MINISTRY OF TRANSPORT
TE MANATŪ WAKA

OC240996

28 August 2024

[redacted]

Tēnā koe,

I refer to your email sent on 23 August 2024, requesting the following under the Official Information Act 1982 (the Act):

> *"….Under section 12(3) of the Official Information Act (the OIA) we request that you treat this request as urgent. Our reasons for seeking an urgent response are that we need the requested information in order to participate in the scrutiny of the Land Transport (Drug Driving) Amendment Bill.*
>
> *… The Ministry has published a redacted version of its Regulatory Impact Statement (RIS) on the legislation…. However, it has redacted portions of the RIS on pages 3, 5, 16, 19, 20, 21, and 23. We request an unredacted copy of the RIS.*
>
> *… Under section 16 of the Official Information Act, our preferences are (a) to receive a copy of the whole of the document (b) that the information is disclosed in a text searchable format, either Word or PDF, (c) that it does not have a watermark of 'Released under the Official Information Act' or similar across the text and (d) that it is sent to the email address from which the Ministry received this request.*
>
> *…If the Ministry decides that there is 'good reason' under the OIA to withhold any of the information we are requesting, then under section 19(a)(ii) of the OIA, we further request that the Ministry provide us with the grounds in support of each withholding reason cited for refusal and the public interest factors favouring disclosure that the Ministry considered."*

I have reviewed the redactions on the Regulatory Impact Statement titled Legislative Amendments to Enable Roadside Oral Fluid Testing. While some of the redacted information is being released in the attached document, I have decided to continue to withhold some information under the following sections of the Act:

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. This information relates to the estimated cost of tests that will be procured under the legislation. The public release of this information would likely prejudice the procurement process.
9(2)(h)	to maintain legal professional privilege

9(2)(i) to enable a Minister of the Crown or any public service agency or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities

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.

In response to your observation about the Bill's consistency with the New Zealand Bill of Rights Act 1990 (BORA), the Attorney-General's report on this matter is publicly available. The redacted information does not add anything further, in terms of BORA issues, to those raised in that report.

You have the right to seek an investigation and review of this response by the Ombudsman, in accordance with section 28(3) of the Act. The relevant details can be found on the Ombudsman's website **www.ombudsman.parliament.nz**

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

Joanna Heard
Manager, Safety

Regulatory Impact Statement: Legislative amendments to enable roadside oral fluid testing

Coversheet

Purpose of Document	
Decision sought:	Agreement to introduce legislative amendments to enable roadside oral fluid screening of drivers. This will complement existing measures for detecting and deterring drug driving.
Advising agencies:	*Ministry of Transport, NZ Police*
Proposing Ministers:	*Associate Minister of Transport*
Date finalised:	19 April 2023

Problem Definition

A roadside oral fluid test (OFT) regime of drivers intended to be introduced from March 2023 cannot be implemented. This is because no commercially-available OFT devices can meet the legislative approval criteria. The intended benefits of improved detection and deterrence of drug driving cannot be realised.

The current regime intended to use the OFT devices as the basis for issuing infringements and stand-down periods for drivers at the roadside. There are limitations in terms of device accuracy and ability to detect specific drugs. This could result in drivers who haven't recently consumed drugs being negatively impacted (due to false positive results). It could also result in drivers who have recently consumed drugs not being detected (because the devices can only detect the family or class of drug, not a specific drug).

Executive Summary

Why government intervention is required

Many illicit, recreational and prescription drugs impair driving ability and increase crash risk.[1] Data from the Crash Analysis System[2] shows that over 2019-2021, an average of 101 people per annum were killed in crashes where the driver had consumed impairing drugs before driving. This represented 31% of all road deaths.

A new OFT regime introduced to address the risks of drug driving can't be implemented

The government recently took action to address the risks of drug driving by introducing an oral fluid[3] testing regime and other improvements through the Land Transport (Drug Driving) Amendment Act 2022. This amended the Land Transport Act 1998 (the Act) to enable Police to randomly stop drivers and test their oral fluid for drugs, in a manner

1 See the final report of the Independent Expert Panel on Drug Driving, released in April 2021, available at: https://www.transport.govt.nz/assets/Uploads/Report/IndependentExpertPanelonDrugDrivingFinalReportApril2021.pdf

2 The Crash Analysis System is a tool used to capture information on where, when and how road crashes occur.

3 Saliva comprises the secretions from the salivary glands, whereas oral fluid is saliva plus other debris in the mouth.

similar to the alcohol breath testing regime. If the driver failed two oral fluid tests, they would be forbidden from driving for 12 hours and issued an infringement notice at the roadside. A medical defence is available for drivers who have consumed medication in accordance with their prescription or instructions from their health practitioner.

The Act sets out approval criteria for an OFT device. Because the devices would be used as the evidential basis for taking action at the roadside, the legislation sets a high threshold for device approval. A Police procurement process undertaken in 2022 was unable to find a suitable OFT device that met the legislative approval criteria.

Options to enable roadside oral fluid testing

Three options were identified to enable compulsory roadside oral fluid testing:

1. Status quo: delay implementation of the random roadside oral fluid testing regime until a device is developed that meets the legislative requirements.
2. Amend the OFT device approval criteria and allow for identification of a class or family of drug (rather than an individual qualifying drug).
3. Introduce a new OFT regime, where the OFT device at the roadside is used as a screening tool, followed by evidential testing which involves laboratory analysis. This is the preferred approach.

Potential impact of the preferred option to use OFT as screening tool, with infringement notices issued following positive evidential test in the laboratory

Benefits

The main benefit of the preferred option is that roadside oral fluid testing could be implemented within a reasonable timeframe (e.g., 12 months from Royal Assent of any Amendment Bill) and at a scale that can detect and deter drug driving. This will not only save lives but will also prevent many road users from being seriously injured in crashes involving drug drivers.

The preferred option will also address some known limitations of the devices, particularly around the device accuracy and ability to detect specific drugs. This will also go some way to addressing concerns expressed by stakeholders, particularly about the impact of false negative results on drivers.

The Ministry of Transport (the Ministry) undertook a cost-benefit analysis of the original roadside OFT regime and predicted harm savings of around $415M over ten years (preventing approximately 65 fatalities and 431 serious crashes that would have resulted in deaths or serious injuries). We would expect the preferred option to deliver similar benefits, although at a slightly smaller scale (as the amendments to the Act included other measures, including higher penalties for drivers whose blood contained high-risk concentrations of impairing drugs).[4]

Costs

The preferred option will be more expensive to implement that the current regime in the Act, as there is an additional oral fluid laboratory test to confirm positive OFT results. The majority of direct costs of the oral fluid screening test regime will fall to government, particularly for the Police.

[4] Ministry of Transport (2020) *Enhanced testing regime for drug-impaired driving: Cost–Benefit Analysis.*

Drivers will bear some costs, including the time detained at the roadside for oral fluid testing. Drivers who have two positive roadside oral fluid screening tests will be forbidden to drive for 12 hours, which will involve some cost and potentially considerable inconvenience.

Risks

Commercially available OFT devices do not test for all qualifying drugs specified in the Act. Drivers who take drugs and drive may shift to drugs that won't be detected by OFT devices. These drivers may still be detected through the compulsory impairment test if a police officer has good cause to suspect they have consumed drugs.

The preferred option will limit some rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990, including potentially the right to be secure against unreasonable search or seizure (section 21) and not to be arbitrarily arrested or detained (section 22). These rights and freedoms can be subject to reasonable limits that are demonstrably justified in a free and democratic society (section 5).

There remains a very small chance (0.01% – 5.5%)[5] that a driver is forbidden for driving for 12 hours when they haven't consumed any qualifying drugs (based on two false positive OFT results).

Laboratory testing of oral fluid (as opposed to blood) for qualifying drugs is not currently undertaken in New Zealand by the Institute of Environmental Science and Research (ESR), the approved laboratory test provider for Police. This poses a risk to the implementation of the new regime. If ESR is unable to provide oral fluid drug tests there are other laboratory testing options that can be explored.

Consultation

When developing the preferred option outlined in this statement, we have considered the views expressed through earlier consultation exercises.[6] We consider that the preferred option addresses many concerns that were previously expressed by stakeholders. We have consulted with mainly government departments during the development of this paper, who were largely supportive of our preferred option, although the Office of the Privacy Commissioner raised some concerns along the lines they previously expressed on the Land Transport (Drug Driving) Amendment Bill.[7] If the preferred option is progressed, there will be an opportunity for interested members of the public to submit on the proposal as it progresses through the Parliamentary select committee process.

5 See footnote 18 below for further information.

6 See: Ministry of Transport (September 2019) Summary of Submissions on Enhanced Drug-impaired Driver Testing, available at https://www.transport.govt.nz/assets/Uploads/Submission/Summary-of-Submissions-Enhanced-Drug-impaired-driver-testing.pdf and the Departmental Report on the Land Transport (Drug Driving) Amendment Bill (August 2021), which contains a summary of submissions on the bill, available at https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCTI_ADV_99686_TI1035/ministry-of-transport-te-manat%c5%ab-waka-departmental-report

7 We consulted with Police, Waka Kotahi New Zealand Transport Agency, WorkSafe, ACC, the Ministry of Justice, Manatū Hauora Ministry of Health, the Crown Law Office, The Treasury, Te Puni Kōkiri and the Office of the Privacy Commissioner. The Privacy Commissioner's submission on the bill is available at https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCTI_EVI_99686_TI866/office-of-the-privacy-commissioner

Limitations and Constraints on Analysis

We have focused our analysis in this regulatory impact statement on addressing the limitations of the OFT regime in the Act while balancing human rights and impacts on drivers. We have not considered the broader questions on the extent to which people are impaired in their driving after consuming qualifying drugs, and the overall effectiveness of random roadside testing to deter drug driving. These issues were discussed in the impact statement that supported the initial proposals to amend the Act.[8]

The Minister of Transport and former Police Minister directed that any new random roadside oral fluid testing regime to align as closely as possible to the original legislative intent, taking account of the known limitations of available devices.

Ministers are keen to quickly progress policy decisions and legislative amendment, to enable oral fluid testing to be introduced as soon as is practically possible. There is limited time to obtain final policy decisions before the 2023 pre-Election period. Due to this, we have not consulted with the public or stakeholders, but have engaged closely with Police and the Crown Law Office. We have not updated the cost benefit analysis completed for the regulatory impact statement that supported the initial drug driving proposals. We anticipate the benefit to cost ratio will remain positive.

Some assumptions have been made, for example, the time it will take to conduct oral fluid screening tests and the cost of those tests plus laboratory confirmation tests.

We note that regimes similar to the preferred option have been proven effective in overseas countries, notably Victoria,[9] in reducing deaths on roads.

Responsible Manager(s) (completed by relevant manager)

Helen White

Manager, Mobility and Safety

Ministry of Transport

26/04/2023

Quality Assurance (completed by QA panel)

Reviewing Agency:	Te Manatū Waka Ministry of Transport
Panel Assessment & Comment:	A Ministry of Transport Quality Assurance Panel has reviewed the Regulatory Impact Statement "Legislative amendments to enable roadside oral fluid testing" produced by the Ministry of Transport and dated 19 April 2023. The panel considers that the Statement partially meets the Quality Assurance criteria. Because the legislated roadside drug testing regime is inoperable, the preferred option represents a new approach. The Statement

8 Available at: https://www.treasury.govt.nz/sites/default/files/2020-08/ria-transport-eddt-jul20.pdf

9 For example, recent research found that an increase in roadside drug tests in Victoria (from 42,000 to 100,000 per year) is estimated to have saved 33 fatal crashes and at least 80 serious injury crashes per year. Road trauma benefits out-weighed costs by 9.4 to 1. Cameron, M, Newstead, S, Clark, B and Thompson, L (2022). "Evaluation of an Increase in Roadside Drug Testing in Victoria Based on Models of the Crash Effects of Random and Targeted Roadside Tests". Journal of Road Safety, 33(2), 17-32. https://doi.org/10.33492/JRS-D-20-00272

	makes a reasonable case for this option, but there are two important provisos. First, given the time constraints this proposal has been developed under there has not been an opportunity to directly consult non-government stakeholders, especially the laboratories that will be required to implement the proposed regime. This deficiency is partially addressed by previous consultation processes and experience with a similar regime in Australia. However, the lack of specific consultation on the new proposal, especially on its detailed implementation, creates a serious risk that the new regime, once legislated, will not work as intended. The Statement points out that some of the implementation issues will be worked through after legislative enactment when detailed regulations are drawn up but this is not sufficient to fully close off the risk that the legislative authority might be inadequate. Second, time constraints have also precluded a detailed benefit cost analysis. A previous analysis is relied on.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Road to Zero is New Zealand's road safety strategy

1. In 2021, 318 people lost their lives in road crashes, and a further 2,323 were seriously injured. Provisional road death figures for 2022 show that 380 people lost their lives in road crashes. This level of harm has a permanent and profound impact on Aotearoa New Zealand communities that must be addressed.

2. Released in late 2019, Road to Zero is New Zealand's road safety strategy. The strategy is based on a vision where no one is killed or seriously injured in road crashes. As a step towards achieving this vision, Road to Zero sets a target for reducing deaths and serious injuries on our roads by 40 percent (from 2018 levels) by 2030.

3. The strategy is built around focus areas addressing infrastructure improvements, speed management, vehicle safety, work-related road safety, road user choices and system management. The action plan that supports implementation of the strategy includes an action to enhance drug driver testing.

Drivers in New Zealand are using impairing drugs

4. Many illicit and prescription drugs have the potential to impair driving, and New Zealand studies show that drivers are using those drugs and driving.[10] These drugs can slow reaction time, increase risk taking and cause lack of coordination, fatigue and disorientation, particularly when taken in combination with alcohol or other drugs.

5. Data from the Crash Analysis System indicates that over 2019-2021, an average of 101 people per annum were killed in crashes where drug use by a driver was a contributing factor. This represented 31 percent of all road deaths.

6. While research shows that drugs have the potential to negatively affect driving ability, we cannot say for certain that the presence of a particular drug or substance in a driver's oral fluid or blood means they are always impaired.[11] People respond to individual drugs, combinations of drugs and different dosages of drugs in different ways. In contrast to alcohol, there is not a clear linear relationship between dosages of drugs, when they are taken, and impairment.

Drug driver detection and enforcement in New Zealand is not as effective as it could be

7. Prior to the introduction of the amendments to the Act, Police at the roadside could only undertake a Compulsory Impairment Test (CIT) on drivers they had 'good cause to suspect' had consumed drugs. This means a police officer has to explicitly identify a reason to suspect a driver is potentially impaired from using drugs from external cues, such as erratic or poor driving, or the driver's behaviour once stopped. Applying the 'good cause to suspect' threshold means it is likely that drug impaired drivers are not being tested because there are no observable signs of impairment at the time of driving.

8. A CIT is a behavioural test, undertaken by a specially trained police officer, usually in a police station (given the hazards of completing the test at the roadside). It comprises eye, walk and turn, and 1-leg-stand assessments. A driver who fails a CIT is required to undertake an evidential blood test. This whole process can take up to 1.5 hours, which limits the number of tests Police can give to detect and deter drug driving.

10 The final report of the Independent Expert Panel on Drug Driving, above footnote 1, provides a useful summary of these studies.

11 See the final report of the Independent Expert Panel on Drug Driving, footnote 1 above.

9. Police records show that 473 CIT blood specimens were submitted for analysis in 2017/2018. It is estimated that, each year, around 500 blood specimens are submitted for analysis following CITs. In comparison, around 2.4 million compulsory alcohol breath tests were carried out in 2022. The low number of drug tests limits the opportunity to achieve a general deterrence effect, meaning that the perceived and actual risk of detection of drug driving is minimal. A University of Waikato survey of drivers in 2017 found that 60 percent of drivers thought people were likely to be caught by Police for drink driving but only 26 percent thought people were likely to be caught for drug driving.[12]

10. Effective deterrence requires a highly visible general deterrence component (such as random roadside drug testing done at scale), backed up with supportive public education. A significant number of drivers should be tested for drugs each year. The results of being caught should be perceived as swift, certain and severe but should not be perceived as unfair.[13] The initial regulatory impact statement noted the evidential basis for deterrence is low, however, most researchers agree that drug driver testing must be performed at scale to be effective. To address this, the initial cost-benefit analysis assumed a conservative deterrence impact that carries through to our current assumptions.[14]

A new regime to detect and deter drug drivers was enacted in 2022 following a public consultation process

11. In 2018, the Ministry of Transport, supported by Police, commenced a programme of work to investigate options to improve New Zealand's current drug-impaired driver detection and enforcement regime. In May and June 2019, the Ministry undertook public consultation on possible approaches to addressing drug-impaired driving. This consultation informed Cabinet policy decisions on a new drug driver testing and enforcement regime. A summary of the diverse views expressed during the consultation exercise is include in the Appendix to this statement. An Independent Expert Advisory Panel was appointed to provide advice on aspects of the new regime, including the extent to which people are impaired after consuming qualifying drugs.[15]

12. In 2022, Parliament passed the Land Transport (Drug Driving) Amendment Act 2022 which sought to introduce random roadside oral fluid testing, amongst other enhancements to the drug driving regime. The amendments came into force in March 2023, allowing a 12 month lead-in time for Police to procure OFT devices through a competitive tendering process, develop operational procedures, and train police officers.

13. The roadside OFT regime was designed to:

    - deter people from driving after having consumed a qualifying drug or qualifying drugs
    - remove drivers from the road who have recently used a qualifying drug or drugs

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12 Starkey, NJ and SG Charlton (2017) The prevalence and impairment effects of drugged driving in New Zealand. NZ Transport Agency research report 597, available at https://www.nzta.govt.nz/assets/resources/research/reports/597/597-The-prevalence-and-impairment-effects-of-drugged-driving-in-NZ.pdf.

13 Frith, WJ (2020) Risks of driving when affected by cannabis, MDMA (ecstasy) and methamphetamine and the deterrence of such behaviour: a literature review. NZ Transport Agency research report 644. Available at https://www.nzta.govt.nz/assets/resources/research/reports/664/664-Risks-of-driving-when-affected-by-various-drugs-literature-review.pdf

14 See footnote 4 above.

15 The consultation document and summary of responses, plus the reports of the Independent Expert Advisory Panel, are available on the Ministry's website: https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/

- sanction drivers who have recently used a qualifying drug in a way that is proportionate with risk but minimises potential harm (through the creation of an infringement regime, rather than relying on criminal offences)
- be operationally feasible for Police (including being efficient and cost-effective) and
- minimise the likelihood of successful legal challenge and maximise consistency with the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) and Te Tiriti o Waitangi.

14. Under the new provisions in the Act, it was intended that drivers could be randomly stopped (that is, there is no 'good cause to suspect' requirement) to undergo an OFT. Drivers commit an infringement offence if the results of two OFTs are positive and indicate the use of the same qualifying drug, and the person does not elect to have a blood test to establish a defence. These drivers will incur an infringement fee, demerit points, and be forbidden from driving for 12 hours.

15. Under the regime, a medical defence is available for drivers who have consumed medication in accordance with their prescription or instructions from their health practitioner. If a driver has a blood test resulting from a failed CIT, they could be liable for an infringement or criminal penalties depending on the type and level of drug/s present.

16. The two positive test results, and the ability to request an evidential blood test, were included in the regime to address the risk of false positive test results which can occur with OFTs. This risk was discussed in the initial impact statement that supported the proposals introduced into the Act.[16] In summary, there is a risk that OFTs return positive results when there the drug is either not present, or is present at a level that should not result in detection (because it is less than the cut-off threshold set in the device). Manufacturers' specifications and independent studies point to a range of error rates (both false positive and false negative results) for devices, typically between one to ten percent.

17. To achieve a level of general deterrence, Police intended to complete around 33,000 OFT in the first year of operating the new regime, increasing up to 66,000 per annum over a three-year period.

18. The Act sets out approval criteria for an OFT device. Before the Minister of Police can approve an OFT, the Minister must:
    i. consult the Minister of Transport and the Science Minister; and
    ii. have regard to the accuracy of the device; and
    iii. be satisfied that the device will return a positive result only if the device detects the presence of a qualifying drug at a level that indicates recent use of a specified qualifying drug. When determining this aspect, the Minister must have regard to any relevant New Zealand Standards or joint Australian/New Zealand Standards.

19. As noted above, people respond to individual drugs, combinations of drugs and different dosages of drugs in different ways. The OFT device approval criteria includes reference to recent use as a proxy for impairment.

20. Commercially available OFT devices have drug concentration cut-off thresholds that are set by the manufacturer. The Independent Expert Panel on Drug Driving noted that the device cut-off thresholds are generally aligned to oral fluid concentrations set in New Zealand or joint Australian/New Zealand Standards. The cut-off thresholds are accepted as a proxy for relatively recent drug use rather than historical use or accidental exposure. The applicable Standard in New Zealand is the AS/NZS

[16] See footnote 8 above.

4760:2019 Australian/New Zealand Standard “Procedure for specimen collection and the detection and quantification of drugs in oral fluid” (the Standard).

21. The device approval criteria was set at high threshold because OFT devices were intended to be used as evidential, rather than screening, tools. Infringement fees and mandatory driving standdown periods would apply on the basis of two positive OFT results at the roadside, without any further analysis of the driver’s oral fluid. This approach is unique to New Zealand. OFT devices are designed to screen drivers for drug use. Other jurisdictions utilise random roadside OFTs as screening devices, requiring further laboratory testing of either an oral fluid sample or a blood sample in order to confirm the presence of a specific drug or drugs.

What is the policy problem or opportunity?

The new oral fluid testing regime to detect and deter drug drivers cannot be implemented, and the regime does not adequately balance human rights and impacts on drivers

22. A roadside oral fluid test (OFT) regime of drivers intended to be introduced from March 2023 cannot be implemented. This is because no commercially-available OFT devices can meet the legislative approval criteria. The intended benefits of improved detection and deterrence of drug driving cannot be realised.

23. There are a number of commercially available OFT devices used overseas for roadside drug testing. In 2022 Police undertook a procurement process to identify potential devices that could meet the legislative approval requirements. However, due to the high legislative threshold required for using the devices as evidential tools, none of the commercial devices currently available on the market can be approved due to concerns with one or more of these factors:

    - accuracy – any device that produces false positive results will not meet the approval criteria, as the Minister must be satisfied that the device will return a positive test *only if* the device detects the presence of a qualifying drug.
    - specificity – any device that detects the presence of a class or family of drug, rather than specific qualifying drugs within these families, will not meet the approval criteria for those drugs. Commercially available OFTs can only detect indicative use of certain individual drugs, but also classes or families of drug (for example, opiates), rather than specific drugs within these families (for example, morphine or tramadol). The devices cannot distinguish between the drugs due to the similarities between their chemical structures.
    - recent use – in some cases, a device can detect certain drugs in oral fluid for up to 24 hours after last use and, for frequent users, up to three days.

24. The current regime intended to use the OFT devices as the basis for issuing infringements and stand-down periods for drivers at the roadside, despite limitations around the device accuracy and ability to detect specific drugs. These limitations were known throughout the development of the amendments to the Act. However, the full extent of the limitations and their interaction with the legislative requirements was not clear until after the procurement process was completed.

25. These limitations could result in drivers who haven’t recently consumed drugs being negatively impacted (due to false positive results). It could also result in drivers who have recently consumed drugs not being detected (because the devices can only detect the family or class of drug, not a specific drug). The regime doesn’t adequately balance legal and human rights considerations, largely because the OFT devices are being used as an evidential, rather than a screening, tool.

What objectives are sought in relation to the policy problem?

26. The objective is to address problems that have been identified with the current regime that was intended to use OFT devices as evidential tools, to improve detection and deterrence of drug driving while balancing legal and human rights considerations.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

27. The following criteria will be used to assess options:

- Detection and deterrence: improved level of deterrence of people from driving after having recently consumed a qualifying drug or qualifying drugs,[17] and improved detection at the roadside of those who have
- Operational feasibility: be operationally feasible for Police (including being efficient and cost-effective)
- Human rights and legal consistency: minimise the likelihood of successful legal challenge and maximise consistency with the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).

What scope will options be considered within?

28. The following factors have influenced the scope of options that have been considered:

- The testing regime will be limited to oral fluid samples. Oral fluid testing is less invasive than blood tests, easier to administer (blood tests require a medical professional to be involved) and involves lower costs for any subsequent confirmatory tests in the laboratory. Mandatory urine testing is not within scope as these tests are difficult to administer at the roadside due to privacy issues.
- Due to cost and practicality considerations, any regime will need to utilise commercially available OFT devices that meet any specified criteria for approval.
- The focus of the existing OFT regime is on recent drug use by drivers. As noted above, the current regime intended for recent use to be a proxy for impairment. Any OFT device approved for use must have drug concentration cut-off thresholds that are aligned to the oral fluid concentrations set out in the relevant Standard as these are accepted as indicating relatively recent drug use.
- Any new regime should align as closely as possible to the current legislative regime (part of the Ministers' commissioning).

What options are being considered?

29. The following options are being considered:

i. status quo – delay implementation of the random roadside oral fluid testing regime until a device is developed that meets the legislative requirements

ii. amend the legislative approval criteria to allow for OFT devices to be used as evidential devices at the roadside

iii. introduce a new OFT screening regime, where the OFT at the roadside is used as a screening tool, followed by evidential testing which involves laboratory analysis.

Option One – Status Quo

30. Police will continue to conduct compulsory impairment tests with the existing level of trained staff, to detect drivers who are impaired by drugs. A police officer must have 'good cause to suspect' that a driver had used a drug, or drugs, before undertaking the test. In 2017/18, 92 percent of blood samples submitted for drugs analysis following a

[17] Although the previous regulatory impact statement noted low evidential basis for the deterrent effect resulting from random roadside oral fluid testing, it has been used to effect in Victoria, Australia. See footnote 9 above.

CIT resulted in drug driving criminal convictions. This illustrates that CITs are accurate at identifying drivers impaired by drugs. Under this option, Police would likely submit around 500 blood samples for analysis following CITs per annum. The low number of tests that Police can complete under the status quo are unlikely to be sufficient to provide the desired deterrence effect.

31. The OFT regime can be implemented when Police are able to procure a commercially available device that meets the statutory approval criteria. While Police anecdotally understand new products may be in development, it is likely to be some years before these devices are available and there is no clear indication of their potential capabilities.

Option Two – Amend the legislative approval criteria to allow for OFT devices to be used as evidential devices at the roadside

32. This option would largely maintain the current regime of random roadside oral fluid testing. Police would have the legal power to stop and test a driver, without having good cause to suspect the driver had used drugs. The fundamental design of the regime would remain the same.

33. The key change under this option is that the Act would be amended to address the following issues that arose during the procurement process that was unsuccessful in identifying OFT devices that met the statutory approval criteria in the Act:

Adjust the approval criteria for OFT devices to allow for a low proportion of false positive test results	Commercially available OFT devices can produce false positive (and false negative) results. False positive results are particularly problematic, as they can result in enforcement action taken against drivers who have not recently consumed any qualifying drug. In recognition of this, safeguards were built into the current OFT regime to mitigate the effects of false positive results, including the requirement for two positive test results before an infringement notice can be issued, and the ability for a person to request a confirmatory blood test. In order for OFT to be implemented using commercially available OFT devices, the approval criteria must allow for some false positive test results. The Minister of Police would be required to have regard to the accuracy of the device, but will no longer need to be satisfied that the device will *only* return a positive result if the device detects the presence of a qualifying drug. The Minister could take into account any relevant information when considering the accuracy of a device. For example, the relevant Standard allows for a 10% error rate, which includes both false positive and false negative results. This means if 20 samples are tested in blind tests, no more than two failures in total (either false negatives and/or false positives) are permitted for each drug class tested. Requiring two positive results reduces the chances of a driver having two false positive results to around 0.01% – 5%.[18]
Clarify the test for recent use, so that it is based on the cut-off thresholds in the relevant Standard	Currently, the Minister of Police can approve a device if satisfied that it will return a positive test only if the device detects the presence of a qualifying drug at a level that indicate recent use. Different interpretations of what constitutes recent use are possible as the term is not defined in the Act. The original policy intent was to include reference to recent use as a proxy for the cut-off thresholds set out in the Standard. As noted above, the Independent Expert Advisory Panel pointed out that cut-off thresholds in

18 The Ministry of Transport's 2020 cost-benefit analysis of options to enhance drug driver testing regimes noted that are a number of reasons why an OFT might report a false positive (operator error, manufacturing fault, sample contamination, unusual subject biology, out-of-operating-limits, climatic conditions, etc). Performing a second OFT will not necessarily eliminate all of these causes. The chance of a positive result after two OFTs could therefore range from 0.01% – 5.5%.

	devices aligned to oral fluid concentrations set in the Standard are generally accepted as indicative of relatively recent drug use. However, the current legislative threshold overrides reference to the Standard and the meaning of recent use is not clear. An amendment is required to give effect to this intent.
Allow an infringement notice to be issued when a driver tests positive for a class or family of drug that a qualified drug is part of (rather than a specific qualifying drug, as is currently the case). Allow the approval of devices that test for classes of drugs that a specified qualified drug is part of	Currently, the Minister can only approve an OFT device for the purpose of testing oral fluid for the presence of one or more individual qualifying drugs. The relevant infringement offence provisions are also linked to two positive oral fluid tests for the same qualifying drug. For many qualifying drugs, OFT devices do not indicate the use of a specific drug, but rather a class of drugs. For example, the methamphetamine channel can also detect MDMA (a different qualifying drug). This means a positive result from this channel could mean the possible use of either methamphetamine or MDMA or both. Similarly, the opiate channel typically detects possible use of morphine, codeine and dihydrocodeine. The benzodiazepine channel can detect possible use of several drugs in that class. The current requirement to identify the presence of an individual qualifying drug significantly limits the scope of the current OFT regime, as a large number of qualifying drugs will be excluded from the testing regime. Allowing for the testing of families of drugs that a qualifying drug is a member of would address this issue, provided the OFT device channels do not also detect drugs that are not listed in the Act as a qualifying drug. New offence provisions will need to allow infringement notices to be issued to drivers that test positive for a family of drug that a qualified drug is part of (rather than a specific qualifying drug, as is currently the case).

34. This option would deliver the policy objective of addressing the problems with current OFT device approval criteria that were highlighted during the procurement process.

35. Because this option would enable Police to implement the roadside OFT regime using commercially available devices, Police will be able to better detect drivers that have recently consumed qualifying drugs. Police could roll out roadside OFT at a scale that would enable deterrence and remove drivers from the road where they test positive for a qualifying drug (or family of drugs that a qualifying drug is a member of). This is also a cost-effective option, as there would only be the cost of the OFT devices, with laboratory confirmation blood tests only required if requested by a driver (as under the current regime).

36. The option is likely to be supported those who made submissions in favour of introducing oral fluid testing under a presence-based approach which penalises drivers at the roadside. This was the position of the majority of submitters on the Ministry's 2019 public consultation document, and around a third of submitters on the Bill that led to the amendments to the Act.

37. In terms of the impact this option would have on particular community groups, it may have a disproportionate impact on specific communities. Submitters on the Bill that led to the amendments to the Act were concerned about the disproportionate negative outcomes of the OFT regime on young people, Māori and lower socio-economic communities. They noted that these groups are already overrepresented in the justice system and rates of cannabis use. A Ministry of Health survey has found that Māori are 2.2 times more likely to use cannabis compared to non-Māori.[19]

38. The impact of this option might be more severe for those living in rural communities, as the 12-hour prohibition on driving following two positive oral fluid tests will present challenges for those people to get home, to work, or wherever they need to be.

19 Ministry of Health (2015) *Cannabis Use 2012/2013*: New Zealand Health Survey.

However, at an operational level, the Police would not leave a driver stranded in a rural area once forbidden to drive, as they have a duty of care with respect to these drivers.

39. Issues of fairness and consistency with rights that are affirmed under the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) arise with this option, for the very small portion of people who have two false positive test results. While these people can challenge these results through a blood test and will not receive an infringement fine as a result, they will still be stood down from driving for the mandatory 12 hours. These drivers would face costs and potentially considerable inconvenience as a result. Submitters on the Bill that led to the amendments in the Act also pointed out that that the elective blood test option would be an expensive and time-consuming process that may undermine the effectiveness of the ability to challenge the OFT results. As a result, this option doesn't adequately balance legal and human rights considerations.

40. The likelihood of false positives occurring and concerns about recent use remain the same as under the status quo. This means some drivers will be issued an infringement notice where they may not have consumed a qualifying drug.

Option Three – Introduce a new OFT screening regime, followed by evidential testing which involves laboratory analysis

41. Option three addresses the issues that arose with the procurement process that was unable to identify an OFT device that met the statutory approval criteria in the Act. A new provision will be required that sets out the approval criteria that the Minister of Police must be satisfied of before approving an oral fluid *screening* test. These criteria will align with the existing criteria (in section 71G of the Act) but with the following changes:

Adjust the approval criteria for screening devices to allow for a low proportion of false positive test results	As with option two, amendments would be made to the device approval criteria to allow for some false positive test results. The Minister of Police would be required to have regard to the accuracy of the device, but will no longer need to be satisfied that the device will *only* return a positive result if the device detects the presence of a qualifying drug.
Clarify the test for recent use, so that it is based on the cut-off thresholds in the relevant Standard	As with option two, amendments would be made to clarify the reference to "recent use" in the approval criteria for screening devices. Recent use would be defined with reference to the cut-off thresholds set out in the relevant Standard. Recent use is an important part of the regime, as it acts as a proxy for impairment.
Allow the approval of screening devices that test for classes of drugs that a specified qualified drug is part of	As with option two, amendments to the screening device approval criteria would be made to enable devices to be approved that detect families of drugs that individual qualifying drugs are members of.

OFT devices would be used as a screening tool

42. The main difference between option two and option three is that for option three the OFT device would primarily be used as a *screening tool*, whereas option two uses the OFT devices as evidentiary testing devices. An infringement offence would only be established if positive roadside oral fluid tests are confirmed through laboratory tests. Confirmatory laboratory testing follows the model of many international jurisdictions, including many states in Australia.

43. Under this option, two positive oral fluid screening tests at the roadside would still be necessary before enforcement action is taken. While two OFTs at the roadside, as opposed to one, will involve higher implementation costs[20] and result in drivers who have an initial positive test result being detained for longer (each test takes approximately five minutes to return a result), two positive test results reduces (but does not eliminate)[21] the chances of enforcement action being taken against drivers who return false positive results. Requiring two positive OFTs is an important safeguard in the system.

44. Following two positive oral fluid screening tests, the driver would be prohibited from driving for 12 hours, to address the safety risk they pose to other road users and themselves if they continue driving. Operationally, Police would not leave a driver stranded or unable to re-access their vehicle once forbidden to drive, as it has a duty of care to uphold. A very small number of drivers may be forbidden to drive following two false positive tests at the roadside.[22]

Laboratory confirmation of roadside OFTs required before infringement could be issued

45. The driver's oral fluid sample would then be sent to a laboratory for confirmatory testing.[23] The laboratory test will be used to confirm (or not) the presence of the qualifying drug or drugs detected by the oral fluid screening test. Where the screening test identified a family of drugs, the lab test will confirm (or not) the presence of one or more qualifying drug that is a member of that family, and any qualifying drugs detectable by that channel.[24] The laboratory test will *not* test for all of the qualifying drugs listed in the Act (due to fairness and cost issues).

46. We intend to develop regulations made under the Land Transport Act 1998 which set out the procedures for dealing with oral fluid specimens, including (but not limited to) chain of custody processes and the laboratory testing method. We will work with Police to ensure all relevant processes are in place for implementation. This is expected to take approximately 12 months.

47. An infringement penalty would only be issued if the laboratory test was positive for the relevant qualifying drug or drugs. This addresses the most common issue raised by submitters on the Bill that led to the amendments in the Act, which was the concern about the accuracy of the OFT devices and the risk of false positive results. These issues were also reflected in the advice of from the Independent Expert Panel. Requiring laboratory confirmation of OFT results before issuing an infringement directly responds to these concerns.

48. Police are not aware of false positive results from confirmatory laboratory testing in other jurisdictions. This implies a high level of accuracy in these tests. A successful challenge may result where the integrity of the oral fluid sample was compromised (e.g., if the sample was kept at an incorrect temperature). Processes will be put in

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20 Oral fluid tests are estimated to cost between $20 – $45 per test. The Ministry's initial Cost Benefit Analysis of the OFT scheme implemented through the amendments to the Act, which does require two positive OFTs, estimated that (based on 66,000 OFTs per annum) there would only be a minor decrease in scheme costs (approximately $0.4M) if a single OFT was used, meaning that there was little value in removing the safeguard of a second positive test for the savings offered.

21 See footnote 18 above.

22 See footnote 18 above.

23 Police are yet to confirm whether two or three oral fluid swabs will be required from the driver, as this is reliant on the outcome of the procurement process. However, Police expect only two will be required given the process followed in international jurisdictions.

24 Some drugs are detectable on multiple channels of an OFT, due to similarities in their chemical structure. For example, an OFT device may have a separate methamphetamine and amphetamine channel. The methamphetamine channel may also detect MDMA and other amphetamines detectable on the amphetamine channel. Similarly, the amphetamine channel may detect metabolites of methamphetamine.

place, covering the collection, handling and storage of oral fluid samples, to mitigate the risk of this occurring.

49. Where a person refuses or fails (some drugs inhibit the production of oral fluid) to undergo an oral fluid screening test at the roadside, they will be required to undergo a blood screening test. This could result in an infringement offence (if a qualifying drug is detected above the tolerance threshold but below the high-risk criminal threshold) or criminal charge (if a qualifying drug is detected at or above the high-risk criminal threshold).

50. A medical defence will also be available for drivers facing infringement fines where they have taken their medication in accordance with their prescription and following any instructions of their health practitioner. To address the potential road safety risk, these drivers will still be forbidden from driving for 12 hours.

New provisions will be required in the Act to give effect to this option

51. The option to use an OFT as a screening device will require the following additional changes to the OFT regime as set out in the Act:

New offence provisions	The Act currently includes infringement offences for drivers where the results of two oral fluid tests are positive and indicate the use of the same qualifying drug [new section 57A(3), infringement fee is $200 and 50 demerit points]. The Act also currently includes infringement offence where the oral fluid tests indicate the use of 2 or more qualifying drugs [new section 57B(3), infringement fee is $400 and 75 demerit points]. There are also new combined offences (where blood or breath contains alcohol, and two oral fluid tests indicate use of one or more qualifying drugs). New infringement offence provisions (with the same penalty levels) will be introduced which apply where drivers have two positive oral fluid screening tests, and a laboratory test confirms the presence of the same qualifying drug (or a qualifying drug that is in the same family that was identified in the screening test). Some other consequential amendments will be required.
New enforcement provisions	New provisions in the Act (sections 71A – 71C) specify who must undergo first, second or further oral fluid tests. The is also a provision (section 71E) that requires a person who fails or refuses to undergo an oral fluid test to undergo an evidential blood test. Similar provisions will be required to enable oral fluid screening tests. Section 94A covers mandatory prohibition from driving for 12 hours if the results of two oral fluid tests are positive. A similar provision will be needed for those that fail two oral fluid screening tests. A new provision will be required to enable a laboratory confirmation oral fluid test for a person who has had two positive oral fluid screening tests. The driver will be provided with an oral fluid sample in case they want to arrange for their own independent testing.
New evidential provisions	New provisions in the Act deal with evidential matters (for example, section 77A, which provides that, for the purposes of proceedings for infringement offences, it is to be presumed (in the absence of proof to the contrary) that a person's oral fluid contains a qualifying drug if the results of the first and second oral fluid tests indicate the use of the drug). A similar provision will be needed for those that have two positive oral fluid screening tests plus a positive confirmatory laboratory test.
New procedures for dealing with oral fluid specimens	The Act currently sets out procedures for dealing with blood specimens (section 74). We propose that procedures for dealing with oral fluid specimens be set out in regulations, drawing on the requirements of the Standard. During the development of these regulations and operational

	policy development, consideration will be given to the importance of acknowledging that DNA is considered taonga by Māori, which has impacts for the collection, storage and use of genetic material. Regulations are suitable for these more minor or technical matters of implementation and operation of the Act.[25] The regulation-making power in the Act (section 167((1)(n)) allows regulations to be made "as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration".

There are benefits and risks with this option, and potential risks

52. As with option two, this option:

- would address problems that have been identified with the current regime, especially in terms of the approval criteria for the OFT devices, and fairness issues associated with people being issued infringements on the basis of a device manufactured for drug screening purposes.
- would enable Police to detect drivers that have recently consumed qualifying drugs. Police could roll out roadside OFT at a scale that would enable deterrence and remove drivers from the road where they test positive for a qualifying drug (or family of drugs that a qualifying drug is a member of).
- would likely be supported those who made submissions in favour of introducing oral fluid testing under a presence-based approach where drivers would be penalised at the roadside.
- would address concerns raised by stakeholders about using OFT devices as the basis for taking enforcement action. Infringements will only be issued as a result of a positive confirmatory test in a laboratory.
- could result in a very small proportion of drivers being prohibited from driving for 12 hours on the basis of two false positive roadside OFT. These drivers would however face costs and potentially considerable inconvenience as a result. They may face challenges in getting to work, education, or their dependents getting to childcare, for example. This risk is mitigated by the requirement to have two positive OFTs before this action is taken. This also needs to be weighed against the road safety risk posed by the vast majority of drivers who test positive for drugs they have consumed.
- may have a disproportionate impact on specific communities, including on young people, Māori, lower socio-economic communities and those living in rural areas.

53. This option will cost more to implement than the status quo (option one) and option two because of the costs associated with confirmatory laboratory testing. We estimate that laboratory confirmation tests of oral fluid would cost around s 9(2)(b)(ii), s 9(2)(i) The exact cost will not be known until Police complete a procurement process for laboratory services. However, at this estimated cost, laboratory testing is likely to cost in region of s 9(2)(b)(ii), s 9(2)(i) This is unlikely to have a material impact on the previous Cost Benefit Report, given that report indicated a positive benefit to cost ratio of 12:1.

54. Laboratory testing of oral fluid (as opposed to blood) for qualifying drugs is not currently undertaken in New Zealand by the Institute of Environmental Science and Research (ESR), the approved laboratory test provider for Police. This poses a risk to the implementation of the new regime. If ESR is unable to provide oral fluid drug tests there are other laboratory testing options that can be explored.

25 Legislation Design and Advisory Committee (2021) Legislation Guidelines, p 68. Available at www.ldac.org.nz/assets/documents/LDAC-Legislation-Guidelines-2021-edition.pdf

Te Tiriti o Waitangi considerations

55. The Crown has obligations to Māori under Te Tiriti o Waitangi when designing and implementing policy. A key obligation in the context of road safety is the Crown's duty to promote equitable outcomes for Māori. Māori experience substantially higher rates of road traffic death and serious injury than people of other ethnic groups in Aotearoa New Zealand.[26] We also are aware that Māori are overrepresented in the justice system and are more likely to use cannabis compared to non-Māori.[27]

56. These factors have informed the development of the proposed infringement offence scheme, which mitigates the risk of Māori receiving criminal penalties for drug-impaired driving. However, there remains the potential for unpaid fees to escalate drivers into the criminal justice system. By detecting and deterring drug driving, roadside oral fluid testing aims to reduce deaths and serious injuries, which will provide a benefit to this population. Officials consider this to provide more of a benefit than a potential increased risk of interaction with the criminal justice system.

57. Police will also design operational procedures before it implements the regime. Police is aware of risks that will need to be managed to ensure that certain groups, including Māori, are not unfairly targeted.

58. The penalty levels in the proposed regime will align with penalties currently in the Act. The infringement offence will attract a $200 infringement fee and 50 demerit points. While not criminal, the penalty is moderately severe. This may impact a driver's employment opportunities or their ability to travel. However, an infringement regime will likely support the Government's commitment to avoid criminalising drug use where appropriate, support a change to the societal approach to drug driving, and put less pressure on the Justice sector.

59. This option gives better protection for drivers' rights. Drivers would no longer be issued an infringement fee on the basis of false positive oral fluid testing results, as these results would now be confirmed by laboratory test. The confirmatory laboratory testing would follow established procedures and be to an evidential standard. However, these drivers would still be prohibited from driving for 12 hours, resulting in cost and potentially considerable inconvenience.

We have consulted with government departments on this option

60. Police is supportive of the preferred option. Police would like to explore further amendments to the regime. However, this has not been possible due to scope and time constraints.

61. Waka Kotahi NZ Transport Agency (Waka Kotahi) is supportive of the preferred option. It notes this option may cause cost pressures on the National Land Transport Fund given the additional implementation costs. Waka Kotahi also note that the preferred option may require more time at the roadside from police officers, which may limit time spent on other road policing tasks. This trade-off should be considered from a cost-benefit perspective and included the next 2024-2027 Road Safety Policing Partnership.

62. The Ministry of Justice is generally supportive of the preferred option. It acknowledges there are human rights and Bill of Rights concerns with taking oral fluid samples from drivers. However, the Ministry is supportive of the safeguards proposed to mitigate these concerns and that these will be further scrutinised if a Bill is developed. Additionally, the Ministry of Justice note the importance of ensuring the regime does not perpetuate/mitigates the risk of systemic and unconscious bias when it comes to

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26 For 2013 to 2017, the average rate of death and serious injuries (DSIs) per 100,000 population for all Māori men was 87 compared to the average rate of 61.5 for all men. For Māori women the DSI rate was 40.5 per 100,000 population, compared to 29 for all women. Waka Kotahi (2021). *He pūrongo whakahaumaru huarahi mō ngā iwi Māori: Māori road safety outcomes*.

27 Ministry of Health (2015) *Cannabis Use 2012/2013*: New Zealand Health Survey.

profiling those more likely to be targeted by enforcement of the regime. We will work with Police to address this issue.

63. The Office of the Privacy Commissioner indicated privacy concerns with the oral fluid testing regime. The concerns centre on the lack of sufficient evidence that the proposed privacy intrusion is proportionate, considering the anticipated benefits, and some specific issues about matters relevant to privacy principles under the Privacy Act 2020, including issues around fairness and accuracy in the collection, use and retention of highly sensitive personal information. We note that some of these issues can be addressed through the development of regulations that will set out the procedures for dealing with oral fluid specimens.

How do the options compare to the status quo/counterfactual?

	Option One – Status Quo	Option Two – Amended approval criteria plus allow for detection of class/family of drugs	Option Three – New OFT screening regime, with laboratory confirmation
Detection and deterrence	0	++ Enables OFTs to be rolled out at the roadside, at scale, supporting the detection and deterrence of drug driving Infringement fines and demerit points can be issued at the roadside, resulting in swift penalties being imposed Drivers who produce two positive OFTs will be removed from the road	++ Enables OFT to be rolled out at the roadside, at scale, supporting the detection and deterrence of drug driving Infringement fines and demerit points can be issued following a laboratory test that confirms the presence of the qualifying drug(s) Drivers who produce two positive OFTs will be removed from the road
Operational feasibility (efficiency and cost effectiveness)	0	++ Commercially available OFT devices can be used to test for the presence of qualifying drugs at the roadside Two positive OFTs are required before enforcement action can be taken	+ Commercially available OFT devices can be used to test for the presence of qualifying drugs at the roadside Two positive screening OFTs are required for roadside enforcement action; and a positive confirmatory lab test is required to establish an infringement offence. There will be additional costs and training associated with collecting, storing and transporting oral fluid specimens to the lab. s 9(2)(b)(ii), s 9(2)(i) [redacted] Laboratory testing of oral fluid for the presence of qualifying drugs is not currently done in New Zealand on a large scale
Human rights and legal consistency	0	- - Raises potential consistency issues with New Zealand Bill of Rights Act and potential legal challenge around accuracy issues with the OFT devices Higher likelihood of enforcement action against a driver where a device gives a false positive result	- Raises potential consistency issues with New Zealand Bill of Rights Act, s 9(2)(h) [redacted]
Overall assessment	0	++	++ Preferred option

Key:

++ much better than the status quo + better than the status quo 0 about the same as status quo - worse than the status quo - - much worse than status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

64. Options two and three are a significant improvement on the status quo, as they meet the objective of addressing problems that have been identified with the current regime, while addressing (to some extent) the fairness/human rights considerations. Both options would improve the detection and deterrence of drug driving through the use of a compulsory, random (that is, no 'good cause to suspect' requirement) roadside oral fluid testing regime. High visibility, high-volume testing with the swift delivery of sanctions are key requirements to achieve deterrence.

65. Option two (amended approval criteria for OFT device, plus allow for detection of class/family of drugs that a qualifying drug is a member of) has some advantages over option three (new OFT screening regime, with laboratory confirmation), in that it is more efficient and cost effective to administer the roadside oral fluid testing regime. Under option two, typically only two oral fluid tests are required (or one test for those that have an initial negative result), and the penalties are applied swiftly (no need to wait for confirmatory laboratory testing). However, option two carries a higher risk of a infringing human rights and successful legal challenge.

66. Option three has some additional advantages, around fairness, appropriate use of the OFT devices and s 9(2)(h) Option three uses the OFT devices as screening tools, which is what they are manufactured for. Infringement penalties are only issued on the basis of positive evidential tests undertaken in a laboratory environment, which is fairer for drivers and is likely to be more consistent with the Bill of Rights Act. Option three is more expensive to implement than the other options, because of the costs of laboratory tests. On balance, this option is preferred.

What are the marginal costs and benefits of the option?

67. We have not completed a cost-benefit analysis of options two and three in this regulatory impact statement, given time constraints. The following table draws on estimated cost and benefit information that was used for the OFT regime that was introduced into the Act.[28] We would expect these values to be similar under our preferred option, with some additional costs for the laboratory confirmation tests. As noted above, these tests are estimated to cost s 9(2)(b)(ii), s 9(2)(i) Police estimate that around 7 – 9% of drivers will have two positive oral fluid screening tests, requiring laboratory confirmation. If 66,000 drivers are tested every year, we would expect approximately 4,600 – 6,000 confirmatory tests, at an estimated cost of s 9(2)(b)(ii), s 9(2)(i)

68. The authors of the initial cost-benefit analysis noted some evidence gaps, including information about the prevalence of drug driving in New Zealand and the limited evidence to determine the deterrence effectiveness of oral fluid testing. Despite the limitations of the data, and the range of estimated impacts, the OFT regime introduced in the Act had a positive benefit cost ration of 12:1, which supported the introduction of the regime.

Affected groups *(identify)*	**Comment** *nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.*	**Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	**Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.*
Additional costs of the preferred option compared to taking no action over 10 years (ranges are provided in brackets)			
Regulated groups	Drivers: Time detained at the roadside for OFT – the cost-benefit analysis estimated inconvenience to innocent drivers of approximately 6,000 hours every year. The mean value of travel time for commuters ranges from $30.90 (in free-flowing traffic) – $57.24 (in heavy traffic) per hour[29] Infringement fines Some drivers may be forbidden from driving for 12 hours when an OFT device produces a false positive result, potentially resulting in cost and considerable inconvenience	$1.2M ($0.7 – $2.1M)	Medium
Regulators	NZ Police: Purchase of OFT devices and testing equipment, police time for testing and processing drivers [note storage and transportation of oral fluid samples for	$26.3M ($17.5 – $40M)	

28 Footnote 4 above.

29 Denne, T, Kerr, G, Stroombergen, A, Glover, D, Winder, M, Gribben, B, & Tee, N (2023). Monetised benefits and costs manual (MBCM) parameter values: Results of a survey to derive values for road safety, travel time and reliability (Waka Kotahi NZ Transport Agency research report TAR 18-04).

	confirmatory testing, costs of confirmatory lab tests, are not included in this estimate] Waka Kotahi and/or Police: Education and information about the new scheme Ministry of Justice: Costs associated with action on unpaid infringements	 $0.5M $1.1M ($0.5 – $1.9M)	
Total monetised costs		**$29.1M ($18.7 – $44M)**	
Non-monetised costs			
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Road users: Reduction in harm from fatalities and serious crash injuries	Approximately 431 crashes prevented, that would have resulted in either death or serious injuries, over a ten-year period. 65 fatalities prevented, over a ten-year period (a saving of around $812.5M, based on an updated value of statistical life of $12.5M per fatality)[30]	
Total monetised benefits		**$812.5M** (fatalities only, not including serious injuries)	
Non-monetised benefits			

30 Footnote 29 above. This represents the mean value of statistical life, which has a range of $8.1M – 16.9M. $12.5M is the mid-point. Note this value has increased since the cost-benefit analysis noted above was published in 2020.

Section 3: Delivering an option

How will the new arrangements be implemented?

69. The scheme will be given effect through amendments to the Land Transport Act 1998, as outlined above in the description of the options.

70. The Police will be responsible for implementing and enforcing the scheme. Police has advised that they will require a minimum 12-month lead-in time after the legislation is passed, to procure OFT devices and laboratory testing services through a competitive tendering process, develop operational procedures and train police officers.

71. A key implementation risk is the ability to procure the necessary oral fluid testing devices that meet the statutory requirements. This risk is considered low, as the preferred option involves changing the approval criteria to address issues that were highlighted through the procurement process conducted by Police in 2022. There is also a risk around procuring the confirmatory laboratory testing services at the scale required to implement option three. Laboratory testing of oral fluid for the presence of qualifying drugs is not currently done in New Zealand on a large scale. However, this is not new technology. Many overseas countries currently conduct confirmatory laboratory tests of oral fluid. This risk can be mitigated through early engagement with laboratories in New Zealand.

72. The Ministry of Transport, Police and Waka Kotahi will work closely to develop guidance and education about the effect of the new scheme.

73. Other agencies with an interest in the scheme will be involved in monitoring and evaluating the scheme.

How will the new arrangements be monitored, evaluated, and reviewed?

74. The Ministry of Transport and Police will monitor the new arrangements with support from Justice sector agencies and the Ministry of Health, initially after one year and three years of data are available.

75. Evidence to support the monitoring of the scheme will be available from the NZTA's CAS database and laboratory data on drug prevalence in the blood samples of drivers who have killed or hospitalised from road accidents, or who have failed a CIT and been required to provide a blood sample. Police and the Ministry of Transport will collect further data about the operation of the oral fluid testing regime. This will likely include the:

- number of individuals tested
- number of false positives on first and second oral fluid tests
- number of blood tests
- drugs identified by the testing devices and laboratory analysis of blood tests
- number of infringement notices issued
- number of defended hearings
- public perception of dangers of drug driving
- public perception of likelihood of being stopped and tested

76. The Act includes a statutory review provision (in Schedule 1, Part 4) that requires the Minister of Transport to appoint a reviewer to undertake a review of the drug driving amendments. The reviewer must be appointed no earlier than three years and no later

than four years after the commencement of the provisions. The reviewer must be independent of the Ministry of Transport and the New Zealand Police.

77. The statutory review is wide-ranging. It must consider a range of factors, including:

- the impact of the amendments
- the reliability of oral fluids in assessing a person's impairment
- whether the amendments have been appropriately implemented by the New Zeeland Police and other relevant agencies
- whether the amendments have had a disproportionate impact on Māori and Pasifika people, and
- the extent to which, if it can be assessed, the number of people driving while impaired by drugs has changed since the amendments came into force.

78. Monitoring data collected by Police and other relevant agencies will be used to support the statutory review. The timeframe for the review will need to be adjusted to account for the delays in implementing the oral fluid testing regime.

Appendix: summary of consultation on drug driving

The oral fluid testing regime was extensively consulted on at the time the amendments to the Act were being developed and progressed through Parliament. An independent expert panel was also established to advise government on key aspects of the regime. Diverse views were expressed, with the following key themes emerging from this engagement:[31]

- there was general support for the introduction of roadside OFT in New Zealand, although some were in support of the OFT being a component of an impairment-based regime (e.g. OFTs used as a screening test for a subsequent compulsory impairment test).
- there were concerns expressed about the accuracy of OFT devices, with support for a second oral fluid test following a failed first test. There was also some support expressed for taking a blood sample for evidential purposes. Others preferred Australian models where, following a failed oral fluid screening test, another sample of oral fluid is collected for evidential analysis.
- some raised concerns about the time taken to undertake the tests (3 to 5 minutes). Others argued it was a minor inconvenience in order to save lives.
- Māori experience disproportionate harm from drug abuse and drug offending. There was support expressed for a health-based non-punitive approach to drug driving offending. The importance of acknowledging that DNA is considered taonga by Māori, which has impacts for the collection, storage and return of genetic material, was also highlighted.

31 See: Ministry of Transport (September 2019) Summary of Submissions on Enhanced Drug-impaired Driver Testing, available at https://www.transport.govt.nz/assets/Uploads/Submission/Summary-of-Submissions-Enhanced-Drug-impaired-driver-testing.pdf