

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.

20 July 2020.

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Part One: General Policy Statement

Addressing drug driving is necessary to reduce road trauma and make our roads safer. In 2014, 18 people were killed in crashes where the driver had consumed drugs other than alcohol before driving. By 2018, the number of people killed in crashes where the driver had consumed drugs other than alcohol before driving had risen to 95. It is clear that our current approach is not effective in deterring drug driving on our roads.

The roadside oral fluid testing regime

The Land Transport (Drug Driving) Amendment Bill establishes a new random roadside oral fluid testing regime. This oral fluid testing regime would sit alongside the current compulsory impairment test (CIT) approach to drug driving. Under the new 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 has consumed drugs, consistent with the existing approach to drink driving enforcement.

The Bill proposes that drivers who fail 2 consecutive oral fluid tests would incur an infringement penalty, aligned to the drink driving infringement penalty.

Cut-off thresholds would be set in the oral fluid devices for the detection of drugs, although these are not specified in the Bill. These thresholds would avoid the risk of penalising drivers who have accidental or passive exposure to drugs, have low residual levels of a drug, or consumed doses of some prescription or over-the-counter medicines that are unlikely to impair driving.

A driver who passes the first oral fluid test (or passes a second test after failing a first), and is not required to carry out a CIT, would be free to go.

Drivers who fail 2 consecutive oral fluid tests can elect to undertake an evidential blood test, and would be subject to both infringement and criminal penalties, depending on the levels of drugs in their blood sample. The medical defence will be available to drivers who elect a blood test.

The CIT process

Once a police officer has stopped a driver, the officer may require the driver to carry out a CIT if the officer has good cause to suspect a driver has consumed drugs. An officer cannot require a driver to undergo a CIT if the driver has returned a first positive oral fluid test or two consecutive positive oral fluid tests for a single drug. A driver who fails the first oral fluid test for more than 1 drug can be required to undergo a CIT.

A driver who fails a CIT would be required to take an evidential blood test and would be subject to both infringement and criminal penalties, depending on the levels of drugs in their blood sample.

A driver who passes the CIT would be free to go after the test is completed. Police officers would not be able switch to the oral fluid testing process after they have commenced the CIT process.

Criminal limits based on impairment

The Bill proposes that criminal limits for qualifying drugs be specified for analysis of blood samples, informed by advice from an expert panel of medical and scientific professionals.

These criminal limits would be specified in a Schedule, and would be aligned with the drink driving measure of impairment equivalent to a blood alcohol concentration of 80 mg per 100 ml. The Bill as introduced does not contain these limits, but includes a power for limits of qualifying

drugs to be added or amended through Order in Council, subject to safeguards (including a parliamentary confirmation process).

The intention is for criminal limits to be added through a supplementary order paper before the Bill is enacted.

Evidential blood tests could be used to test for any qualifying drug as defined in the Land Transport Act 1998.

Qualifying drugs without criminal limits

A wide range of impairing drugs are consumed and could be consumed by drivers in New Zealand. Only a relatively small number of these drugs would, at least initially, have criminal limits set for them.

The Bill proposes to create 2 separate offence pathways, depending on whether or not a driver has undergone a CIT.

Drivers would continue to be charged with a criminal offence following a failed CIT where the driver's blood sample contains the presence of any qualifying drug without criminal limits set.

An infringement penalty would apply for the presence of any qualifying drugs that do not have any limits set when impairment has not been established through a CIT.

Criminal and criminal combination offences would continue to apply to drivers who have not gone through the CIT process if any qualifying drugs with criminal limits were found in their system.

Injured drivers and drivers involved in a crash

Enforcement officers would continue to be able to require injured drivers to provide an evidential blood sample in a hospital or medical centre.

A driver involved in a crash but not injured would be required to take an evidential blood test if the driver produces 2 positive oral fluid test results and an enforcement officer has good cause to suspect that another person has been injured or killed as a result of the crash.

The offence and penalty regime for hospitalised drivers and drivers involved in a crash would be aligned with the oral fluid testing regime.

Offences and penalties

The Bill proposes to establish both infringement and criminal offences, depending on the testing process and the quantity of drugs found in a driver's system. In recognition of the additional road safety risk of driving after consuming multiple drugs (or drugs and alcohol), the Bill also introduces an infringement combination offence and a criminal combination offence, which would apply in different scenarios.

The Bill proposes to establish the following offences and penalties:

- an infringement offence for driving or attempting to drive a motor vehicle on a road with a specified drug in the person's blood at the infringement level (\$200 infringement fee, 50 demerit points and a 12-hour suspension from driving);
- an infringement combination offence for driving or attempting to drive a motor vehicle on a road with more than 1 substance in the person's oral fluid, or more than 1 substance in the person's blood below the criminal limit (\$400 infringement fee, 75 demerit points and a 12-hour suspension from driving);

- a criminal offence for driving or attempting to drive a motor vehicle on a road with a specified drug in the person's blood at or above the criminal level (a prison term of up to 3 months or a fine of up to \$4,500, and a mandatory disqualification from driving of 6 months or more):
- a criminal combination offence for driving or attempting to drive a motor vehicle on a road with multiple substances in the person's blood and at least 1 at or above the criminal limit (a prison term of up to 6 months or a fine not exceeding \$4,500, and a mandatory disqualification from driving of 9 months or more):
- a criminal offence for third and subsequent convictions for drug driving aligned with current offences and penalties for drink and drug driving (a prison term of up to 2 years or a fine not exceeding \$6,000, and a mandatory disqualification from driving for 1 year or more):
- a criminal offence if a driver has a blood drug level at the infringement level, and has caused the injury or death of a person (a prison term of up to 3 years or a fine not exceeding \$10,000 and a mandatory disqualification from driving of 1 year or more).

Medical defence available in certain circumstances

The Bill extends the existing medical defence to be available to drivers who have taken prescription drugs in accordance with their prescription and any instructions from a health practitioner or from the manufacturer of the qualifying drug, and have provided a blood sample through an evidential blood test.

Harm minimisation approach to drug driving

The regime proposes a harm minimisation approach to drug driving. Compulsory referrals for assessment to drug education or rehabilitation programmes would be required for second criminal offences in some situations, and all third and subsequent criminal offences.

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
<i>Discussion Document Enhanced Drug Impaired Driver Testing</i> , Ministry of Transport, May 2019 (accessible at http://www.transport.govt.nz).	

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
Ministry of Transport, <i>Enhanced drug driver testing</i> , (December 2019) – accessible at http://www.transport.govt.nz	
The RIS referenced above was updated in July 2020 to reflect the approach to combination offences and offences where criminal limits do not exist, and is being provided to Cabinet. The updated RIS will be published following Cabinet consideration.	

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
Members of the Ministry of Transport's RIA panel reviewed the Regulatory Impact Statement on enhanced drug driver testing.	

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
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Cabinet authorised the Associate Minister of Transport in consultation with the Minister of Police to make decisions in relation to any minor, technical, procedural, transitional or consequential matters arising during drafting. The RIS does not specifically address the following proposals that are reflected in the Bill:

- the offence and penalty regime for hospitalised drivers would be aligned with the oral fluid testing regime
- drivers involved in a crash would be required to take a blood test if:
 - the crash has required the medical treatment or hospitalisation of at least one person involved in the crash and
 - the driver produces two positive oral fluid test results.
- a new offence would be included in the LTA for drivers with a blood-drug level at the infringement level, and who has caused the injury or death of a person
- evidential blood tests could test for any qualifying drug (not just those drugs able to be tested for on the oral fluid tests), consistent with the current CIT approach
- the definition of qualifying drug would be expanded to ensure drugs affecting driving ability are included in the regime (ie now includes Schedule 3 of MODA, except for Part 6).

In addition to these matters, Ministers made decisions about other minor matters to enable effective functioning of the regime which are reflected in the Bill. These are mainly reflective of provisions in the alcohol regime.

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</i> (published April 2020) – accessible at http://www.transport.govt.nz</p> <p>Ministry of Transport, <i>Enhanced drug driver testing</i> (December 2019) – accessible at http://www.transport.govt.nz</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

Analysis on how the potential costs or benefits are likely to be impacted by the nature and level of regulator effort put into encouraging or securing compliance, can be found in the following reports:

Enhanced testing regime for drug-impaired driving (Cost benefit analysis), Ministry of Transport, April 2020 (accessible at <http://www.transport.govt.nz>)

Enhanced drug driver testing (regulatory impact analysis), Ministry of Transport, December 2019 (accessible at <http://www.transport.govt.nz>).

The potential costs and benefits could be impacted if drivers were not to comply with the requirement to undergo an oral fluid test. This would increase the costs on the system as more drivers would be required to have blood tests, or arrested, leading to more criminal convictions. This is not directly addressed in the cost benefit analysis.

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 provisions of the Bill do not affect New Zealand's international obligations, and are relevant only to domestic law.
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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?

New measures to address drug-impaired driving could have disproportionate impacts for Māori men and women. The Ministry of Health's Cannabis Use 2012/13 New Zealand Health Survey found that Māori were 2.2 times more likely to report using cannabis in the last 12 months than non-Māori. The survey found that Māori were 1.2 times more likely to have driven under the influence of cannabis in the last 12 months than non-Māori.

Māori are significantly over-represented at all stages of the criminal justice system and tend to experience disproportionately more of the risk factors and vulnerabilities leading to offending and entry into the system.
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These factors have informed the development of the proposed infringement offence scheme, which mitigates the risk of Māori men and women receiving criminal penalties for drug impaired driving. However, there remains the potential for unpaid fees to escalate drivers into the criminal justice system.

We note that Police are currently undertaking a programme of work to manage the potential for unconscious bias in police practices.

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?

TBC

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 http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/

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)?
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YES

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

Clauses 9, 10, 11, 12, 14 and 15 create, amend or remove offences or penalties.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice were consulted on the development of the provisions relating to combination offences and penalties. The Ministry of Justice were not consulted on the other provisions relating to offences and penalties during drafting, as Cabinet agreed to the penalties in December 2019.</p> <p>The Ministry of Justice have raised a number of concerns about elements of the new drug driving regime.</p>	

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?	NO

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
<p>In May and June 2019, the Government consulted the public about possible approaches to improving our drug driving system. Eighty-eight submissions were received. Many submitters acknowledged the complex and multifaceted nature of the issues under consideration. There were diverging views on a number of aspects of the consultation but some key themes emerged:</p> <ul style="list-style-type: none"> • there was majority support for the introduction of oral fluid testing, though there are concerns about the accuracy of oral fluid testing devices • most submitters favour a zero-tolerance approach to roadside drug testing • support for random drug testing of drivers is mixed • legal limits for illicit and prescription drugs could be explored in the future • drivers impaired by prescription and illicit drugs should be subject to the same penalties but there should be a medical defence for drivers that are not impaired • a multifaceted approach to penalties is required, including non-enforcement options and health-based initiatives • Māori are disproportionately impacted by drug driving enforcement measures • raising public awareness about the risks of drug-impaired driving is critical. <p>Further consultation on the proposals will occur through the select committee stage of the Bill.</p>	

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?	NO

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 following section create strict liability offences: sections 57A(1), (1A), (1B), 57B(1), (2), (3), 57C(1), (2), (3), (4) and 62(1B).</p> <p>These provisions create an offence and infringement offence regime for drug driving offences which align with the regime in the LTA for drink driving.</p> <p>The potential adverse effects of these offences and infringement offences being strict liability is mitigated by:</p> <ul style="list-style-type: none">• requiring two positive oral fluid tests (registering the same drug) before the infringement offence is given• including provision for the offender to elect to take a blood test following two oral fluid tests. The blood test is conclusively presumed to reflect the level of the drug in the blood at the time as it responds at a higher level of accuracy and could be below the infringement level, at the infringement level or at the criminal level• the infringement offence can be challenged through the courts.	

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?	YES
<p>Sections 167A(1) and (3) create or amend a power to make delegated legislation that could amend an Act.</p> <p>Cabinet has agreed that the Independent Expert Panel on Drug Driving (the Expert Panel) be established to provide advice to Government about the criminal limits to be specified for qualifying drugs in legislation. These limits determine the threshold of when a driver becomes liable for a criminal penalty rather than an infringement penalty.</p> <p>The Expert Panel will not have its advice on the criminal limits available to inform the Bill, if it is introduced before Parliament dissolves. Additionally, these limits may need to be altered in the future, either:</p> <ul style="list-style-type: none"> • in response to the increasing availability or classification (under the Misuse of Drugs Act 1975 (MODA 1975)) of new drugs, such as designer drugs • if new research emerged to suggest a change to the existing limit for established or known drugs was appropriate • to establish criminal limits for those drugs not previously established by the Expert Panel at the time that the Bill is being considered. <p>Therefore the Bill as introduced includes a power that allows for criminal limits to be added to the Land Transport Act 1998 (LTA 1998) through an Order in Council. This approach enables the criminal limits to be established and amended once the Bill is enacted.</p> <p>The following safeguards will apply to the power to ensure it is properly constrained and used appropriately:</p> <ul style="list-style-type: none"> • only allow a recommendation to the Governor-General that an Order in Council be made by the relevant portfolio Minister(s) following full Cabinet scrutiny • require the relevant portfolio Minister(s) to take into account the overriding policy intent when making a recommendation • require the relevant portfolio Minister(s) to seek independent technical advice from experts and to require their advice to be for the purpose of aligning the thresholds with blood-alcohol limits as far as practicable • require any Order in Council to be approved by a confirmation process before being brought into force. 	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

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