

Departmental Disclosure Statement

Land Transport (Drug Driving) Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Transport.

The Ministry of Transport certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

16 July 2024

Contents

Contents.....2

Part One: General Policy Statement.....3

Part Two: Background Material and Policy Information3

Part Three: Testing of Legislative Content.....7

Part Four: Significant Legislative Features9

Part One: General Policy Statement

The Land Transport (Drug Driving) Amendment Bill (the Bill) enables the rollout of random roadside oral fluid screening tests to better detect and deter drug-impaired drivers. Drug-impaired driving is a persistent issue in New Zealand and has a significant impact on road safety. Over 2019-2022, an average of 105 people were killed each year in crashes after drivers had consumed impairing drugs, representing around 30% of all road deaths. Drug-impaired drivers put the lives of all road users at risk.

In March 2023, a random roadside oral fluid testing regime was introduced by the Land Transport (Drug Driving) Amendment Act 2022 to enable police officers to test drivers' oral fluid for the presence of the highest-risk illicit and prescription drugs that impair driving. Under this regime, a police officer would be able to stop any driver of a motor vehicle and administer an oral fluid test without cause to suspect a driver had consumed drugs, consistent with the existing approach to drink-driving enforcement.

The Bill amends the Land Transport Act 1998 to resolve issues with the current oral fluid testing regime. The existing legislative settings have prevented the implementation of roadside oral fluid testing for drugs as there is no oral fluid testing device that meets the current requirements for approval. The Minister of Police can currently only approve an oral fluid testing device if satisfied that the device will return a positive result only if it detects the presence of a specified qualifying drug at a level that indicates recent use (recent use is a proxy for impairment). However, devices can produce false positive and false negative results, cannot always detect an individual specified qualifying drug (but rather classes or families of drugs), and may detect some drugs several hours or longer after consumption.

The Bill retains much of the existing regime, with the changes set out below.

New device approval criteria

The Bill introduces new device approval criteria that better reflects the limitations of oral fluid testing devices. The proposed approval criteria account for devices producing a low proportion of false positive and false negative results, and detection of families of drugs that include specified qualifying drugs.

The approval criteria in the Bill broadly align with existing legislative requirements, with the following changes:

- accuracy: the Minister of Police will 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;
- drug detection: devices can be approved if they detect families of drugs that individual qualifying drugs are members of;
- recent use: the device will need to have a concentration threshold for a specified qualifying drug (or specified family of qualifying drugs) set at a level that indicates recent drug use. Devices that have a concentration threshold that aligns with a concentration threshold set out in any relevant standard will meet this requirement. The current standard is the AS/NZS 4760:2019 Australian/New Zealand Standard Procedure for specimen collection and the detection and quantification of drugs in oral fluid. The cut-off thresholds in that standard are generally accepted as indicative of relatively recent drug use (as opposed to historical use or accidental exposure).

Use of oral fluid devices for screening

The Bill provides for the use of approved oral fluid devices to conduct screening tests at the roadside. If a driver tests positive for a specified qualifying drug at the roadside, they will need to undergo a second roadside oral fluid screening test. Drivers who return 2 positive screening tests at the roadside will be prohibited from driving for 12 hours to address any immediate road

safety risk. The requirement for 2 positive screening tests before being prohibited from driving will mitigate the possibility of enforcement action being taken on the basis of false positive oral fluid test results.

Drivers who refuse to take a screening test will be issued with an infringement fee and demerit points at the roadside and will be prohibited from driving for 12 hours.

Evidential laboratory analysis following positive screening test

The Bill requires the evidential testing of oral fluid in a laboratory before infringement notices are issued. A positive screening test at the roadside will require a sample of oral fluid to be sent to an approved laboratory for testing. Infringement notices will only be issued if the laboratory test detects the presence of any specified qualifying drug at a level that is indicative of recent use.

The Bill enables the Minister of Police to specify (by notice) the qualifying drugs that will be tested for by an approved laboratory, which must be from the list of 25 qualifying drugs in Schedule 5 of the Land Transport Act 1998. Those drugs were included in that schedule on the advice of an independent expert panel, based on New Zealand data linking road crashes with the presence of the drugs in the drivers' blood samples.

The notice issued by the Minister of Police must also specify the thresholds at which a laboratory test will appear positive. Those thresholds should be set at a level that indicates recent use of a listed qualifying drug and it will be sufficient if those thresholds will align with the applicable thresholds specified in the relevant standard.

A medical defence will continue to be available to drivers who can establish that they have taken any prescription medication in accordance with a current prescription and any instructions from a health practitioner or manufacturer.

Review of amendments made by Bill

The Bill proposes that an independent review of the amendments made by it should be undertaken 3 years after commencement. This review would also consider matters relating to provisions that were implemented under the Land Transport (Drug Driving) Amendment Act 2022.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p><i>Discussion Document Enhanced Drug Impaired Driver Testing</i>, Ministry of Transport, May 2019 https://www.transport.govt.nz/assets/Uploads/Discussion/EnhancedDrugImpairedDriverTesting.pdf</p> <p><i>Recommended statutory limits for drug concentrations relating to impaired driving</i>, Independent Expert Panel on Drug Driving, April 2021 https://www.transport.govt.nz/assets/Uploads/Report/IndependentExpertPanelonDrugDrivingFinalReportApril2021.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Ministry of Transport, <i>Legislative amendments to enable roadside oral fluid testing</i>, April 2023 https://www.transport.govt.nz/assets/Uploads/30.-redacted-Regulatory-Impact-Statement-Legislative-Amendments-to-Enable-Oral-Fluid-Testing_Redacted.pdf</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The RIS did not meet the threshold for RIA Team assessment. It was reviewed internally by members of the Ministry of Transport's RIA panel.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
<p>Cabinet agreed to the following changes after the regulatory impact statement was finalised:</p> <ul style="list-style-type: none"> • A positive roadside oral fluid screening test will result in an oral fluid sample being sent to a laboratory for testing. The policy option in the regulatory impact statement proposed requiring two positive oral fluid screening tests before a sample is sent to the laboratory. • The laboratory test will test for the presence of any specified listed qualifying drug that is included in the notice issued by the Minister of Police. The policy option in the regulatory impact statement proposed that the laboratory test would only confirm the presence of the drug (or drugs) identified through the roadside screening test. • The introduction of a new infringement offence for drivers that fail or refuse to undergo an oral fluid test. This replaces the previous requirement for these drivers to undergo a blood test. 	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>Analysis on the size of the potential costs and benefits can be found in the following reports:</p> <p>Ministry of Transport, <i>Enhanced testing regime for drug-impaired driving Cost-Benefit Analysis</i>, April 2020 (https://www.transport.govt.nz/assets/Uploads/Report/Cost-Benefit-Analysis-Drug-Driving.pdf)</p> <p>Ministry of Transport, <i>Legislative amendments to enable roadside oral fluid testing</i>, April 2023 (https://www.transport.govt.nz/assets/Uploads/30.-redacted-Regulatory-Impact-Statement-Legislative-Amendments-to-Enable-Oral-Fluid-Testing_Redacted.pdf)</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The key benefit sought through the Bill is a reduction in drug-driving, and ultimately a reduction in road trauma caused by drug-impaired driving. Over 2019-2022, an average of 105 people were killed each year in crashes where the driver had consumed impairing drugs before driving. This represented around thirty percent of all road deaths, and an annual average of approximately \$1.4B in social costs.</p> <p>The oral fluid screening regime is underpinned by a deterrence approach to drug-driving, allowing for mass screening and therefore high visibility, increasing the real and perceived risk of drug-driving enforcement.</p> <p>It has been estimated that 65 lives would be saved and 431 death and serious injury crashes prevented in New Zealand over a 10-year period with the implementation of roadside oral fluid screening, with an estimated \$812.5M benefit from the lives saved.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The matters considered in this Bill may be relevant to New Zealand's international human rights obligations under the International Covenant on Civil and Political Rights (ICCPR). The New Zealand Bill of Rights Act 1990 expressly affirms New Zealand's commitment to the ICCPR and therefore any inconsistency with the New Zealand Bill of Rights Act may also be inconsistent with the ICCPR.
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Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry analysed impacts on population groups, including Māori, to understand any differential impacts.
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Māori experience substantially higher rates of road traffic death and serious injury than people of other ethnic groups in New Zealand, with road traffic mortality rates estimated at between 60 and 200 percent higher for Māori compared to non-Māori. Given that drug-impaired driving can and does result in serious injuries and fatalities means that taking steps to combat this harm is therefore part of the Crown's responsibilities to actively protect Māori.
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Māori are also overrepresented in the justice system, and rates of cannabis use (estimated to be 2.2 times higher for Māori than non-Māori).
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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.

Our next step is public consultation, including with Māori, which is what the select committee process will enable.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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The Ministry of Justice is undertaking an assessment of whether the Bill is consistent with the New Zealand Bill of Rights Act 1990.
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Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/the-bill-of-rights-act/ .

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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The Bill amends existing offences and creates a new infringement offence.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted during the policy development, and on the draft Bill. The Ministry was satisfied that the offences and penalties were appropriate, focused on road safety, and that human rights considerations had been considered.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
The Bill enables an enforcement officer to collect oral fluid for the purpose of roadside screening and laboratory testing to detect the presence of qualifying drugs. This raises privacy issues, through the process of collecting a driver's oral fluid sample, and because testing can reveal sensitive personal information (i.e., the presence of a qualifying drug in the driver's oral fluid).	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Privacy Commissioner was consulted during the policy development, and on the draft Bill. The Privacy Commissioner acknowledged the importance of road safety, but commented that "there is a lack of evidence that the anticipated benefits from compulsory oral fluid testing for drugs are proportionate to justify the very serious privacy intrusion involved." The Privacy Commissioner noted concerns about the oral fluid testing regime, in particular, the risk of inaccurate (false positive) roadside screening tests likely to fall short of Privacy Act requirements for fairness and accuracy in the collection, use and retention of personal information.</p> <p>The Ministry acknowledges that the regime could result in a very small proportion of drivers being prohibited from driving for 12 hours on the basis of two false positive roadside oral fluid tests. This needs to be weighed against the road safety risk posed by the vast majority of drivers who test positive for qualifying drugs that they have consumed. Whether the appropriate balance has been struck will be an issue for Parliament to consider.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
The Ministry considered the views expressed through an earlier (2019) consultation exercise on drug-impaired driver testing when developing the policy that is given effect to by this Bill. However, the specific proposals in this Bill have not been subject to public consultation.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
The Ministry has consulted the New Zealand Police on the policy in this Bill to determine that it can be implemented at the roadside.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
<p>The Bill amends a number of strict liability offences that relate to driving with oral fluid that contains evidence of one or more qualifying drugs (sections 57A(3), 57B(3) and 57C). An existing offence for refusing to remain at a specified place or to accompany an enforcement officer to undergo an oral fluid screening test is amended to be an infringement offence and to include failure or refusal to accompany an enforcement officer or to remain in place to provide a further oral fluid sample, if required (section 59(3)). A new infringement offence is created for refusing to undergo an oral fluid screening test or provide an oral fluid sample (new section 60A).</p> <p>The potential adverse effects of these offences and infringement offences being strict liability offences is mitigated by:</p> <ul style="list-style-type: none">• requiring a positive laboratory test before an infringement notice is issued;• the penalties are at the lower end of the scale (typically infringement fees and demerit points);• the infringement offence can be challenged in the courts; and• a defence is available for drivers who have taken a qualifying drug in accordance with a current and valid prescription.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill amends the regulation-making power in section 167 to enable the making of regulations to prescribe procedures for dealing with oral fluid samples. This would cover the collection, storage, and disposal of oral fluid samples. These are minor, technical matters of implementation and operation that are suitable for inclusion in regulations. The oral fluid screening devices and laboratory testing services procured by the Police after the Bill is enacted will influence the procedures included in the regulations.</p> <p>The Bill also amends an existing provision that enables the Minister of Police to approve, by notice in the Gazette, an oral fluid screening device and the testing of specific qualifying drugs by these devices under the Act. The Bill also includes an empowering provision that enables the Minister of Police to specify the qualifying drugs and their concentration thresholds to be tested for by an approved laboratory.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO