of blood tests. These costs will not be fully understood until the implementation of the regime.
- 36 Should the Bill be amended to give effect to Transport's recommendation, Police will need to effectively manage any associated administrative complexity to minimise the risk of additional legal challenges.

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Appendix 1: Departmental Report

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Ministry of **Transport**
TE MANATŪ WAKA



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Land Transport (Drug Driving) Amendment Bill Departmental Report

May 2021



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Glossary

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Introduction

1. The Land Transport (Drug Driving) Amendment Bill establishes a new random roadside oral fluid testing regime. The Bill aims to reduce road trauma and make our roads safer by detecting and deterring people from driving after taking potentially impairing drugs. Delivery of this regime is a key action under Road to Zero, the Government's road safety strategy for 2020-2030.
2. The oral fluid testing regime would sit alongside the current compulsory impairment test (CIT) approach to drug driving. Under the new regime, police officers would be able to conduct random oral fluid tests at the roadside to detect the most prevalent impairing illicit and prescription drugs. Oral fluid testing devices will detect the presence of drugs above a specific cut-off threshold built in to the testing device. Police will be able to test drivers 'anywhere, anytime', consistent with the existing approach to drink driving enforcement.
3. The Transport and Infrastructure Committee (the Committee) received 188 submissions. Appendix 1 provides a list of submitters.
4. A number of submitters commented on elements of the proposed regime at a high level, or raised general concerns. We also heard a number of concerns and recommendations on specific matters about the regime. Submissions also tended to focus on specific issues, rather than the wording of specific clauses in the Bill. We have therefore provided a summary of submissions and then reviewed submissions and provided responses by key theme. A more detailed clause-by-clause analysis follows in Appendix 2.
5. This report covers:
 - a. issues raised in submissions on the Bill
 - b. departmental advisers' response to these issues, including recommendations for amendments to the Bill
 - c. additional matters proposed by advisers
 - d. advice on the two matters raised by Ministers:
 - i. the Order in Council process in the Bill to set and amend criminal limits and blood infringement thresholds
 - ii. whether drivers liable for an infringement offence should contribute towards the cost of the blood test.
6. The Bill had its First Reading and was referred to the Committee on 4 August 2020 by the previous Government. The Bill was amended by a Government Supplementary Order Paper (SOP) which was publicly released and provided to the Committee on 1 April 2020. The SOP added blood infringement thresholds and criminal limits into the Bill.

Land Transport (Drug Driving) Amendment Bill

7. A number of submissions were made prior to the SOP. Some concerns or recommendations are therefore addressed through the amendments made in the SOP. Where this is the case, this is made clear in our commentary.
8. The recommended amendments to the Bill are subject to Parliamentary Counsel Office (PCO) advice concerning how to best express each recommendation in the legislation. In addition, PCO may include in the revision-tracked version additional minor amendments to the Bill that are:
 - a. a consequence of implementing a recommendation in this report
 - b. that are necessary for the overall coherence of the legislation, or
 - c. are necessary editorial, minor or technical changes (for example, punctuation, spelling and typographical corrections).

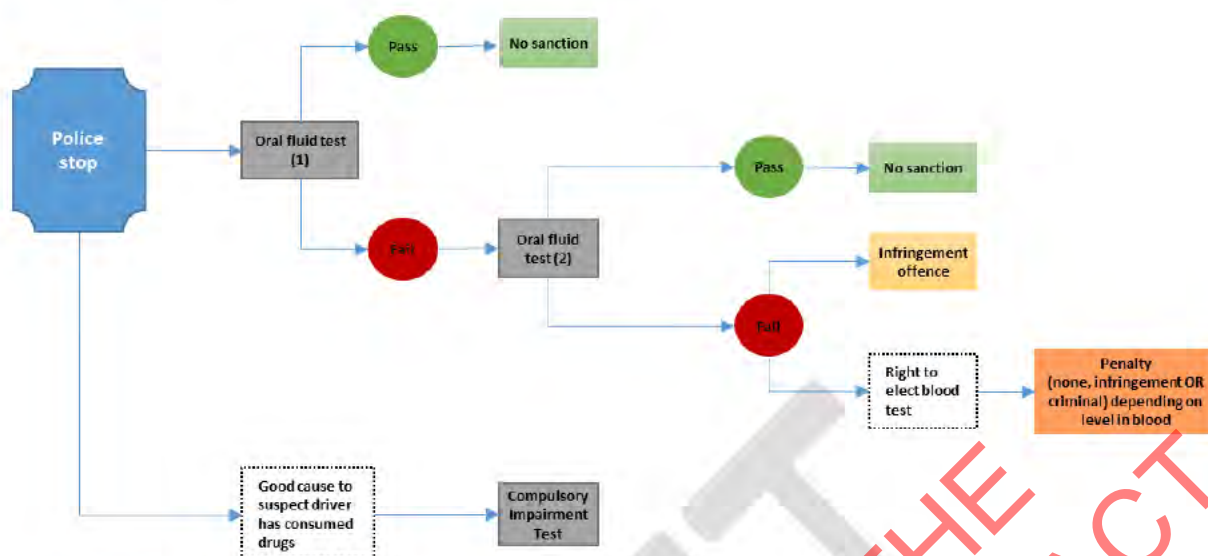
Overview of the regime

9. Random roadside oral fluid testing and the CIT will form the basis of a broader drug driving testing regime, which also includes drug testing for hospitalised drivers and drivers who have injured others in a crash. The Bill proposes that the offence and penalty regime for hospitalised drivers¹ and drivers who have injured others in a crash be aligned with the oral fluid testing regime.
10. The new regime will enable Police to test a much larger number of drivers each year for drug driving, which will increase detection and deterrence of this high-risk behaviour.
11. The oral fluid test is expected to detect the most prevalent legal and illicit drugs used by New Zealand drivers: THC (the psycho-active ingredient in cannabis), methamphetamine, benzodiazepines (sedatives) MDMA (ecstasy), opiates (e.g. morphine) and cocaine.²
12. A driver who receives a negative result on a first or second oral fluid test will usually be free to go. Drivers who receive two consecutive positive oral fluid test results will incur an infringement penalty, aligned to the drink driving infringement penalty.
13. Drivers who receive two consecutive positive oral fluid test results can elect to undertake an evidential blood test. Depending on the levels of drugs in their blood sample, they could receive no sanction, or an infringement or criminal penalty (refer Figure 1 below).
14. The Bill extends the existing medical defence to drivers who have taken prescription drugs in accordance with their prescription and any instructions from a health practitioner or from the manufacturer of the qualifying drug.

¹ At present, hospitalised drivers are only tested for drugs in Schedule 1 the Misuse of Drugs Act 1975.

² This will be subject to the availability of appropriate devices identified through the Police procurement process.

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Compulsory impairment testing

15. Once a police officer has stopped a driver, the officer can require the driver to undergo a CIT if the officer has good cause to suspect a driver has consumed drugs (for example, the driver is visibly impaired). Once a police officer has elected to administer a first oral fluid test, the Bill provides discretion for an officer to switch to a CIT following a negative oral fluid test result (first or second test) or where a first oral fluid test shows the presence of multiple drugs (refer to Appendix x for a more detailed process diagram).
16. A driver who does not satisfactorily complete a CIT will be required to take an evidential blood test. The driver could be subject to either infringement or criminal penalties, depending on the levels of drugs in their blood sample.³
17. A driver who passes the CIT will be free to go (for impaired driving processes) after the test is completed. Police officers will not be able switch to the oral fluid testing process after they have commenced the CIT process.

Offences and penalties

18. The Bill establishes both infringement and criminal offences, depending on the testing process and the quantity of drugs found in a driver's system. Oral fluid tests will result in infringement offences only. Criminal limits will apply only to offences established through blood testing.
19. There are three key types of limits/thresholds that underpin the drug driving regime.
 - a. *oral fluid infringement thresholds* will be the cut-off thresholds built into oral fluid testing devices. These thresholds will determine the level at which a drug is detected as present, and therefore where a positive oral fluid test result will be

³ This is a change from the current CIT regime where the presence of a drug is a criminal offence only.

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produced. A driver who produces a positive result on two consecutive oral fluid tests will be liable for an infringement offence.

- b. *blood infringement thresholds* will determine the level at which a driver receives an infringement offence following an evidential blood test.
 - c. *criminal limits* will determine the level at which a driver receives a criminal offence following an evidential blood test.
20. Blood infringement thresholds and criminal limits were included in the Bill through the SOP. These thresholds and limits for 25 impairing drugs were recommended by an Independent Expert Panel on Drug Driving (the Expert Panel)⁴. The criminal limits were not included in the Bill at the time of introduction due to delays in establishing, and therefore receiving advice from, the Expert Panel.
 21. In recognition of the additional road safety risk of driving after consuming multiple drugs (or drugs and alcohol), the Bill also introduces an infringement combination offence and a criminal combination offence, which would apply when a driver has consumed more than one substance.
 22. Compulsory referrals for assessment to drug education or rehabilitation programmes would be required for second criminal offences in some situations and all third and subsequent criminal offences, in line with the current approach to alcohol offences.
 23. Police will also provide drivers who receive an infringement penalty with information on drug-related health services.

Summary of Submissions

24. A total of 188 submissions were received on the Bill from 173 submitters (15 submitters provided two-part submissions or sent an attachment through as a second submission). The Committee also heard oral submissions from 23 submitters.
25. 41 submissions were received from organisations, non-government organisations, charities and/or trusts:
 - a. 7 submissions came from health service providers, of which, 3 were health service providers for Māori.
 - b. 5 submissions came from medical member organisations;
 - c. 7 submissions came from health, safety and/or political advocacy groups.
 - d. 3 submissions came from drug-related advocacy groups, including the New Zealand Drug Foundation and Community Action on Youth and Drugs (Auckland and Morrinsville).

⁴ The Expert Panel includes members from the fields of toxicology, pharmacology, pharmacy, medicine and biochemistry.

Land Transport (Drug Driving) Amendment Bill

- e. 3 submissions came from advocacy groups for the legalisation of cannabis.
 - f. 2 submissions came from road user organisations, the Road Transport Forum and the New Zealand Automobile Association;
 - g. the remaining 14 organisation submissions included submissions from Te Rūnanga o Ngāti Whātua, the Hamilton City Council, New Zealand Law Society, New Zealand Police Association and Office of the Privacy Commissioner.
26. An additional 137 submissions were received from individuals. The full list of submitters is attached as Appendix A.
27. 86 submissions were opposed to the Bill. Equally, 59 submissions supported the Bill and a further 22 supported the intention of the Bill to reduce drug-related harm on New Zealand's road. However, many of those in support, or in support of the intent, had concerns or recommended changes to the Bill.
28. 16 submissions did not clearly support or oppose the Bill.

Key matters raised by submitters

29. The key issues raised by submitters can be grouped around the following key matters:
- a. general concerns about the scientific understanding of drug impairment
 - b. oral fluid testing devices, including:
 - i. accuracy of oral fluid testing and the risk of false positives and false negatives
 - ii. oral fluid testing devices not establishing impairment
 - iii. drug switching
 - c. cannabis testing
 - d. offences and penalties and taking a harm minimisation and health based approach to drug driving
 - e. blood infringement thresholds and criminal limits
 - f. NZ Bill of Rights Act 1990 (BORA), including concerns about the medical defence and access to justice
 - g. implementation and deployment
 - h. disproportionate impacts to specific communities including Maori and Pacific peoples and young people
 - i. monitoring and evaluation.

General concerns about the scientific understanding of drug impairment

30. Several submitters raised concerns about the lack of scientific research on drug consumption and impairment. A number of submitters highlighted that the relationship between drug use and impairment is more complicated than it is for alcohol. For some, this concern was sufficient to recommend the regime as designed is not implemented until there is a better understanding of this relationship between drug use and impairment.
31. For example, the NZ Drug Foundation noted that “for most illicit substances, there is no clear established linear correlation between when a person takes a drug, how much they take and their level of impairment”.
32. Another submitter indicated, “unlike alcohol, dose-performance relationships for other drugs are not well established.”
33. These concerns are reflected in the advice from the Expert Panel, which advised that setting specific limits is not an exact science. For any given individual the effects of a drug dose will be different, and will depend on factors such as the route of administration, time since the last dose, the cumulative effect of previous doses and the ability of that individual to eliminate the drug from their body. And that this relationship for most drugs is more difficult to determine than it is for alcohol.
34. Many submitters raised this concern about cannabis in particular and focused more on oral fluid rather than blood concentrations (these specific matters are touched on in more detail in the sections below).

Departmental response

35. Officials acknowledge the relationship between drug concentrations in bodily fluid and impairment is more difficult to establish than the similar relationship for alcohol. This makes determining appropriate infringement thresholds and criminal limits for the regime difficult.
36. However, there are a number of illicit and prescription drugs which impair driving ability and increase the risk of crashes on our roads. Drivers in New Zealand are using these drugs and driving and the current deterrence approach is not as effective as it could be. Only 26 percent of New Zealanders think it is likely they will be caught drug driving versus 60 percent for drink driving.⁵
37. It is important to note that an infringement offence at the roadside is based on the presence of a drug above a cut off threshold built in to an oral fluid testing device. This test will not establish the specific level of drug in the driver’s system or guarantee impairment. Rather, testing devices will be procured that have cut-off thresholds that are indicative of recent use to avoid capturing drivers with low levels of drugs in their system which are unlikely to be impairing.

⁵ Starkey, N., and Charlton, S., The prevalence and impairment effects of drugged driving in New Zealand, University of Waikato, (2017).

38. The Expert Panel provided advice on criminal limits and blood infringement thresholds – this ensured independent experts informed key elements of the proposed regime. The Expert Panel’s recommended blood levels are based, where this is possible, on limits set in other jurisdictions, drug concentrations in impaired drivers in New Zealand, data from scientific literature and take into account policy objectives of the regime. The Expert Panel’s advice in relation to oral fluid testing is covered in the section below.
39. This approach sets blood infringement thresholds at a level where there is a risk of impairment and avoids penalising drivers who have small amounts of a drug in their system from accidental or passive exposure or past consumption. Criminal limits are set at a higher drug-blood concentration than blood infringement thresholds, reflecting a higher level of confidence that the driver is impaired.
40. This does not prove that each individual driver is impaired, but the regime targets only drivers with high enough drug concentrations in their bodily fluid that they are likely to be impaired. While the relationship between consumption and impairment is clearer for alcohol, the alcohol testing regime does not prove that each individual driver is impaired either, only that their breath or blood is above a specific alcohol concentration.
41. The proposed regime will detect, remove from the road, and penalise drivers with drug concentrations that are likely to be impairing (and therefore, across the population, increase the overall crash risk). This regime is also expected to deter other drivers from engaging in this high-risk behaviour.

Recommendations

42. We do not recommend substantial changes to the overall structure of the regime.

Oral fluid testing devices

43. Roadside oral fluid testing is the core element of the proposed regime and therefore received the most attention from submitters. Comments and recommendations in this section cover:
 - a. Accuracy of oral fluid testing
 - b. The time taken to test at the roadside
 - c. Drug switching
44. Submitters also commented on the potential disproportionate impacts of the regime, implementation and deployment, and BORA concerns, including access to justice. These matters are covered in separate sections below.

Accuracy of oral fluid testing

45. The accuracy of oral fluid testing devices was one of the most common issues raised by submitters, with over 60 references in submissions. The Office of the Privacy

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Commissioner noted: *“there is also a further risk that the detection of drug presence itself will be inaccurate”*.

46. This view was shared by a number of submitters:
- a. *“Road-side testing devices used to detect drugs are much less accurate and reliable than alcohol breath testing.”* - Royal Australian and New Zealand College of Psychiatrists
 - b. *“Te Rūnanga o Ngāti Whātua conditionally supports oral testing but express concerns around the effectiveness and accuracy of oral fluid tests. In particular, the potential for false positives, inability to detect synthetic substances, determine impairment, or when the drugs were taken.”* - Te Rūnanga o Ngāti Whātua
 - c. *“False positives may occur in as many as 10% of samples. Though the proposal to require a second saliva test will reduce this risk. A false positive could lead to an unjust outcome for an individual who has not consumed drugs but has received two positive tests.”* – NZ Drug Foundation
 - d. *“We have previously expressed concerns about the reliability of oral swabs: current devices show a high number of false positives and false negatives”* NORML New Zealand
47. Submitters were most commonly concerned about general inaccuracy or the risk of false positives, i.e., the risk that a device incorrectly produces a positive result leading to the driver being liable for an infringement offence.
48. However, some submitters also noted the risk of false negatives (i.e., the risk that a device incorrectly produces a negative result when a driver has oral fluid levels that exceed the cut-off threshold in the device). The NZ Drug Foundation submitted: *“As many as 13% of tests will return a false negative test. This means that a person may be sent on their way even though they had consumed one of the drugs tested for, at a level that was impairing.”*
49. A smaller number of submitters supported the reliability and accuracy of oral fluid testing devices.

Time taken to test at the roadside

50. A number of submitters raised concerns with time taken to conduct a roadside oral fluid test. This concern about time sometimes explicitly referenced BORA concerns and how this infringement on their freedom of movement was not justified.
51. Te Runanga o Ngati Whatua submitted: *“We also express concerns regarding the length of time that random drug testing would take, and how this infringes on the driver’s and passengers’ journey in relation to the Bill of Rights.”*
52. The Royal New Zealand College of General Practitioners also suggested: *“the cumbersome nature of the testing framework means that selection of testing targets will be up to individual officer discretion, rather than by an ‘everyone gets tested’*

approach as happens in a road-block testing protocol for detecting alcohol-impaired driving”.

Drug switching

53. Six submitters raised concerns that that certain drugs such as synthetic cannabis, synthetic cathinone and hallucinogens are not listed in the SOP and would likely not be picked up by oral fluid testing devices. These submitters were concerned that this might lead substance users to ‘switch’ from more readily detectable drugs to other harmful substances such as synthetic cannabinoids to avoid detection.
54. Community Action on Youth and Drugs submitted: *“we are concerned that substance users may intentionally use synthetic substances if they believe they will not be picked up by an oral fluid drug test”*. Similarly, the NZ Medical Association commented: *“A possible unintended consequence of the proposed Bill could be to encourage people who use cannabis to switch to more harmful substances such as synthetic cannabinoids to evade detection by roadside oral drug testing”*.

Departmental response

55. Following Royal Assent, Police will undertake a tender process to identify and procure an oral fluid testing device that will meet both legislative and Police operational requirements. In assessing oral fluid testing devices, a range of factors will be considered, including accuracy and costs.
56. The Bill provides that the oral fluid testing devices will be gazetted following approval by the Minister of Police. Before approving a device the Minister of Police must:
 - a. consult with the Minister of Transport and the Minister of Research, Science and Innovation
 - b. have regard to the accuracy of the device
 - c. be satisfied that the device will only return a positive result if it detects the presence of a qualifying drug at a level that indicates recent use.
57. Once the Minister has approved a device, this will be notified in the Gazette, along with the in built cut-off thresholds in the device, which will provide transparency.
58. The Expert Panel has advised that there is an Oral Fluid Standard AS/NZS 4760:2019⁶ that recommends detection cut-offs for on-site devices and laboratory analysis. These Standards are most commonly applied to workplace safety but they are relevant for roadside testing. The recommended cut-off thresholds are generally accepted as indicative of recent drug use, rather than historical use or accidental exposure that is unlikely to cause impairment.

⁶ AS/NZS 4760:2019 Australian/New Zealand Standard - *Procedure for Specimen Collection and the Detection and Quantification of Drugs in Oral Fluid*.

59. Including a reference to relevant New Zealand Standards in the Minister of Police's approval criteria would strengthen the above criteria.

60. A number of further safeguards have been built into the regime to mitigate the concerns about oral fluid testing, including:
- a. the procedural safeguard of requiring drivers to take and have two consecutive positive oral fluid test results before being liable for an infringement offence
 - b. the sanction for failing two oral fluid tests is an infringement notice, not a criminal sanction
 - c. drivers having the option to elect an evidential blood test if they wish to dispute the result of an oral fluid test
 - d. requiring the oral fluid drug concentration thresholds built into any approved oral fluid testing device to be published in the Gazette notice approving the device
 - e. providing a medical defence pathway for oral fluid infringement notices that does not require a blood test
 - f. the compulsory impairment test (CIT) pathway remains in place, and Police officers are able to require drivers to undertake a CIT if there is good cause to suspect a driver is impaired by drugs.
61. These safeguards satisfied the Attorney General that the Bill is consistent with the New Zealand Bill of Rights Act 1990.⁷

Accuracy of oral fluid testing

62. We acknowledge the concerns of submitters around the accuracy of the oral fluid testing devices and recognise that accuracy rates do vary according to devices. However, we also note that oral fluid testing devices are becoming increasingly accurate. For instance, recent studies have shown very high results for accuracy in correctly detecting the presence of some drugs (over 90 percent). In Australia, accuracy has been reported as high as 99 percent. Nevertheless, we recognise that due to the nature of the testing technology, the risk of false positives and false negatives cannot be entirely mitigated.
63. Oral fluid testing devices are manufactured with 'cut-off' thresholds for the detection of the presence of drugs in oral fluid. These built-in thresholds reduce the risk of penalising drivers who have low residual levels of a drug in their saliva that are unlikely to impair driving. These low levels can be caused by a number of factors including passive or accidental exposure to drugs, previous, but not recent, use, or consuming doses of prescription or over the counter medicines that are unlikely to impair driving.
64. Before approving a device the Minister of Police must specifically have regard to the accuracy of a device. As mentioned above, the regime also includes the safeguards of

⁷ Report of the Attorney General under Standing Order (1) on the Supplementary Order Paper on the Land Transport (Drug Driving) Amendment Bill. This was presented to the House on 20 April 2021.

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requiring two consecutive positive results and an elective blood test. These safeguards limits the chance for a false positive result and allow a driver to challenge the result of an oral fluid test if they believe it is a false positive.

65. The method of testing delivery can also impact false positive rates. For example, a significant proportion of false positives reported are due to operator error rather than device error. A comprehensive training programme for Police staff will ensure the effective delivery of oral fluid testing.
66. We also acknowledge that there may be some variation in the sensitivity of devices in being able to distinguish between drugs with similar chemical structures (e.g. different types of benzodiazepines), which could also lead to false positive results. The ability for a device to test for the qualifying drugs identified as most prevalent (e.g. THC, methamphetamine, MDMA, opiates, and benzodiazepines) and accurately distinguish between these different drugs will also be key considerations during procurement.
67. We also acknowledge the concern about false negatives. The CIT pathway remains an option for police at each roadside stop. If the officer has good cause to suspect a driver is impaired then the driver can be required to undergo a CIT. This approach enable police to detect impaired drivers who pose a safety risk even if they have consumed a drug not tested for on the oral fluid test, or the test produces a false negative result when a driver is impaired.

Time taken to test at the roadside

68. Police will determine the exact testing process and time required to deliver a test as part of the implementation planning following the Bill's enactment. Police will need to consider a number of factors, including the type of device procured, the number of drugs tested, and what other road safety activities Police conducts as part of the vehicle stop (for example, procedural checks of licence and registration and drink driving enforcement).
69. Based on the technology currently available, the administration of the initial oral fluid test could take between two to five minutes. However, the timings are indicative only, and are largely dependent on the device used and the number of drugs tested for. The timings also do not include the delivery of other road safety activities.
70. Drivers who receive a negative result on the first oral fluid test and are not required to undergo a CIT are likely to only be detained for a short period while awaiting the initial oral fluid test result. Drivers who receive a positive first test and are either required to undergo a second test, or who receive two positive tests and elect a blood test, or who are required to undergo a CIT will be detained for a longer period of time.

Drug switching

71. We acknowledge the concern that testing for some qualifying drugs may encourage some people to switch to a different drug. The proposed regime is intended to address the harm caused by the impairing drugs deemed to be most prevalent and highest risk in New Zealand drivers.

72. The provisions in the Bill enable the regime to adapt to changing drug use patterns over time (e.g. additional drugs could have blood criminal limits and infringement thresholds set in Schedule 5). The Bill also enables the Minister of Police to approve new oral fluid testing devices. As technology improves and tests can test for a wider or different array of drugs, these devices can be approved for use in New Zealand.

Recommendations

73. We recommend amending the criteria for the approval of oral fluid testing devices to include a reference to consideration of the cut-off thresholds specified in any relevant New Zealand Standards approved under the Standards and Accreditation Act 2015.

Cannabis concerns

74. 54 submissions raised concerns about cannabis, substantially more than any other drug. Some submitters recommended removing cannabis from oral fluid testing or the drug driving regime entirely. Concerns raised tended to be in relation to:
- The time taken for cannabis to leave a person's system and therefore the relationship to impairment and oral fluid testing
 - Passive exposure to cannabis
 - Medicinal cannabis use

Cannabis in bodily fluids and the link to impairment

75. Many submitters raised concerns about the length of time cannabis might be detectable in a driver's bodily fluid. Some submitters raised concerns about cannabis remaining detectable in blood or oral fluid for many weeks after consumption, where there is very little risk of impairment. Many submitters highlighted this concern in relation to chronic or regular users of cannabis.
76. The NZ Drug Foundation indicated: "Oral fluid THC concentrations can also remain high for several days. One study tested THC in subjects who use cannabis heavily. They found the drug at levels that would result in an infringement fee 150 hours (six days) after last use. Even someone who has never used cannabis before may test positive in a saliva test up to 12 hours after consuming the substance".
77. Some submitters also suggested that cannabis did not impair driving. It should be noted that many submitters both in support of and with concerns about the regime did acknowledge the potentially impairing effects of cannabis consumption.

Passive exposure

78. Some submitters raised the concern about passive exposure to cannabis and whether this could result in detection and therefore penalties under the proposed regime. For example, the New Zealand Law Society submitted "it is unclear whether inhalation of cannabis smoke by a person present when others are smoking it could create a low

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level of relevant chemicals in the body's fluids. In such cases it may be possible the oral fluid test produces a positive result for drugs in circumstances where the driver has no moral fault".

Medicinal cannabis

79. Some submitters wanted further protections for medicinal cannabis users or were concerned about non-psychoactive medicinal cannabis leading to failed oral fluid or blood tests. The NZ Medicinal Cannabis Council recommended *"because of considerable uncertainty regarding impairment, patients using cannabis derived medicines according to their prescriber's directions should explicitly be protected in law, not be prosecuted and required to provide a defence."*
80. NORML New Zealand supports *"making a legal defence available to patients using cannabis products medicinally and acting under the directions of their physician, consistent with the approach taken for other legal medicines."*
81. Other submitters recommended that CBD oil based medicinal products should be excluded from the proposed regime.

Departmental response

Cannabis in bodily fluids and the link to impairment

82. The Expert Panel advised that the potential impairing effects of cannabis on driving include disorientation, altered sense of time and distance, lack of concentration, difficulty in thinking, loss of coordination, increased reaction time, lateral travel and impaired sustained vigilance.
83. Drugs are detectable for the shortest time in oral fluid and blood, and are detectable for a longer period in urine, and even longer in hair samples. The Expert Panel indicates that *"it has been claimed that cannabis use can be detected in biological fluids for weeks after its use. This is not true for the detection of THC in oral fluid or blood"*.
84. For most drivers, blood THC concentrations are likely to drop below the criminal limits and infringement thresholds in the Bill within a few hours. However, this could be longer for chronic cannabis users.
85. Of the 523 drivers found to be impaired by Police through a CIT, who were found to have only cannabis in their system, 25% had THC blood concentrations less than 3 ng/mL (the THC criminal limit) and 10% had blood concentrations less than 1 ng/mL (the THC blood infringement threshold). This illustrates the variability of THC concentrations and the potential for impairment even at blood levels below the Expert Panel's recommendations. Other jurisdictions have thresholds in place ranging from 1 ng/100mL to 9 ng/100mL.
86. In making its recommendations the Expert Panel has attempted to balance these competing concerns about detecting impaired drivers (some may have low drug blood concentrations) and avoiding capturing drivers who are unlikely to be impaired.

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87. The blood infringement threshold in the SOP is intended to avoid capturing drivers with low levels of THC in their blood that are unlikely to impair driving. The same intent will inform the procurement of an oral fluid testing device. As indicated above, an approved oral fluid testing device will have an in-built cut-off threshold that avoids detecting low levels of a drug that are not associated with recent use.

Passive exposure

88. The Expert Panel has advised that it is unlikely that passive exposure to cannabis smoke under realistic exposure conditions will result in a positive oral fluid test at the roadside. Officials expect the cut off thresholds in an approved oral fluid testing device will avoid capturing people who have had only passive exposure to cannabis.
89. In some extreme situations, passive exposure could lead to a substantial inhalation of cannabis and therefore elevated blood and oral fluid levels. In these rare situations, the person is also likely to be at risk of impairment and should not drive.

Medicinal cannabis

90. It is not always clear whether a submitter reference to medicinal cannabis is limited to pharmaceutical cannabis, or any cannabis product (raw or processed), being used to treat a medical condition.
91. The SOP adds an alternative medical defence pathway for drivers who fail an oral fluid test if they are taking their medication as prescribed. This new pathway would not require a driver to take a blood test. However, they would be suspended from driving for 12 hours. They would have to provide proof of a current and valid prescription after the infringement offence was issued.
92. If a driver is prescribed a medicinal cannabis product that is psychoactive and contains THC, then users of this medicine may be advised not to drive after consumption. A driver who is advised that they are able to drive on their prescription, who subsequently fails an oral fluid or blood test, could utilise the medical defence pathways provided by the Bill.
93. The Expert Panel advised that “CBD-based medicines have legally restricted, low concentrations of THC that will not result in impairment, positive oral fluid tests or blood THC concentrations.”

Recommendations

94. We do not recommend THC is treated differently to other drugs under the regime and so have no THC-specific recommendations.

Offences and penalties

Harm minimisation and health-based approaches

95. Many submitters supported a harm minimisation approach to drug driving. This included suggestions to shift from an offences and penalties approach to a health

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based approach, expansion of rehabilitation programmes, increased and earlier health referrals and education about drug driving and the new regime.

96. For example, the NZ Medicinal Cannabis Council recommended *“education and proactive health responses ahead of deterrence and/or punitive measures. Alternatives to penalties particularly for rangatahi (young people) and first-time offenders should be considered”*.
97. A similar view was reflected in a number of submissions:
- a. *“We recommend a health referral pathway is offered from the first infringement or offence”* - Te Oranga Branch - Maaori Women's Welfare League
 - b. *“Health-based interventions for drug driving should occur far earlier on, perhaps even starting at a person's very first infraction under the legislation. A stepwise tiered approach could be used whereby alternatives to fines, such as the option to attend an education and/or counselling session or to undertake community service, could be offered for a first-time infraction.”* - Royal New Zealand College of General Practitioners
 - c. *“At a minimum, we believe that imprisonment, court charges, and criminal charges should be avoided at all costs, as such consequences have hugely detrimental effects on the communities most at risk.... We also believe that above all else, drug consumption should be treated as a health issue, not a criminal one. This is why we are recommending that health referral pathways occur sooner rather than later.”*
- YES2020
 - d. *“Although we do not support the choice to take drugs while driving there will need to be a future focus on rehabilitating drug users. There are many rehabilitation programmes on offer. It is important to inform the public about the proper treatment available and encouraging drug users, especially the ones that are seen as a danger, to participate in these programmes and get the help they need.”* - Rangatahi Group

Penalties are too low

98. A few submitters considered the infringement penalty to be too low, or indicated that the oral fluid testing pathway should lead to more serious penalties, rather than being subject to an infringement regime only. For example, one submitter noted that the approach to roadside testing for drugs appears to take a softer approach to offending than for roadside alcohol testing (where a driver may be liable for a criminal offence).
99. This view was rarer than the support for taking a harm minimisation, health-based approach to drug driving.

Departmental response

Harm minimisation and health-based approaches

100. The roadside oral fluid testing regime is an infringement regime only. This approach was taken to limit the risk of drivers receiving criminal penalties for drug impaired driving while deterring this high-risk behaviour.
101. As part of a health-based approach, there will be opportunities to refer some drivers to appropriate services to address the underlying causes of offending, or reoffending, and improve outcomes. The Bill currently provides for compulsory referrals for assessment to drug education or rehabilitation programmes for some second criminal offences and for all third and subsequent criminal offences. This is the approach currently taken with alcohol and drug driving offences.
102. However, officials acknowledge concerns that the Bill does not specifically provide a response for drivers who receive infringement offences, in particular repeat infringements. The current intent is for Police to provide contact information to drug and alcohol referral services for drivers when issuing infringement notices.
103. Subject to the availability of appropriate services and programmes, there may be further opportunities for Police to provide more targeted information to drivers or refer drivers to specific support services.
104. Officials explored the option of a health-based alternative to an infringement offence with the Ministry of Health.
105. The existing system of drug-related referral and treatment services is not designed to best support many of the drivers who are likely to receive an infringement offence, where a drug(s) may be consumed recreationally, as opposed to being symptomatic of an underlying drug dependency issue which would benefit from a health intervention.
106. Alcohol and other drug assessment and treatment centres are under considerable resourcing pressures. An increase in referrals would add further pressure to the availability of these services. A pathway for drivers who receive an infringement offence into the current system risks a high-volume of people who do not experience serious drug-related harm taking the place of individuals who are experiencing more serious drug and alcohol related harms. This may mean individuals who are more likely to benefit from existing treatment programmes miss out or experience further delays.
107. Ministry of Health, Ministry of Transport and Police officials support improving health-based pathways. However, the development and implementation of appropriate services, referral pathways and processes across several sectors would be required to support drug referrals for infringement offending, including health, police and justice. This scale of change is not possible on the current timelines of the Bill.
108. Officials have also recommended that Ministers consider further health-based harm minimisation approaches to drug driving once the regime has been operational for a period of at least 12 months.

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Penalties are too low

109. The proposed regime creates single drug and combination infringement and criminal offences. The penalties associated with the single drug offences are aligned directly with the alcohol offences in the Act. The combination offences are higher in recognition of the higher crash risk associated with consuming multiple impairing substances.
110. The Ministry of Transport is in the process of conducting a wider review of road safety offences and penalties. This will include consideration of the appropriateness of the proposed drug driving infringement offences. In the meantime, we consider alignment with the existing alcohol offences is the most appropriate approach.

Recommendation

111. We do not recommend any changes to the drug driving offences and penalties.
112. Note that officials will progress two pieces of work alongside the introduction of the proposed regime:
 - a. The Ministry of Health will explore options for expanding drug and alcohol related referral pathways and services.
 - b. Transport will lead a review of road safety offences and penalties

Blood infringement thresholds and criminal limits

Including blood limits in the Bill

113. Blood infringement thresholds and criminal limits were added to the Bill via SOP, released on 1 April 2021. A number of submissions were made prior to this date and commented on the lack of criminal limits and blood infringement thresholds.
114. The Insurance Council of New Zealand noted: “*not having “Schedule 5” included with the Amendment Bill is an oversight as knowing the list of drug substances and the cut-off thresholds linked to impairment will be important to those commenting and supporting the Amendment Bill.*” Unfortunately a number of submitters made or finalised their submission prior to 1 April 2021 and were in a similar position to the Insurance Council.
115. One of the key suggestions in the Attorney-General’s Section 7 report on the Bill was to include blood infringement thresholds below which the presence of a qualifying drug would not be an infringement offence. Some submitters, the New Zealand Law Society for example, endorsed this position.

Specific blood levels

116. Only a few submitters commented on the specific blood levels recommended by the Expert Panel. One submitter strongly supported the 3 ng/100mL criminal limit for THC

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while another submitter indicated this level was too low and suggested research indicated an appropriate level for THC would be in the range of 7-10 ng/100mL.

117. Community Action on Youth and Drugs submitted: *“We are concerned that in the case of some drugs, the specified ‘tolerance’ blood concentration levels are too high and may increase the chances for an individual to have used a qualifying substance, drive whilst impaired and still ‘pass’ without penalty.”*

Impairment testing and the CIT

118. A few submitters supported the intent of the regime but recommended a specific test of impairment, rather than bodily fluid thresholds alone, to determine liability for a drug driving offence. Often this referenced a version of the CIT or a request for research into improved means of determining impairment.
119. For example the New Zealand Automobile Association strongly supported the proposed regime, but noted: *“we believe there could be value in reviewing the current CIT test and considering if there are alternatives for judging impairment that could be more effective or practical for use in the field by Police officers”*.
120. Mostly this concern was raised in relation to drivers receiving a positive oral fluid test result while not being impaired. However, some submitters were also concerned about drivers receiving a negative result on a blood or oral fluid test while they were impaired and being permitted to drive. This may occur when drug concentrations in bodily fluid are low while the impairing effects, or after-effects, of the drug are still impacting the brain.

Departmental response

Including blood limits in the Bill

121. The majority of submitters concerns on the inclusion of criminal limits in the Bill have been addressed through the SOP. Criminal limits and blood infringement thresholds for 25 impairing drugs are now included in the Bill.
122. The relevant offence provisions have also been amended to indicate that the presence of a drug below the blood infringement threshold would not be an infringement offence.
123. Following the changes proposed in the SOP, the Attorney-General has revised his advice and is satisfied the Bill is now consistent with the NZ Bill of Rights Act (BORA).

Specific blood levels

124. The Expert Panel used data from the scientific literature, considered statutory limits in overseas jurisdictions, and used New Zealand data on drug blood concentrations in road traffic crashes to develop its recommendations.
125. The Expert Panel has also been guided by the policy intent and outcomes set by previous Ministers, to avoid capturing drivers with low levels of a drug unlikely to

impair. For prescription medicines, the Expert Panel has also considered what dose of the drug is known to impair, the maximum dose of the drug that may typically be prescribed, and the blood concentrations expected from such a dose.

126. We acknowledge the complexity and uncertainty the Expert Panel faced. We consider the approach the Expert Panel has taken provides us with the best available estimates for criminal limits and blood infringement thresholds.
127. The Expert Panel also noted in its report the 2005 meta-analysis that referred to THC concentrations of 7 to 10 ng/mL. It is important to note that this particular reference refers to THC concentrations in serum (which is a component of blood). When testing whole blood, which is what ESR does when carrying out a blood test, the equivalent THC concentration is half as much as in serum. That is, the THC concentration of 7 – 10 ng/mL in this study is equivalent to a THC concentration of 3.5 – 5 ng/mL in whole blood. This lower number is what should be compared to any other THC level references in the Expert Panel's report.
128. The Expert Panel also refers to a number of more recent studies to inform its final recommendations, some of which have indicated impairment occurs at lower THC levels than suggested in this study.

Impairment testing and the CIT

129. The CIT will continue to be a pathway available to police officers. Our current approach to deterrence though, which relies on the CIT alone, is not as effective as it could be at deterring the high-risk behaviour of drug driving. Only 26 percent of New Zealanders think it is likely they will be caught drug driving.
130. The practical limitations of the CIT restrict how many tests can be carried out each year. CITs take considerable time to perform, require the driver to be moved to an appropriate location to perform the test, and can only be carried out by specially trained officers.
131. The current CIT regime will complement the proposed regime and will remain an important road safety tool where a driver is visibly impaired or where an officer has good cause to suspect that a driver is driving after having consumed drugs that are not tested for on an oral fluid test. This is important given that an oral fluid test will only be able to detect the presence of 3-6 classes of drugs, whereas a blood test following a failed CIT can establish the presence of a drug not tested for on the oral fluid test.
132. Police will continue to train staff in the CIT process to mitigate some of the limitations of the oral fluid testing regime. The ability to maintain capability for Police to detect and deter drug drivers across the road network to complement the oral fluid testing regime will be an important consideration in Police's implementation planning for the regime.

Recommendations

133. No further changes to blood infringement thresholds or criminal limits.

BORA concerns

134. The Attorney-General concluded that the provisions of the Bill as introduced were inconsistent with the rights to be secure against unreasonable search and seizure, the right not to be arbitrarily detained, and the right to be presumed innocent until proved guilty as affirmed in sections 21, 22 and 25(c) of the BORA.⁸ The Attorney-General drew this to the attention of the House of Representatives under Standing Order 269.
135. Similar views were expressed by a number of submitters who considered the Bill in violation of BORA. For example, *“The Law Society endorses the Attorney-General’s view and analysis in his section 7 New Zealand Bill of Rights Act 1990 (NZBORA) report”*.
136. A few submitters also raised access to justice concerns and indicated the existing elective blood test pathway could be onerous or discourage drivers from using it:
- “While clause 25 amends section 77A of the principal Act [elective blood test provision] to allow a driver to prove their oral fluid did not contain a qualifying drug, this would be an expensive and time-consuming process and may undermine the effectiveness of the ability to challenge the results of oral fluid test.”* - New Zealand Law Society
 - “The Government has expressed interest in the Select Committee’s view on whether drivers should also be liable to pay for the evidential blood test if they have committed only an infringement-level offence. Such a requirement would be a further disincentive to opting for a blood test to challenge the results of OFTs”* - Office of the Privacy Commissioner

Medical defence

137. Four submissions highlighted the risk of the oral fluid testing regime unfairly capturing people that are on medication. For example, the New Zealand Needle Exchange Programme submitted: *“it is highly likely that people consuming a daily dose of methadone or buprenorphine as part of an opioid substitution programme will fail an oral fluid test ... if the person wishes to use the medical defence they will be required to undergo an evidential blood test, something that can be problematic for many clients of opioid substitution treatment services due to poor veins resulting from previous IV drug use”*.
138. A number of submitters supported the medical defence provision to provide a defence pathway for prescription drug users who have taken their medication in accordance with a prescription and medical advice that permits them to drive.

⁸ Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Drug Driving) Amendment Bill (2020). Retrieved from: <https://www.justice.govt.nz/assets/Documents/Publications/S7-report-Land-Transport-Drug-Driving-Amendment-Bill.pdf>

139. Some submitters thought further protections, or a more straightforward defence, were required for prescription drug users.

Departmental response

140. The Government understood that the drug driving regime was likely to have implications for rights and freedoms protected under the BORA, similar to drink driving legislation when it was originally introduced.
141. The drug driving regime as introduced included safeguards that were intended to help justify the limitations on rights and freedoms affirmed in the BORA. These safeguards included:
- a. the procedural safeguard of requiring drivers to take and have two consecutive positive oral fluid test results before being liable for an infringement offence;
 - b. extending the existing medical defence to this regime;
 - c. the roadside testing regime primarily being an infringement offence regime only; and
 - d. drivers having the option to elect an evidential blood test.
142. The SOP added further safeguards to the Bill to help justify the limitations on rights and freedoms affirmed in the BORA:
- a. setting the blood concentration infringement thresholds alongside the criminal limits in the Bill as recommended by the Attorney General
 - b. amending the relevant infringement offence provisions in the Bill to indicate that the presence of a drug below the blood infringement threshold would not be an infringement offence as recommended by the Attorney General.
 - c. requiring the oral fluid drug concentration thresholds built into any approved oral fluid testing device to be published in the Gazette notice approving the device
 - d. A new medical defence pathway for infringements resulting from positive oral fluid test results that does not require the driver to undergo a blood test.
143. The Attorney General issued a further report following publication of the SOP that he is satisfied that the Bill is consistent with the BORA.⁹

Medical defence

144. As indicated above, the SOP introduced an alternative medical defence pathway. This pathway would not require a driver to elect a blood test after a positive oral fluid test result in order to challenge its outcome. However, a driver would be required to

⁹ Report of the Attorney General under Standing Order 381(1) on the Supplementary Order Paper on the Land Transport (Drug Driving) Amendment Bill [e4ad3929f5c3307eba4327cc2be2335a81f478ff](https://www.parliament.nz/~/media/Parliament.nz/Assets/Reports/2024/03/2024-03-20-Report-of-the-Attorney-General-under-Standing-Order-381-1-on-the-Supplementary-Order-Paper-on-the-Land-Transport-Drug-Driving-Amendment-Bill) (www.parliament.nz)

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establish that they had taken medication with a current and valid prescription and in accordance with any instructions, in order to challenge an infringement notice. The driver would still be suspended from driving for 12 hours.

Recommendations

145. We do not recommend any further changes that would require a police officer to determine whether a driver has a current and valid prescription at the side of the road. We do not consider officers at the roadside are best placed to take these decisions.

Implementation and deployment

The cost of the regime and the impact on alcohol testing

146. Some submitters raised concerns about whether Police will have sufficient resources and funding to effectively detect and enforce drug driving. Given some submitters considered alcohol testing and drunk driving to be an equal or greater concern than drug driving, they raised concerns about resources being diverted away from alcohol testing:
- a. *“Police will need significant additional resourcing to deliver the testing programme. The AA already has serious concerns about the reduction that has taken place in drink-driving testing numbers in recent years and the introduction of drug testing must not take away any activity around alcohol enforcement.” – NZ Automobile Association*
 - b. *“NZ Police is currently not conducting 100% of its random alcohol testing quota, adding on an additional quota of random drug testing would further add to that load.” - Community Action on Youth and Drugs*
 - c. *“Alcohol is one of the most impairing substances, with only methamphetamine having a similarly impairing effect. Alcohol consumed alongside other drugs magnifies the impairment level exponentially. The table below sets out the potential risks of death and serious injury while driving with multiple drugs and drugs and alcohol. This shows the importance of continuing to ensure resources go towards alcohol testing.” – NZ Drug Foundation*

Public education

147. A number of submitters in support of a harm-minimisation approach recommended public education campaigns:
- a. *“We recommend national promotional and educational campaigns that bring greater attention to increasing driver’s awareness, emphasising social responsibility, and creating a culture shift away from drink driving. This can be delivered through public health promotion, secondary school curriculum, advertising, media advocacy, social marketing etc. If the Bill is implemented, it is*

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essential that the testing process is explained in these campaigns, including how tests are conducted, and the potential penalties.” - Te Runanga o Ngati Whatua

- b. *“We also recommend that there are highly visible media and education campaigns running alongside the introduction of the oral fluid drug testing regime that would alert the public to the new testing, how the testing is conducted, and what the potential penalties are.” - Community Action on Youth and Drugs Auckland*

Misuse of Drugs Act

148. A few submitters raised concerns about the proposed regime being used to enforce wider drug related offences against drivers.
149. Te Runanga o Ngati Whatua submitted: *“It is also possible that a positive oral test could prompt police to undertake further actions under the Misuse of Drugs Act, such as vehicle searches for drugs.”*
150. A similar view was presented by NORML New Zealand: *“there appears nothing preventing officers from using positive test results to initiate searches of drivers, their passengers, or their vehicles. Such searches would be little more than “fishing trips” and are likely to be used more frequently against Maori and young males. We recommend strengthening s73A by adding a provision to ensure positive results cannot be used to initiate searches.”*

Privacy

151. The Office of the Privacy Commissioner noted some privacy concerns in relation to the Bill:

“It is unclear how the information about alleged drug users collected through the infringement regime may be used. Replacement section 73A(2) of the Act (inserted by clause 23 of the Bill) provides that neither a positive OFT nor a blood specimen taken under the relevant provisions of the Act may be used as evidence of the use of a controlled drug in a prosecution for an offence under the Misuse of Drugs Act 1975. This is an important protection, but the Bill does not impose general restrictions on the use or disclosure of information collected through the infringement offence process. The controls on use or disclosure under the Privacy Act would apply, but it would be appropriate for the Bill to impose restrictions on the use and disclosure of information about infringement offences imposed on individuals. I recommend a prohibition on the retention and/or use of test results showing the presence of a drug at a level below the tolerance blood concentration levels for drug driving offences...”

If the Bill does proceed, I recommend that the Bill be amended to provide for:

- restrictions on the use and disclosure of information about drug driving infringement offences imposed on individuals*
- a prohibition on the retention and/or use of test results showing the presence of a drug at a level below the tolerance blood concentration levels for drug-driving offences*

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- *a compulsory review of the drug driving regime three years after the commencement of the regime.*”

Implementation timeframe

152. Four submissions urged the Government to implement and enforce the regime as quickly as possible. The Road Transport Forum submitted: “the RTF would like to see the Land Transport (Drug Driving) Amendment Bill enacted as soon as possible. New Zealand’s road toll is an embarrassment and must be taken seriously. Statistics show that drivers impaired by drugs are causing harm and deaths on our roads.”
153. An individual submitter expressed a similar view: “*we also recommend that this Bill is introduced as soon as possible as drug driving continues to be an increasing issue in New Zealand and puts drivers on the road at risk of serious harm.*”

Departmental response

The cost of the regime and the impact on alcohol testing

154. The Government is intending to fund the scaled delivery of 33,000 drug tests in the first year, 50,000 tests in the second year, and 66,000 tests in the third and subsequent years.
155. While the overall cost of the regime will not be fully understood until the Bill is enacted, and a procurement process for the OFTs have been completed, the Government has committed to funding the regime through the National Land Transport Fund under the Road Safety Partnership Programme.
156. The Road Safety Partnership Programme provides \$XB to police annually to carry out its functions across X,Y,Z. Alcohol and drug driving enforcement activities will be funded through this mechanism.
157. Police will continue to maintain a strong focus on alcohol enforcement, given that alcohol continues to account for a substantial proportion of all road trauma.

Public education

158. Waka Kotahi will be responsible for a broader education and awareness campaign on the proposed regime. Police will work with Waka Kotahi to use and share relevant resources produced for the campaign. For example, handing out informative pamphlets ahead of the regime coming into effect to make people aware of changes or to respond to queries.

Misuse of Drugs Act

159. Roadside oral fluid testing is intended to be only a road safety tool and not a means of detecting and enforcing illicit drug use. A positive oral fluid test result cannot be used as evidence of the use of a controlled drug in a prosecution for an offence under the

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Misuse of Drugs Act 1975. This is explicitly provided for in section 73A (clause 23 of the Bill). This is consistent with the current approach to drug driving where a driver receives a positive blood test result after a failed CIT. This blood test result cannot be used as evidence for other drug-related offences.

160. A positive oral fluid test result for illicit drugs would not be sufficient to justify a search of a vehicle for the purposes of establishing other drug-related offences. A warrantless search of a vehicle under section 20 of the Search and Surveillance Act 2012 may not be carried out unless the officer has reasonable grounds to believe that in or on the vehicle there is a specified controlled drug or precursor substance.
161. A positive oral fluid test is only indicative of consumption and does not meet the required grounds for belief that a controlled drug is present in the vehicle. However, if an officer has reasonable grounds to believe that there are drugs or precursor substances in or on the vehicle based on other evidence (e.g. drugs or drug paraphernalia being clearly visible) further enforcement action could be considered.
162. As there is currently a provision in the Bill to mitigate this concern, officials do not recommend any further changes to the Bill to address this matter.

Privacy

163. Police currently obtain and retain information generated as a result of Police operations and practices in accordance with statutory instruments such as the Public Records Act 2005 and the Privacy Act 2020. The retention and use of information held by Police accords with Police's responsibilities to maintain the law and supports Police prevention, investigative and intelligence activities, including supporting alternative resolutions such as health-based referrals (for example, where chronic low level use is indicated).
164. The retention and potential use of information by Police obtained under the Bill aligns with the above requirements and also with sections 209 and 209A of the Bill (which enables collection and retention of bodily fluid samples for research and statistical purposes).
165. The Privacy Act 2020 already provides privacy protection regarding retention and use of information, and the Public Records Act 2005 sets appropriate timeframes for destruction of Police records, and Police consider an additional general framework is unnecessary.
166. Police require data to fully meet its road safety responsibilities. Police will look to hold and analyse test results indicative of drug use, including where no offending is identified, for research purposes to fulfil Police's commitment to contribute to cross agency analysis. This may include retrospectively analysing bodily fluid (blood and oral fluid) specimens to establish a baseline of current drug driving behaviour and help monitor the impacts of the regime.

Implementation timeframe

167. The Bill is expected to come into force one year after it receives Royal Assent. This time period is necessary to enable NZ Police and Waka Kotahi NZ Transport Agency to implement the new regime. For example, to confirm funding, procure oral fluid testing devices, make relevant ICT changes, introduce new internal processes, and train frontline staff.

Recommendations

Disproportionate impacts for Maori and Pacific people

168. Several submitters have raised concerns that the current drug driving regime and particularly how Police will enforce the regime could lead to disproportionate outcomes. These concerns were raised primarily regarding Maori and Pacific people who are already overrepresented in the rates of cannabis use and the justice system, as well rangatahi, and lower socio-economic communities. This was also a concern raised by the Committee, which specifically requested further information from officials on this matter.
169. This was one of the most common concerns raised by submitters:
- a. *"We are aware that there is evidence of police and legal authorities having a systematic bias towards Māori and other minority groups. Māori experience more frequent policing and arrests for drug related offences than non-Māori and are therefore more likely to face criminal convictions. Māori also experience bias within the criminal justice system; on average, Māori receive higher rates of incarceration and harsher penalties ...*
If the Bill is implemented, we recommend that there are detailed plans in place outlining how and where to conduct oral drug testing, as well as comprehensive monitoring of linked offences, to ensure that areas with high Māori and Pacific populations are not over tested or targeted." – Te Runanga o Ngati Whatua
 - b. *"We recommend that there is a specific plan in place for how and where to conduct oral fluid drug testing, with special consideration taken to not over-test areas that have high populations of Māori and Pasifika."* - Community Action on Youth and Drugs
 - c. *"We are concerned about the risk of Maaori and Pasifika peoples being over-represented in the testing space and being unfairly targeted when enforcement officers are allowed to stop and test drivers without cause. The New Zealand Police have a long history of both conscious and unconscious bias relating to the unjust treatment of Maaori and Pasifika communities. While we are encouraged by their progress over the years, we cannot assume that this will have changed drastically ahead of the implementation of this testing regime."* - Te Oranga Branch - Maaori Women's Welfare League

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- d. *“Due to the time the current tests take to complete (approximately five minutes), not all drivers will be able to be stopped as is the case with alcohol testing. Based on previous research we know that Māori and Pacific people are more likely to be randomly stopped by police and are more likely to be charged with drug-related offences (Morrison, 2009). The proposed oral fluid testing regime is at risk of perpetuating this inequity.” – Regional Public Health*

Departmental response

170. The proposed regime aims to limit disproportionate outcomes for those who experience greater risk factors and vulnerabilities leading to offending and entry into the criminal justice system. The roadside oral fluid testing regime is an infringement offence regime only. This limits the risk of a disproportionate response of drivers receiving criminal penalties, while still improving deterrence of drug driving as a high-risk behaviour.
171. We acknowledge there remains the potential for unpaid infringement fees to escalate drivers into the criminal justice system. However, we note the risk of people entering the criminal justice system and experiencing disproportionate outcomes goes beyond the drug driving regime and cannot be addressed through the Land Transport (Drug Driving) Amendment Bill alone. These risks apply across all police enforcement and legislation that includes offence and penalty regimes, especially mandatory and financial penalties. These issues have been the focus of broader work across the justice sector to transform the criminal justice system and deliver better outcomes.
172. While we acknowledge the concerns about the risk of disproportionate outcomes, we do not think it is appropriate for the Land Transport Act to prescribe specific operational matters relating to police enforcement practices under the drug driving regime. Police will target drug driving enforcement to areas of heightened road safety risk.
173. Police will be considering how to improve the way information around ethnicity and gender is collected, interpreted and reported on, to better understand if the regime is having disproportionate impacts on any particular groups. As the information improvement project will require technology and training enhancements, it is expected to take 12 to 18 months to complete from when it is commenced in the second half of 2021.
174. Police has also recently commissioned research titled “Understanding Policing Delivery”, to ensure an evidence-based approach to mitigating bias in police practices. The first tranche will be completed by the end of June 2021. This will include a data stocktake and literature review. The second and third tranches will commence in the second half of 2021 and be led by independent researchers from the University of Waikato and an independent panel of academics and community leaders led by Sir Kim Workman. The second and third tranches will consider topics such as who police stop and charging decisions.

Land Transport (Drug Driving) Amendment Bill

175. Police will be ensuring that the development of the deployment model for the drug driving regime, and guidance and training for staff, is closely aligned with this broader work on mitigating bias to enhance justice sector responses through an equitable enforcement approach.

Recommendations

Monitoring and evaluation

176. Some submitters proposed that the regime would benefit from a review once implemented. Submitters have suggested such a review could assess the effectiveness of the regime, consider developments in drug impairment research and new technology and/or how Police have enforced the regime.
- a. *“If the Bill is implemented, it is essential to ensure robust and comprehensive monitoring of all impacts including on deterrence of drug driving, patterns of drug use and driving, and to evaluate data on offences by ethnicity and age group. High quality baseline data need to be collected before the measures in the Bill take effect. It is also important to evaluate the extent to which roadside oral drug testing leads to offences under the Misuse of Drugs Act, and to identify whether certain populations are disproportionately being targeted.”* - Royal New Zealand College of General Practitioners
 - b. *“If the Bill proceeds, it should also be subject to a compulsory review of the operation of the new drug driving regime after three years. Monitoring of evidence of the regime’s operation is proposed in the Ministry of Transport’s regulatory impact statement, but I recommend a formal statutory review should be provided for in the Bill. The review should look at evidence of the impacts of the new arrangements within New Zealand, including differential impacts on Māori and other groups, and at the latest evidence on drug driving testing from other comparable jurisdictions.”* - Office of the Privacy Commissioner
 - c. *“Require the Police to keep good records about the ethnic group, age and gender of those they have stopped, and where they have run checkpoints. Require records to be kept of any incidents where cars are stopped and non-driving related criminal charges are subsequently laid.”* - New Zealand Drug Foundation

Departmental response

177. Officials agree that it is important to keep the regime under review, particularly in its early stages. The regime is relatively complex and there is some uncertainty about the procurement and deployment of oral fluid testing devices. Waka Kotahi has already scoped a research project to investigate baseline evidence of drug driving behaviour. A research provider will be contracted later this year to carry out that work. This will provide a baseline to assess effectiveness of the regime in the future.

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178. The Bill has also been designed to be flexible in responding to new evidence and technology. For example, the Bill:
- a. includes an Order in Council process to enable criminal limits and blood infringement thresholds to be set and amended in future without requiring a full amendment bill
 - b. does not specify the drugs to be tested for in oral fluid so that Police can acquire new testing devices as drug use patterns change
 - c. includes provisions enabling the Minister of Police to approve oral fluid testing devices so that new technology can be procured once it becomes available.
179. The Ministry of Transport will continually monitor the regime as part of its regulatory stewardship role, which seeks to ensure transport legislation is maintained to be up to date and fit for purpose. Police officials will monitor the deployment and enforcement of the regime, including considering new oral fluid testing technology as it becomes available. Waka Kotahi and Police intend to monitor the effectiveness and outcomes of the drug driving regime 12 months following implementation, and then three years after the regime has been operating.
180. Waka Kotahi also carries out an ongoing 'Public Attitudes to Road Safety Survey', which will provide an indication of how public perceptions about the likelihood of getting caught drug driving change over time.
181. Parliament has occasionally provided for statutory reviews to be included in legislation, but they carry risks. Risks include that the statutory scope might be too narrow or broad to respond effectively to problems that are identified. Further, the statutory timetable for a review might not be appropriate: it might be too far off to respond to issues, or too early for evidence to be available. In other words, statutory reviews risk crowding out and diverting limited resources from well-focused, timely, effective reviews.
182. We support ongoing monitoring and evaluation of the regime and Ministry of Transport, Waka Kotahi and NZ Police will be involved in carrying this out. But we do not consider it is beneficial to include a statutory review provision in the Bill.
183. If the Committee wished to recommend a review, we would suggest the scope of the review is kept broad and permissive to avoid restricting what a future review could focus on. We would also suggest a timeframe of five years after enactment. The first 12 months after enactment is an implementation period for Police and Waka Kotahi to prepare for the regime to come into force. The intention is for oral fluid testing to be scaled up over the following three years until the regime reaches its 'steady state' in year four. A review carried out no later than year five would ensure a full year of data was available on the fully implemented regime.

Recommendations

184. We do not recommend a statutory review clause is added to the Bill.

Advice on the two issues raised by Ministers

185. In developing the regime, the Government identified two matters it was particularly interested to receive advice from the Committee on. The Minister of Transport and Minister of Police have invited the Committee to consider whether:
- a. the Order in Council provision for adding and amending criminal limits should remain in the Bill following the addition of the criminal limits through a Supplementary Order Paper
 - b. a driver who has committed an infringement offence following a blood test should be liable for the blood test fee (and what an appropriate fee is).

The Bill includes a mechanism for adding and amending criminal limits

186. Criminal limits have been added to the Bill by Supplementary Order Paper. In order for the Bill (at the time of introduction) to function without criminal limits, it included a power that allowed for criminal limits to be added and amended through an Order in Council after the Bill was enacted.
187. This power has been retained in the Bill and extended to cover blood infringement thresholds. The Bill enables the criminal limits and blood infringement thresholds to be added or amended by Order in Council (rather than an amendment bill), subject to certain safeguards.
188. Adding or amending criminal limits and blood infringement thresholds may be necessary in the following circumstances:
- a. in response to the increasing availability or classification (under the Misuse of Drugs Act 1975) of new drugs, such as designer drugs
 - b. if new research emerged to suggest a change to the existing limits or thresholds for established or known drugs was appropriate
 - c. to establish criminal limits or blood infringement thresholds for those drugs where limits or thresholds had not previously been established by the Expert Panel at the time that the Bill is being considered.
189. Because the criminal limits define criminal conduct, several safeguards have been included in clause 35 which place conditions on when the Order in Council provision can be used. The safeguards include requiring:
- a. the Ministers of Transport and Police to jointly recommend to the Governor-General that an Order in Council is made having taken into account the overarching policy intent
 - b. the Ministers of Transport and Police to seek independent technical advice from experts

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- c. the Ministers of Transport and Police to publish a notice in the Gazette of their intention to recommend the making of the Order in Council and give interested persons a reasonable time to make submissions on the proposed order
 - d. the Ministers of Transport and Police to consult persons, representative groups, government departments, and Crown entities that the Ministers consider reasonable and appropriate to consult in the circumstances
 - e. any Order in Council to be approved by a confirmation process before being brought into force, which would allow Parliament to consider any changes to the schedule of criminal limits before it was amended.
190. Requiring the Order in Council to be approved by a confirmation process ensures the House of Representatives has some level of oversight of the proposed change.
191. Cabinet has considered the Order in Council provision in the Bill, and agreed that as introduced the provision was necessary. However, Cabinet has indicated that it 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, or whether it should be removed.
192. Retaining the provision would provide flexibility to alter criminal limits without having to go through a full legislative process, enabling the legislation to be responsive to scientific and other contextual developments. However, the provision does not properly accord with the principle that criminal conduct should be defined in primary legislation.

Recommendations

193. Officials consider the benefits of being able to respond more quickly to changing drug use patterns and technological improvements, with the safeguards in place, outweigh the risks of criminal limits being amended through this Order in Council process.

The Bill does not include a requirement for drivers liable for an infringement offence to pay a blood test fee

194. Under the proposed drug driving regime, a driver that fails two oral fluid tests could elect a blood test to conclusively show the amount of a drug present in the driver's system. This provision allows drivers to challenge the results of the oral fluid test on the basis of a suspected false positive result.
195. Following a blood test, the regime proposes that a driver who receives a criminal offence is liable for the cost of the blood test and any associated medical expenses. This is based on the current approach of the CIT regime. The regime does not currently propose making a driver liable for the blood test costs if the blood result is at (or below) the infringement level.
196. Cabinet requested that the Committee considers whether a driver who has committed an infringement level offence only should be liable for a blood test fee and what an appropriate fee could be.

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197. The cost of a drug driving blood test is likely to be significantly more expensive than a blood test for alcohol and the current blood test for drugs, which only detects presence rather than a specific level. Drug blood tests under the new regime are estimated to cost around \$2,500 (compared to the fees drivers currently pay of \$111.99 for alcohol and \$668.94 for drugs¹⁰).
198. Requiring drivers to pay this additional fee would be disproportionate to the penalty a driver would be liable for if they have committed an infringement offence (\$200). The risk of having to pay the full cost of the blood test could be a barrier to requesting an evidential blood test even if the driver has not recently used drugs.
199. The Ministry of Justice does not support a mechanism for passing the costs of the blood test on to the individual who is contesting the result of the oral fluid test. The Ministry of Justice considers it appropriate for the government to bear the costs of enforcement.
200. Officials consider it reasonable and equitable to require all individuals who have completed a blood test and returned a result at either the infringement or criminal level to be liable for some fee, as they are under the drink driving regime.
201. However, given the anticipated cost of these blood tests, officials recommend that significant subsidisation is required, to ensure that drivers can elect blood tests at a reasonable cost, while also bearing some financial liability if an offence is established.

Recommendations

202. We recommend a fee for drivers liable for an infringement offence to be set equivalent to the alcohol blood test fee of \$111.99. Drivers liable for a criminal offence would remain liable for the existing drug test fee of \$668.94.
203. If a subsidisation approach is supported, this would also need to translate to drivers who are liable for an infringement offence under the CIT regime, where currently a driver is liable for the \$668.94 blood test fee. This would also have cost implications for Police.
204. This fee is not set in the Bill. If the Committee supports this approach it may wish to note this support in its report to Parliament.

Recommendations outside the scope of the Bill

205. A number of submitters made suggestions that were outside the scope of this Bill. These suggestions tended to relate to the funding or expansion of services to reduce drug-related harm in society. One individual submitter suggested the government should *“fix the substance use problem by addressing the root causes of substance use which is systemic racism, socioeconomic, abuse and underfunding of mental health treatment.”*

¹⁰ Note that this fee of \$668.94 applies only to criminal offences.

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206. Other submitters also commented on a broad range of initiatives, including:
- a. broader investment in services that may address the causes of drug use such as access to education, health services and mental health support
 - b. improving education in schools about drug use
 - c. wider drug reform, including decriminalisation of cannabis and the legal and enforcement approaches to drug use and possession.
207. These types of changes are beyond the scope of the proposed drug driving regime in this Bill.

Other matters raised by Departmental advisers and PCO

We are working with PCO on a number of minor and technical amendments to the Bill that will be included here in a table.

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Appendix 1: List of submitters

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Appendix 2: Clause by clause analysis and recommendations

RELEASED UNDER THE
OFFICIAL INFORMATION ACT



11 May 2021

OC210372

Hon Michael Wood
Minister of Transport

Action required by:
Friday, 21 May 2021

TRANSPORT ACCIDENT INVESTIGATION COMMISSION: DRAFT STATEMENT OF INTENT 2021 – 2025 AND STATEMENT OF PERFORMANCE EXPECTATIONS FOR 2021/22

Purpose

Provides you with advice on the Transport Accident Investigation Commission's (TAIC's) draft Statement of Intent (SOI) for 2021 – 2025 and draft Statement of Performance Expectations (SPE) for 2021/22, and a draft letter to the Chief Commissioner with proposed comments on both documents.

Key points

- As responsible Minister for TAIC, you have an important role to play in setting expectations for TAIC and influencing their SOI and SPE - which are public accountability documents.
- TAIC provided you with copies of their draft SOI and SPE on 30 April 2021. You have 15 working days (21 May 2021) to provide feedback on both documents, in accordance with sections 146 and 149I of the Crown Entities Act 2004.
- Overall, the Ministry of Transport (the Ministry) is comfortable with the contents of TAIC's draft SPE and SOI, and consider that the measures contained within the SPE are consistent with the expectations you have outlined in your Letter of Expectations (LOE) for 2021/22. We recommend you make the following comments to TAIC on these documents (which are included in the letter **attached at Appendix One**):

Withheld under sections 9(2)(f)(iv) and 9(2)(g)(i) of the Official Information Act 1982

[Redacted content]

[Redacted content]

IN CONFIDENCE

- o **encouraging TAIC to work with the transport regulators in the development of notification analytics and associated qualitative measures.** As part of their Knowledge Transfer System project, TAIC is looking to develop the ability to conduct wider trend analysis for accidents to determine common causes that require proactive investigations. Given the potential overlap of this objective with the role of the transport regulators, the Ministry recommends you encourage TAIC to work with regulators on these matters.
- o **confirming TAIC’s intentions for incorporating the *Government Workforce Policy Statement on the Government’s expectations for employment relations in the public sector*, and associated guidance, into their final SPE.** It is unclear whether TAIC intend to apply the guidance across the forecast financial statements for staff remuneration expenditure.
- Once your comments have been received, TAIC must consider your comments before finalising its SOI and SPE. TAIC are required to publish the final versions of its SOI and SPE as soon as practicable, but no later than 1 July 2021.

Recommendations

We recommend you:

- 1 **agree to sign the attached letter (Appendix One)** with feedback to the Chief Commissioner of the Transport Accident Investigation Commission on the draft Statement of Intent 2021 – 2025 and draft Statement of Performance Expectations for 2021/22, subject to any additional changes you wish to make. Yes / No

Withheld under section 9(2)(a) of the Official Information Act 1982



Robert Anderson
Manager, Governance
11 / 05 / 2021

Hon Michael Wood
Minister of Transport
..... / /

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

Comments

Contacts *Withheld under section 9(2)(a) of the Official Information Act 1982*

Name	Telephone	First contact
Nick Brown, Deputy Chief Executive, System Performance and Governance		
Robert Anderson, Manager, Governance		✓
Jono Reid, Senior Adviser, Governance		

TRANSPORT ACCIDENT INVESTIGATION COMMISSION: DRAFT STATEMENT OF INTENT 2021 – 2025 AND STATEMENT OF PERFORMANCE EXPECTATIONS FOR 2021/22

The Statement of Performance Expectations (SPE) and Statement of Intent (SOI) provide an important opportunity for you to influence an entity's short-to-medium term priorities

- 1 SPEs and SOIs are statutory planning and accountability documents governed by the Crown Entities Act 2004 (the Act).
- 2 The purpose of an SPE is to:
 - 2.1 enable you, as responsible Minister, to participate in the process of setting annual performance expectations;
 - 2.2 enable the House of Representatives to be informed of those expectations; and
 - 2.3 provide a base against which actual performance can be assessed.
- 3 SOIs have a similar purpose, but outlines strategic intentions and medium-term undertakings. The SPE operates within those intentions and includes reporting towards those intentions. SOIs must cover a minimum of four years and be refreshed at either least every three years or at your direction
- 4 Your Letter of Expectations (LOE) for 2021/22 to TAIC's Chief Commissioner provided context and input for TAIC's draft SOI and SPE. The Ministry has assessed TAIC's draft documents against the expectations set in your LOE, and a copy of your LOE is attached at **Appendix Two** for reference.

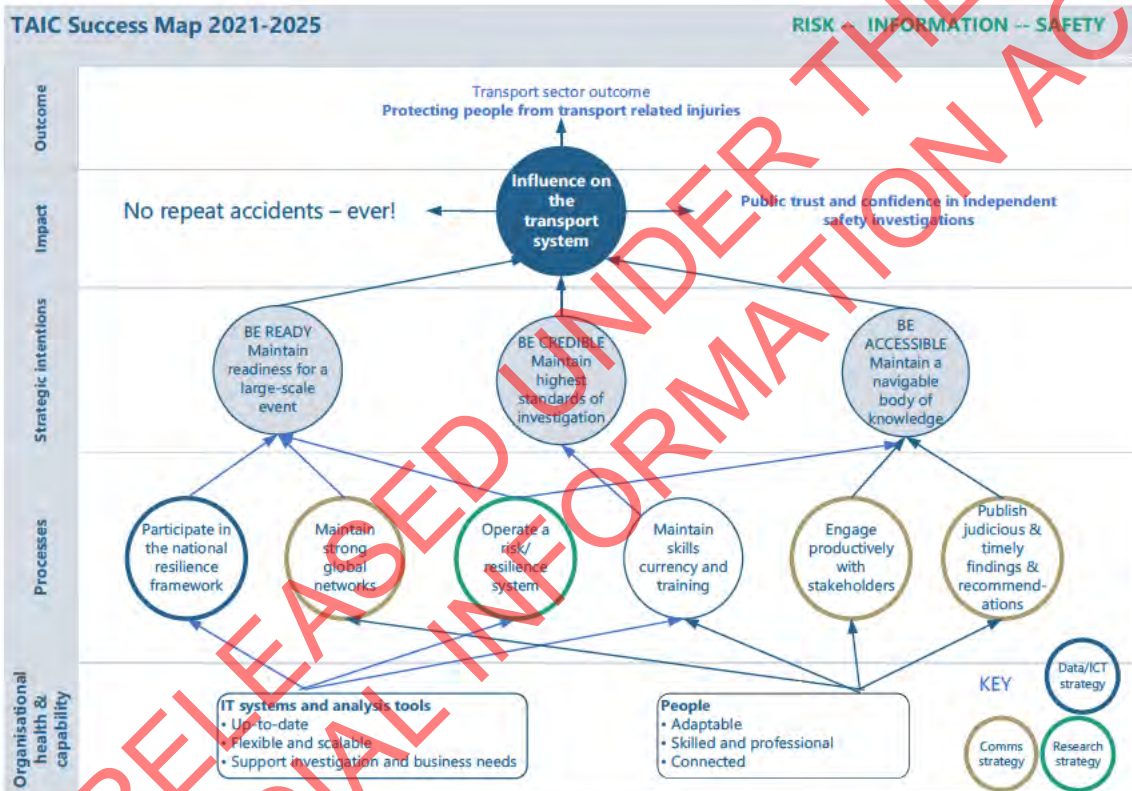
Strategic Alignment

Giving effect to the Knowledge Transfer System Project is a core priority for TAIC through to 2025

- 5 TAIC's SOI focuses on giving effect to their successful baseline increase through Budget 2020, and the Knowledge Transfer System project. TAIC's previous SOI (2018-2022) focussed on reviewing the organisation's analysis, software, hardware and data management needs. This SOI outlines the planned actions being taken following this work.
- 6 The outcomes TAIC is seeking through their SOI and Knowledge Transfer System strategies are outlined in their success map on **page 17** of the SOI (and copied within this briefing for reference). TAIC has identified three strategic intentions, which are the pillars for the outcomes the Commission is seeking:
 - 6.1 **Be ready – maintaining readiness for a large scale event:** TAIC has noted that the funding received from Budget 2020 enables them to design scalable systems that will better enable the Commission to respond to sudden influxes of data and information that would occur after a major event. By June 2025, TAIC

aims to have the systems and process in place to support a response to a major accident.

- 6.2 **Be credible – maintaining the highest standards in investigation processes:** TAIC intends to achieve this through documenting all their investigative processes by 30 June 2024. Currently four out of eight investigative processes are fully documented. TAIC also notes that in recent years they have introduced inquiry protocols and quality assurance frameworks.
- 6.3 **Be accessible – maintaining an accessible body of knowledge:** currently all of TAIC’s information is available through written reports. TAIC intends to improve accessibility through making findings, recommendations or other key information searchable.



7 By the end of the SOI reporting period (30 June 2025), TAIC expects to have achieved the major benefits of the Knowledge Transport System.

Withheld under Section 9(2)(f)(iv) and 9(2)(g)(i) of the Official Information Act 1982

8 [Redacted]

9 [Redacted]

Withheld under Section 9(2)(f)(iv) and 9(2)(g)(i) of the Official Information Act 1982

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- 11 The Ministry also notes that the 'process' section of TAIC's success map does not include explicit reference to the assurance approach in place to provide the Commission with confidence over the quality of TAIC's accident investigation and reporting processes. We suggest TAIC considers inclusion of this. We are also unsure what TAIC means by 'operate a risk/resilience' system', and have sought clarity from TAIC on this matter separately to this briefing.

TAIC's core purpose, strategic framework and direction remain unchanged

- 12 TAIC continues to retain their aspirational goal of 'No Repeat Accidents – Ever!'. In terms of wider transport outcomes, TAIC contributes towards the 'Healthy and Safe People' component of the *Transport Outcomes Framework*. TAIC's work seeks to protect people from transport related injuries, through findings that prevent similar accidents or incidents from occurring again.

Delivery Expectations and Performance

TAIC has made one minor change to their existing output class

- 13 TAIC is funded for one output class: accident and incident investigation and reporting. Within this output class, TAIC sets expected parameters for timeliness, volume (expected ranges for completed inquiries, and caseloads) and cost.
- 14 This SPE, TAIC's cost measure 'average cost of domestic inquiries closed' has increased from \$300,000-\$350,000 per annum to \$350,000-\$400,000 per annum. This change reflects the increased overheads allocations that will be incorporated into the average cost of each investigation as a result of the 2020 baseline increase.
- 15 The Ministry is comfortable with this change given the size of the increase to TAIC's baseline funding (from \$5.5 million in 2019/20 to \$7.3 million in 2020/21), and the links between TAIC's baseline and the overhead cost component of their 'average cost' measure. The previous actual average costs reported by TAIC over the past three financial years are: \$329,000 in 2019/20, \$350,000 in 2018/19 and \$340,000 in 2017/18.

TAIC also intend to introduce additional qualitative measures into future SPEs

- 16 TAIC is also intending to introduce qualitative measures as part of giving effect to its strategic intentions. The key changes surrounding these measures include being able to undertake risk trend analysis, and develop a risk based approach for opening inquiries (page 8 of the 2021/22 SPE refers). Currently these activities appear to be undertaken by transport sector regulators as part of the notification process to TAIC, and the Commission is seeking to develop greater ownership over this process.
- 17 **Ministry comment:** The Ministry is aware that TAIC has started to engage externally on this matter, and our observations of their engagement with the Civil Aviation Authority (CAA) indicate that each party will have to work together to develop clarity over roles and objectives. TAIC and regulators will likely seek different objectives

through their notification analytics. We also note that Audit New Zealand have encouraged TAIC to create a measure that enables the Commission to assess how regularly future accidents or incidents are repeating, and whether they are achieving their aspirational goal of 'No Repeat Accidents – Ever!'.

- 18 The Ministry recommends that as part of your feedback, you ask TAIC to work closely with the parties that provide them with information to ensure there is role clarity, and insights gained to ensure both TAIC and the transport regulators achieves their statutory mandate.
- 19 No research strategy measures have been included within TAIC's draft SPE or SOI. TAIC has indicated this will come in the 2022/23 SPE following finalisation of the Research Strategy in mid-2021.

Financial performance

TAIC is forecasting a net surplus of \$124,000 in 2021/22, with a neutral budget for 2022/23

- 20 TAIC is forecasting a net surplus of \$124,000 for the 2021/22 financial year, and a breakeven budget for 2022/23. The overall funding changes noted within TAIC's SPE reflect the baseline increases from Budget 2020.
- 21 TAIC noted that they are currently forecasting personnel cost changes at the Commissioner level. TAIC has no control over these cost changes as remuneration for Commissioners is set by the Remuneration Authority. The Ministry suggests that you ask TAIC to consider whether the latest Government Workforce Policy statement and guidance should be incorporated into the forecast financial statements. As an independent Crown Entity TAIC is required to 'have regard to' the Government Workforce Policy Statement, but they are not obligated to give effect to it.

No significant issues were identified by Audit New Zealand in their annual audit of TAIC for 2019/20

- 22 Audit New Zealand issued their unmodified audit opinion on TAIC's performance for 2019/20 on 18 November 2020 and reported the following matters:
 - 22.1 The 'management control environment', 'financial information system and controls' and 'performance information system and associated system controls' all continued to be rated as 'very good'. Audit NZ also could not identify any issues that indicated management override of internal controls.
 - 22.2 TAIC were recommended to ensure that all their relevant financial manual journals were printed, checked and evidenced as independently reviewed by BDO. This recommendation was considered 'beneficial' for the organisation, which is the lowest of Audit NZ's recommendation rankings. This recommendation was accepted by TAIC management.
- 23 Two previous recommendations remain open on Audit NZ's report, which date back to 2017. These recommendations cover the development of a new stakeholder survey, and inclusion of a measure on repeat accidents. Both matters are captured within TAIC's strategic intentions, and look like they will be addressed by the end of the SOI reporting period. The Ministry will continue to monitor this matter.

Risks

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There is an inherent risk to TAIC's accident and investigation reporting output measures, as the nature of TAIC's work mean that sudden influxes of inquiries within a small portfolio of cases can affect the overall targets. This risk is largely outside of TAIC's control; however, it is always something that should be noted.

Next Steps

26

Please review the **attached** letter of feedback at **Appendix One**, alongside TAIC's draft SOI and SPE, and provide your feedback to TAIC before 21 May 2021. Once received, TAIC must consider your comments before finalising their SOI and SPE.

27

TAIC is required to publish the final versions of their SOI and SPE as soon as practicable, but no later than 1 July 2021.

28

Final versions of TAIC's SOI and SPE will be provided to your Office upon completion. You will be required to table these documents in the House of Representatives and you can either do this upon receipt, or when you table TAIC's Annual Report for 2020/21 in late October/early November 2021.

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Jane Meares
Chief Commissioner
Transport Accident Investigation Commission

jane.meares@cliftonchambers.co.nz

Dear Jane

Statement of Intent 2021 – 2025 and Statement of Performance Expectations for 2021/22

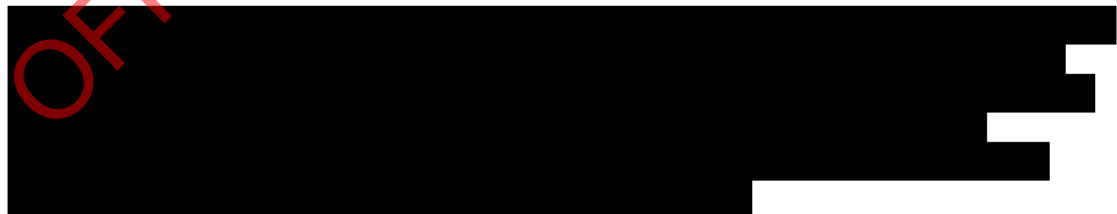
Thank you for submitting the Transport Accident Investigation Commission's (TAIC's) draft Statement of Intent (SOI) 2021 – 2025 and draft Statement of Performance Expectations (SPE) 2021/22 for my review. I appreciate the time and effort that has gone into preparing both of these documents.

Overall, I am largely comfortable with the proposed intentions and expectations listed within the documents. I also note the changes you have made to your performance outputs as a result of the effects of the 2020 baseline funding increase on the overhead cost allocation component of the 'average cost of domestic inquiries closed' measure. I am comfortable with these changes.

I have a few comments across both documents, which are listed below:

- **Major accident response:** I note one of the core focuses of your SOI is to design scalable systems that will better enable TAIC to respond to sudden influxes of data and information that would occur after a major event. I also note that TAIC aims to have the systems and process in place to support a response to a major accident by 2025.

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- **Success map:** Within the 'processes' section of the Success Map, I note there is no explicit reference to TAIC's core business of accident and incident investigation and reporting, and how assurance is gained that TAIC's processes and reporting remain of the highest standard. TAIC may wish to consider including assurance processes as part of the success map.

- **Upcoming development of qualitative measures in relation to notification analytics:** I note across both documents that TAIC is conducting further work to determine what qualitative measures it can add to its performance reporting. These include being able to proactively open inquiries based on intelligence received.

Both TAIC and the regulator both holds significant responsibilities towards maintaining and improving public safety. These measures appear a positive step towards future improvements and I look forward to receiving updates.

I understand TAIC has begun to engage with the transport sector regulators on this matter. I encourage TAIC to continue to do so to ensure that shared insights and benefits can be gained through this process, without impacting on each agency's statutory duties.

- **Inclusion of additional information about how TAIC meets its good employer obligations:** Within your draft SPE, I note your statement that the organisation will continue to strive to meet the Government's Expectations on Employment Relations in the Public Sector. In addition to this commentary, I would like to see further information about how TAIC works to meet its obligations as a good employer. These obligations cover a wide range of matters including recruitment, diversity and inclusion, culture, staff wellbeing, and building staff capacity and capabilities.

Thank you again for providing me with these draft documents, and the work that has gone into them. I look forward to our continued engagements and work to improve transport outcomes for New Zealanders.

Yours sincerely

Hon Michael Wood
Minister of Transport

Copy to: Lois Hutchinson, Chief Executive, Transport Accident Investigation
Commission

Hon Michael Wood

MP for Mt Roskill

Minister of Transport

Minister for Workplace Relations and Safety

Deputy Leader of the House



27 JAN 2021

Jane Meares
Chief Commissioner
Transport Accident Investigation Commission
PO Box 10 323
WELLINGTON 6143

jane.meares@cliftonchambers.co.nz

Dear Jane

Letter of Expectations 2021/22 for the Transport Accident Investigation Commission

This letter sets out my expectations of the Transport Accident Investigation Commission (TAIC) for the upcoming year, to help set TAIC's strategic direction and inform reporting to Ministers on its impacts and performance.

The Government has three overarching objectives: keeping New Zealanders safe from COVID-19, accelerating our economic recovery, and laying the foundations for a better future. This last objective has a focus on reducing child poverty, tackling climate change, and addressing housing. As Minister, my focus is to deliver on the Government's objectives and our commitments. I expect that TAIC has the governance, leadership and organisational capability to support delivery on these objectives and commitments.

New Zealand's transport system has a crucial role to play in supporting and improving peoples' wellbeing, and the quality of places we live in and visit. It is a long-term and integrated system, where the results of investments are felt across generations.

To improve intergenerational wellbeing, transport needs to make positive contributions across the five transport outcomes framework areas: economic prosperity, inclusive access, resilience and security, healthy and safe people, and environmental sustainability. I expect TAIC to consider how these outcomes are met as part of their operational activities and the functions that it delivers.

In addition to this, the Government's transport priorities are:

- **Safety:** Delivering a transport system where no-one is killed or seriously injured
- **Better travel options:** Providing people with better transport options to access social and economic opportunities
- **Climate change:** Developing a low carbon transport system that supports emissions reductions, while improving safety and inclusive access

- **Improving freight connections:** Improving freight connections for economic development.

Specific expectations for the Transport Accident Investigation Commission

I have set specific expectations that I would like the TAIC Board to deliver in 2021/22. These expectations are critical in supporting the delivery of the Government's priorities for the year ahead.

TAIC's investigative role

I acknowledge TAIC's ongoing progress and commitment to delivering its statutory role of determining the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future, rather than to ascribing blame to any person. I expect TAIC to:

- continue to improve overall timeliness of the number of inquiries completed per year, while ensuring the quality of investigations are not compromised (this includes considering views from stakeholders on how best to address the timeliness concerns)
- build organisational resilience on capacity and capability (including IT capability) to respond to a rapidly changing operating environment, and to 'shocks', such as a major accident or natural disaster
- influence the transport system by effectively sharing TAIC's insights and knowledge with participants
- explore modal trend analysis and insight sharing, in addition to case studies and the publication of the Watchlist.

Knowledge Transfer System project delivery

I expect TAIC to continue to work with the Ministry of Transport (the Ministry) in implementing its Digital Transformation Strategy and Knowledge Transfer System project. This includes updating the Ministry on the progress of the project, and ensuring the project remains within the funding allocations provided.

Financial management

I expect TAIC to continue to deliver its operations in an efficient and cost effective manner.

Working with others

I expect you to work with others in the transport system to maximise the benefit that the system and New Zealand derives from the insights and lessons from your investigations, in particular to:

- continue to track and report how agencies and other participants have responded to TAIC's recommendations, and explore ways to better track the current progress on those recommendations
- ensure effective communication with key stakeholders, including families and next-of-kin, so that they are appropriately informed during the investigation process

- support the Ministry's work programmes including the regulatory stewardship programme, and ongoing monitoring programme.

Good employment practices

I expect the TAIC to act as a good employer including meeting the Government Expectations on Employment Relations in the State Sector and embedding a strong health and safety culture within the Agency. I also expect you to use your leverage to ensure good employment and health and safety practices by your contractors and their subcontractors.

Crown monitoring

I have high expectations that the transport Crown entities are working with the Ministry in its capacity as monitor. The role of the Crown monitor is critical in ensuring that I am appropriately briefed on any risks or issues that could impact on TAIC's ability to perform effectively.

I have asked my officials to undertake their monitoring activity in line with the monitoring programme established for TAIC, which is attached. I have also instructed my officials to undertake any other monitoring activity necessary to provide me with confidence in the capability and performance of TAIC.

I expect that all TAIC staff engaging with the Ministry's Crown monitor to do so in a constructive and transparent way. This means ensuring that information is provided in a timely way to ensure issues and risks are being appropriately managed.

Board performance and good governance

As new opportunities or changes arise in the investigations sector, I expect TAIC to proactively engage with the Ministry at an early stage to ensure safety and security perspectives are considered.

I expect TAIC to consider the general expectations and good governance requirements set out in **Appendix One**.

Response

I request that TAIC provide advice, in the briefing that accompanies formal submission of its updated accountability documents, detailing how its Statement of Performance Expectations and Statement of Intent responds to my expectations and priorities set out in this letter.

As you work to develop your accountability documents, I would like to see a clear articulation of my priorities against your entity's delivery programme for the year ahead.

I also expect TAIC to be reporting to me on progress directly against my expectations, the associated deliverables, and any risks that may affect TAIC's delivery and performance. I expect TAIC's reporting to provide a free and frank view on progress, delays and risk, so I can have meaningful conversations with the Board on TAIC's performance.

I encourage you to work with my officials in developing your response.

I am ambitious for what we can collectively achieve in creating a modern transport system that improves the wellbeing of all New Zealanders. I look forward to working with you in the year ahead.

Yours sincerely



Hon Michael Wood
Minister of Transport

Copy to: Lois Hutchinson, Chief Executive, Transport Accident Investigation Commission
Peter Mersi, Chief Executive, Ministry of Transport

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Appendix One: General Expectations and Good Governance

Board governance

The direction and decisions set by the Board have a fundamental and long lasting impact on the wellbeing on all New Zealanders. With this in mind, I expect the Board to provide strong and effective governance of their entity, ensuring they are well placed to make effective decisions and use its resources efficiently.

The Board is the most significant influence in ensuring that TAIC is performing effectively. I expect the Board to provide me with clear information to understand the progress that TAIC is making to deliver my priorities.

Collective duties of the Board

I expect the Board, in line with the Crown Entities Act 2004, to:

- act consistently with TAIC's objectives, functions, statements of intent and current statement of performance expectations
- perform their functions efficiently, effectively and consistently with the spirit of service to the public, and in collaboration with other public entities where practicable
- operate in a financially responsible manner.

Individual duties of Board members

I expect individual Board members, in line with the Crown Entities Act 2004, to:

- comply with the requirements of the Crown Entities Act, the Transport Accident Investigation Commission Act 1990, the Health and Safety at Work Act 2015 and other relevant legislation that TAIC is responsible for administering or is subject to
- act with honesty and integrity
- act in good faith and not at the expense of their entity's interests
- act with reasonable care, diligence and skill
- not disclose information.

Further, I expect individual members and the Board as a whole to actively manage conflicts of interest. This means ensuring my officials are advised of any conflicts as they arise, including the steps taken to manage conflicts.

Complying with relevant directions

I expect TAIC to understand and comply with relevant government and central agency directions, including those issued by the Cabinet Office, Treasury and the Public Service Commission. In particular, I would like TAIC to ensure it has taken appropriate account of:

- the Government's Enduring Letter of Expectations
- model standards and guidance issued by the Public Services Commission, including (but not limited to) the Standards of Integrity and Conduct, and model standards

relating to Positive and Safe Workplaces, Information Gathering and Public Trust, Speaking Up, Conflicts of Interest, and Workforce Assurance

- the Government's Expectations on Employment Relations in the State Sector, issued by the Public Services Commission
- Cabinet office circular CO(19) 6 (Investment Management and Asset Performance in the State Services), which includes the requirement for agencies to complete Risk Profile Assessment and engage in the Gateway review process
- the All-of-Government ICT Operations Assurance Framework.

Additionally, I expect TAIC to ensure it adheres to the principles of open data and proactively provides what data and information it can publicly, as appropriate in accordance with the government open data policies. I also encourage TAIC to consider the importance of data security and the protection of assets and people, such as the use of the Government's Protective Security Requirements framework.

Organisational culture

I expect the Board to lead and nurture an inclusive and accepting culture within TAIC, which respects and reflects the diversity of New Zealanders and the Government's expectations for Employment Relations. This includes ensuring there is a zero tolerance approach to bullying and harassment, and that TAIC has appropriate policies in place for managing staff wellbeing.

Treaty of Waitangi

I expect Boards to lead and ensure that TAIC supports the Crown in its relationships with Māori under te Tiriti o Waitangi (the Treaty). This includes adhering to obligations under the Treaty, engaging with Māori as part of the TAIC's work programme and also understanding Māori perspectives on matters.

Board Governance and Performance Evaluations

I expect the Board to undergo regular performance reviews to ensure it has the right capability to perform as an effective governance body for TAIC. I expect an evaluation process is undertaken annually, with external evaluations undertaken periodically unless there have been significant changes to your board or TAIC's responsibilities. I encourage you to consider using an independent facilitator as part of this evaluation process, and that the evaluation is tailored to the needs and state of the organisation and your Board at the time (i.e. a full and comprehensive independent evaluation is not expected annually, but it should take place at least once every three years).

I also expect Chairs to inform the Ministry of the outcome of the results of the evaluation, including a summary of results. Should any performance issues arise as a result of those evaluations, I expect Chairs and the individual directors affected to work to resolve those issues. Members should also continue to professionally develop within their role and an active culture of learning should be fostered within the Board.

Please note, the Ministry may seek to explore the process through which board evaluations are undertaken as part of its regular monitoring programme, and may request further information about evaluations in order to discharge their monitoring function.

No surprises approach

I expect the Board to keep me informed of any significant risks or issues, taking a 'no surprises' approach. In the context of this approach, 'no surprises' means that the Board:

- is aware of any possible implications of their decisions and actions for wider government policy issues
- informs me in advance of any major strategic initiative; and
- advises me of issues that may be discussed in the public arena or that may require a ministerial response, as soon as possible. This includes, but is not limited to: significant legal proceedings, matters that will result in expected sustained negative media or public scrutiny, instances where directors are placed in situations of actual or perceived conflicts of interest, or issues that may affect a director's ability to contribute to the board.

I also ask you to avoid 'pre-judging' my potential response to risks and opportunities. I expect you to advise me about emerging issues and opportunities, including major actions the Board is considering.

The Board must ensure that it is effectively managing potential, perceived and actual conflicts of interest. In particular, the Board should ensure that any conflicts are disclosed as they are identified, with appropriate mitigations put in place in a timely fashion. I also expect the Board to ensure that TAIC has effective processes to support disclosure and management of conflicts, noting that any substantive conflicts should be notified to the Ministry on my behalf.

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Appendix Two: 2021 Monitoring Programme



Note: the areas of focus (noted above) are indicative and will be adapted throughout the year as new information or issues arise. These assessments do not substitute our wider monitoring role, but rather provide a basis for a more proactive focus on key areas of interest.