

Supplementary Departmental Disclosure Statement

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

It highlights material changes to previous disclosures relating to:

- 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.

The original disclosure statement for the Land Transport (Drug Driving) Amendment Bill 2020, dated 20 July 2020, can be found at this link:

<http://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2020-317.pdf>.

This supplementary 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.

11 March 2021.

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The Main Areas of Change to the Original Disclosures

This is a supplementary disclosure statement for the Land Transport (Drug Driving) Amendment Bill 2020.

A supplementary disclosure statement supplements the original disclosure statement for the Bill by reporting the additions and changes that would need to be made to the original disclosure statement to accurately reflect the Bill with the proposed government amendments incorporated.

Where the Bill now also incorporates changes made by a select committee of the House, the supplementary disclosure statement will note these if relevant but will not explain them further.

The main areas of change to the original disclosure statement include the:

- addition of prescribed criminal limits and blood infringement thresholds for 25 impairing drugs in the Bill
- linking of prescribed blood infringement thresholds with the relevant infringement offence provisions throughout the Bill
- an updated medical defence for oral fluid infringement offences
- amendment of the criteria in the Bill to enable criminal limits and blood infringement thresholds to be set and amended in the future
- amendment to the *Gazette* notice requirements for approved oral fluid testing devices
- clarification that drug driving offences apply only when a driver *exceeds* the relevant drug concentration level, to align the offences with drink driving offences.

The Supplementary Order Paper (SOP) proposes a number of other minor amendments throughout the Bill to provide further clarification of the regime.

Part One: General Policy Statement

Prescribed criminal limits and blood infringement thresholds

The terms “criminal limits” and “blood Infringement thresholds” referenced throughout the Bill and original disclosure statement have been replaced with “high risk levels” and “tolerance levels” respectively.

At the time of introduction, Ministers indicated that high-risk levels for qualifying drugs would be specified in the Bill, informed by advice from an expert panel of medical and scientific professionals (the Panel). The Panel was also asked to provide advice on oral and blood tolerance levels. However, at the time it was not proposed to specify tolerance levels in the Bill.

The SOP sets the Panel’s recommended high-risk levels **and** blood tolerance levels for 25 impairing drugs. It also amends the Bill in several places to link the tolerance levels to the relevant offence provisions throughout the Bill.

Inclusion of tolerance levels in the Bill will help to justify the limitations on the human rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (BORA). Further comment on the BORA is provided in section 3.3 below.

Amendment to the criteria for setting or amending high-risk levels and tolerance levels for drug-driving offences

The original disclosure statement stated that high-risk levels would be specified in a Schedule of the Bill, and be aligned with the drink driving measure of impairment equivalent to a blood alcohol concentration of 80 mg per 100 mL. However, the Panel subsequently advised in September 2020 that it could not recommend blood limits for drugs in line with the drink driving measure, as there is not enough information available to accurately establish the relationship.

The SOP removes any references in the Bill to the blood-alcohol criminal limit of 80mg/100mL and replaces it with new criteria for setting or amending high-risk levels and tolerance levels for drug-driving offences. Independent experts would base their advice on the risk of impairment for setting or amending high-risk levels and the likelihood of recent use for setting or amending tolerance levels. This requires amendments to Sections 167A and 167B.

This approach will ensure blood levels are set at a level that avoids penalising drivers who have accidental or passive exposure and have not recently consumed drugs.

Oral fluid device Gazette notice requirements

The SOP amends section 168D to require the Minister of Police to publish the oral fluid thresholds in the approved device in the *Gazette* notice alongside the other information in section 168D. This requirement will improve transparency of the oral fluid testing regime.

Updated medical defence pathway for oral fluid

The SOP amends the medical defence provisions (new section 64(1AB)) to enable drivers to access a medical defence for oral fluid infringement offences without requiring

a blood test. It is important that drivers can straightforwardly establish a legal defence where they are legitimately consuming prescription drugs as prescribed by medical practitioners.

Amendment to the wording of drug driving offences to align them with drink driving offences

The SOP amends the Bill to clarify that drivers will be liable for an offence if their blood-drug concentration “exceeds” the prescribed high-risk levels or tolerance levels. The current wording in the Bill is “equals or exceeds”.

This change will better align the drug driving and alcohol offences. It will also reduce the risk of any interpretation concerns or confusion in the courts, particularly in regard to combination 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
<p>Drug Driving Advisory Panel - Interim Report 3: Setting Statutory Limits for Blood Drug Concentrations Relating to Impaired Driving. This will be available on the Ministry of Transport's website: https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/.</p> <p>Attorney General. Section 7 Report on Land Transport (Drug Driving) Amendment Bill 2020. Available online at: https://www.justice.govt.nz/assets/Documents/Publications/S7-report-Land-Transport-Drug-Driving-Amendment-Bill.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?	NO
<p>A RIA was prepared at the time the Bill was introduced and updated in July 2020 to reflect the approach to combination offences and offences where a qualifying drug does not have high-risk levels set.</p> <p>The RIA was not amended based on the proposed amendments to the Bill in the SOP, as these changes do not vary materially from the policy options analysed in the RIA.</p> <p>RIA: Ministry of Transport, <i>Enhanced drug driver testing</i>, (July 2020). Available online at: https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/.</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
Members of the Ministry of Transport's RIA panel reviewed the RIA.	

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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The RIA does not assess specific high-risk levels and tolerance levels.

The specified high-risk levels and tolerance levels in the Bill are assessed in the Panel's report. This will be available on the Ministry of Transport's website:
<https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/>.

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 of the proposed drug driving regime was completed at the time the Bill was introduced and outlined in the original disclosure statement. This analysis can be found in the following reports:</p> <p>CBA: Ministry of Transport, <i>Enhanced testing regime for drug-impaired driving</i>, (published April 2020). Available online: https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/.</p> <p>RIA: Ministry of Transport, <i>Enhanced drug driver testing</i>, (July 2020). Available online: https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/.</p> <p>These assessments are not changed by the proposed amendments to the Bill outlined in the SOP.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be affected 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 was completed at the time the Bill was introduced and outlined in the original disclosure statement. This analysis can be found in following reports:

CBA: Ministry of Transport, *Enhanced testing regime for drug-impaired driving*, (published April 2020). Available online: <https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/>.

RIA: Ministry of Transport, *Enhanced drug driver testing*, (July 2020). Available online: <https://www.transport.govt.nz/area-of-interest/safety/drug-driving-testing/>.

The changes to the Bill proposed in the SOP do not raise any new concerns.

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?

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

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 implications of the proposed regime for Māori were identified and discussed at the time the Bill was introduced, and outlined in the original disclosure statement. The changes to the Bill proposed in the SOP do not raise any new concerns.

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

Section 7 Report on Land Transport (Drug Driving) Amendment Bill 2020. Available online at: <https://www.justice.govt.nz/assets/Documents/Publications/S7-report-Land-Transport-Drug-Driving-Amendment-Bill.pdf>.

The Attorney-General concluded that the provisions of the Bill are inconsistent with the rights to be secure against unreasonable search and seizure, the right not to be arbitrarily detained, and the right to be presumed innocent until proved guilty as affirmed in sections 21, 22 and 25(c) of the BORA.

The SOP adds further safeguards to the Bill to help justify the limitations on rights and freedoms affirmed in the BORA:

- Setting the blood tolerance levels alongside the high-risk levels in the Bill.
- Amending the relevant infringement offence provisions in the Bill to indicate that the presence of a drug below the blood tolerance level would not be an infringement offence.
- Requiring the oral fluid drug concentration thresholds built into any approved oral fluid testing device to be published in the Gazette notice approving the device.
- A simplified medical defence pathway for drivers who return two positive results on an oral fluid test.

Incorporating blood tolerance levels into the Bill goes some way to addressing the Attorney-General's concerns with the Bill in the following ways:

- It ensures that drivers who have low levels of a drug in their blood would not be penalised.
- It will prevent drivers who undertake an evidential blood test being liable for an infringement offence based solely on the presence of a drug in their blood.
- It provides visibility of blood tolerance levels to enable an infringement offence to be effectively challenged.
- It improves access to a medical defence for drivers who are taking a current and valid prescription drug.
- It also better aligns the drug driving testing regime with the drink driving regime. Under the drink driving regime, there is a blood-alcohol infringement threshold and criminal limit explicitly included in the Land Transport Act 1998.

However, the Panel has advised that it is not possible to determine equivalent oral fluid and blood tolerance thresholds. This means the SOP does not fully address the inconsistencies outlined in the Attorney-General's report.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
<p>The SOP also amends Part 1 of Schedule 5 in the Bill to prescribe the high-risk levels for drug driving offences.</p> <p>The SOP amends Part 2 of Schedule 5 in the Bill to prescribe tolerance levels for drug driving offences and links these with the relevant infringement offence provisions throughout the Bill.</p> <p>The offences set out in Sections 57A, 57B, 57C, 61 and 62 have been amended to make them simpler and more accessible to read, as well as to link them to the high-risk and tolerance levels inserted into Schedule 5.</p> <p>The penalties for these offences remain unchanged.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice has been consulted on the SOP and has raised some concerns about oral fluid testing devices.</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?	NO
<p>Public consultation on the SOP will run until 16 April 2021 on the Parliament website, as part of wider public consultation on the Bill:</p> <p>https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_99686/land-transport-drug-driving-amendment-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 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 SOP amends strict liability offences in sections 57A(1), (2), (3), 57B(1), (2), (3), 57C(1), (2), (3), (4), 61(2)(b) and 62(1B) of the Bill.</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 amendments in the SOP are limited to prescribing the high-risk levels and tolerance levels for drug driving offences and linking the tolerance levels with the relevant infringement offence provisions throughout the Bill.</p>	

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>The SOP amends Sections 167A and 167B to clarify what the Ministers must consider before making a recommendation to set or amend high-risk levels or blood tolerance levels for drug-driving offences.</p> <p>The Panel was originally tasked with recommending high-risk levels for drugs that align with a level of impairment associated with a blood alcohol concentration of 80 mg per 100 mL. This same criteria was included in the Bill as a requirement for setting or amending high-risk levels in future.</p> <p>However, the Panel advised previous Ministers that this approach to setting high-risk levels for drugs was not possible, due to the complex relationship between the concentration of drugs in blood and the degree of impairment when driving.</p> <p>The amendment in the SOP requires independent experts to consider:</p> <ul style="list-style-type: none">- the blood concentration likely to impair a person's driving (for high-risk levels)- the blood concentration likely to indicate a person has recently used the drug and avoids capturing people with low levels of the drug in their system (for tolerance levels). <p>This amendment enables changes to be made over time as new drugs enter the market, drug use patterns change, and further information about drug impairment comes to light.</p>	

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