In Confidence

Office of the Associate Minister of Transport
Office of the Minister of Police

Chair, Cabinet Economic Development Committee

AN ENHANCED DRUG DRIVER TESTING REGIME

Proposal

1. This paper seeks Cabinet's in-principle agreement to undertake public consultation on options for legislation to enhance the drug-driver testing regime in New Zealand.

Executive Summary

2. Addressing drug driving is an important objective if we are to make our roads safer. Studies show that many recreational and prescription drugs have negative effects on driving ability, particularly when taken in conjunction with alcohol or other drugs. Research shows that New Zealanders are using these drugs and driving.

3. New Zealand's current approach to drug driving enforcement is based around a behavioural test, undertaken by specially trained Police officers after they have established 'good cause to suspect' a driver is under the influence of drugs. The test is effective for detecting drug drivers and removing them from the road but the time taken to complete the test and the threshold of 'good cause to suspect', mean that not enough tests are able to be completed to provide credible general deterrence of drug driving.

4. The Member's Bill: Land Transport (Random Oral Fluid Testing) Amendment Bill (the Member's Bill) was drawn from the ballot on 3 May 2018 and commenced its first reading on 5 September 2018. It proposes to address the limitations of the current regime by introducing random oral fluid testing in parallel with the current behavioural testing. However, the drafting of the Member's Bill raises a number of issues, which include that: it does not describe the testing process in detail; is unclear whether the oral fluid test is for screening purposes or is an evidential test; does not specify how many oral fluid screening tests a driver might be required to undergo; and presumes a court prosecution and criminal sanctions for all cases of drug driving.

5. These issues are fundamental to the design of a drug driver testing regime, but New Zealanders have not previously been consulted on them. For example, introducing a random testing regime (of any kind, including via a Government Bill) would engage several rights affirmed and protected by the New Zealand Bill of Rights Act 1990, such as the right to be secure against unreasonable search and seizure and the right not to be arbitrarily detained. We recommend that the Government does not support the Member's Bill.

6. This paper seeks Cabinet's agreement to undertake a public consultation process to seek the public's views on drug driver testing, including: the methods of screening and testing for drugs; the drugs to be tested for; the circumstances in which drivers may be tested; the evidence that would result in an offence; and the sanctions that might apply to offences. Following the public

consultation process, and after undertaking a full analysis of the options available, we propose that the Government develops new legislation for an enhanced drug driver testing regime.

Background

7. Since 2013 the number of road deaths in New Zealand has been rising. In 2013, there were 253 deaths. In 2017, there were 378 deaths – a 49 percent increase over five years. It is clear that a new approach is needed, with evidenced-based interventions across all aspects of the land transport system.

8. To reverse the upward trend in road deaths, the Government has put safety at the forefront of all decision-making on land transport. In June 2018, we released the Government Policy Statement on Land Transport 2018 (GPS), which sets out the government's priorities for the land transport system over the next 10 years. In the GPS, we elevated safety to one of two key funding priorities. We have also commenced the development of a new road safety strategy, which includes investigating whether we should adopt 'Vision Zero'[1] for New Zealand.

9. Addressing drug driving is an important objective if we are to make our roads safer.

Previous consideration of drug driving detection and enforcement

10. Following a review of New Zealand's drug driving enforcement regime in 2014/15, Cabinet considered a proposal in April 2016 to introduce random oral fluid drug testing [CAB-16-MIN-0151 refers]. At that time, Cabinet invited the Minister of Health to consider the proposal in the context of the National Drug Policy 2015-2020 and report to the Cabinet Strategy Committee. In June 2016, the Associate Minister of Health at the time, Hon Peter Dunne, advised that the National Drug Policy emphasised a proportionate response to minimise drug-related harm, whereas a driver who returns a positive test for the presence of drugs does not necessarily represent a risk to road safety [STR-16-MIN-0002 refers].

11. In November 2016, Cabinet considered a modified proposal for oral fluid drug testing following an incident comprising either a suspected driving offence or a driver's involvement in a motor vehicle crash [CAB-16-MIN-0606 refers]. Cabinet directed the Associate Minister of Transport to provide further advice on the options in the paper and to prepare a draft document for public consultation on the proposed options. This was not completed before the General Election in 2017.

Many recreational and prescription drugs have the potential to impair driving

12. International studies have shown that a large number of recreational and prescription drugs and other substances have potentially significant negative effects on driving ability, for example by slowing reaction time, increasing risk taking and causing fatigue, particularly when taken in combination with alcohol or other drugs.

13. The World Health Organisation's 2015 review of 66 different studies[2] found that using drugs while driving was associated with an increase in the risk of crash involvement, reporting an

[1] Sweden founded the "Vision Zero" strategy in 1997. The vision is underpinned by the principles that eventually no one will be killed or seriously injured within the road transport system and it can never be ethically acceptable that people are killed within the road transport system.

[2] *World Health Organisation: Global status report on road safety*, 2015 and *Risk of road accident associated with the use of drugs: A systematic review and meta-analysis of evidence from epidemiological studies*, Journal of Accident Analysis and Prevention, Elvik, R., 2012.

increased crash risk for 11 different drug classes or drugs[3]. A more recent (2017) literature review by the European research project SafetyCube[4] of over 80 papers on drugs and driving performance found that a number of the most used legal and illegal drugs have a negative impact on road safety. They increase crash risk, injury severity and fatal crash rate, and they reduce the general ability to drive. When combined with alcohol or other drugs, the negative effects are even larger.

14. The negative effects of high doses of cannabis on driving performance are well documented and cannabis use is associated with increased risk of being killed or injured.[5] A number of studies consider the impact of stimulants such as cocaine or methamphetamine. Some studies demonstrate an increased reaction time from stimulants but overall, most studies note that stimulants may lead to increased risk taking and do not compensate for the effects of fatigue[6]. Methamphetamine has been found to be the most risky drug to be driving under the influence of, and the drug found with increasing prevalence compared to other drugs in fatal crash victims[7].

15. There are also numerous prescription drugs that can impact driving performance. Over 1500 different drugs are prescribed in New Zealand and over 200 of these come with the warning "do not drive or operate machinery if affected, may cause drowsiness", and for many, "restrict or avoid alcohol"[8]. Most of these drugs have the potential to impair safe driving, particularly when first prescribed.

16. Studies on drug driving show that many drivers take more than one drug prior to driving or combine drugs with alcohol. The combination of more than one drug often acts as a synergistic factor (additive or even multiplicative), leading to very high levels of driving-related impairment. Finally, when combined with alcohol, the crash risk is dramatically increased.

Weaknesses in the data on drugs and impairment

17. In the international studies on the impact of drugs on driving ability and crash risk there is considerable variability in the methodology, reporting and use of controls in experiments. This means that, while overall conclusions can be drawn about the impairing qualities of individual drugs, there are contradictory views on the degree to which certain drugs impair and create crash risk.

18. Some studies on the prevalence of drug use in the driving population rely on evidence derived from small sample sizes or from samples that are defined by the requirements of enforcement agencies who determine whether a blood sample is to be tested for alcohol, cannabis, or a broader array of drugs. In countries with enforcement regimes with 'good cause to suspect' thresholds for detaining drivers to test for impairment, including New Zealand, there may be a significant layer of impaired drivers at various levels below that threshold that are not detected.

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[3] Amphetamines, analgesics, anti-asthmatics, anti-depressives, anti-histamines, benzodiazepines, cannabis, cocaine, opioids, penicillin and zopiclone (a sleeping pill).

[4] Leblud, J (2017), *Driving Under the Influence: Legal and Illegal Drugs*, European Road Safety Decision Support System, developed by the H2020 project SafetyCube.

[5] The effects of cannabis intoxication on motor vehicle collision revisited and revised, Rogeburg et al. (2016).

[6] *The prevalence and impairment effects of drugged driving in New Zealand*, University of Waikato, Starkey, N and Charlton, S, 2017 and *Impairment to blood amphetamine and/or methamphetamine concentrations in suspected drugged drivers*, Gustavsen, Morland, Bramness, Accident Analysis and Prevention Journal, 2006.

[7] Risk of road accident associated with the use of drugs: a systematic review and meta-analysis of evidence from epidemiological studies, Elvik (2013).

[8] Anaesthetics, analgesics, antidepressants, anti-epilepsy, antipsychotics, anti-anxiety agents, sedatives and hypnotics.

There are also likely to be drivers who pass behavioural tests while under the influence of drugs.

Drivers in New Zealand are using drugs that impair driving

19. In 2017, the University of Waikato undertook a study on the prevalence and impairment effects of drug driving in New Zealand[9]. An internet survey of drivers found that the percentages of drivers who used drugs (other than alcohol) within three hours prior to driving were: strong painkillers (16.6%), antidepressant medication (14.3%), cannabis (12.7%), anti-nausea medication (5.8%), and anti-anxiety medication (5.5%).

20. Of those who admitted taking drugs and driving, 42.6 percent reporting that they drove after taking cannabis, 28.2 percent after illegal stimulants, 25.5 percent after taking strong painkillers and 50 percent reporting 'drugged driving' once a week or more in the last 12 months while taking anti-depressants, sedatives or methylphenidate (commonly referred to as Ritalin used to treat ADHD in children).

Recent ESR analysis is indicative of the extent of drug use by drivers

21. Analysis by Environmental Science and Research Ltd (ESR)[10] of the blood samples of 845 drivers killed in crashes between January 2014 and May 2018 found that:

- 27 percent of 787[11] deceased drivers' blood samples showed cannabis use;
- 10 percent of 763 blood samples showed methamphetamine use; and
- 15 percent of 763 blood samples showed use of other drugs[12].

22. ESR's analysis of the blood samples of 1,619 drivers hospitalised following a crash between January 2014 and May 2018, where the New Zealand Police (Police) requested drugs analysis, showed that:

- 37 percent of the drivers had used cannabis;
- 28 percent had used methamphetamine; and
- 12 percent had used other drugs.

23. Police policy is not to proceed with analysis for drugs when a blood sample has shown a positive result for alcohol, so the above results are expected to underreport the prevalence of drugs used by the drivers tested.

24. Analysis of 1,456 blood samples from drivers who had been stopped by Police and passed a breath alcohol test but failed the Police behavioural drug test between January 2014 and May 2018 showed that 59 percent of those drivers had used cannabis, 41 percent had used methamphetamine and 9 percent other drugs[13].

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[9] *The prevalence and impairment effects of drugged driving in New Zealand*, University of Waikato, Starkey, N and Charlton, S, 2017.

[10] In New Zealand, all toxicological analyses are carried out by one laboratory, ESR, in Wellington.

[11] Not all of the 845 samples submitted to ESR were subjected to a full drugs screen.

[12] Not alcohol, cannabis or methamphetamine.

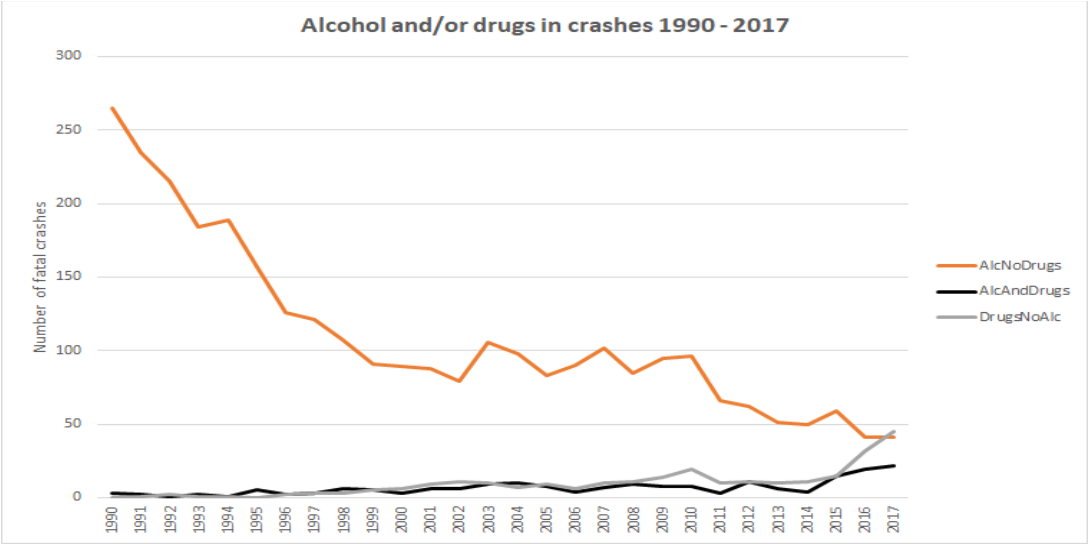
[13] These numbers add up to more than 100 percent as some drivers had used a combination of drugs.

25. Analysis of the blood samples of 3,050 drivers who failed a breath alcohol test from 2012 to 2015 showed that many drivers use alcohol and drugs in combination: 27 percent of drivers who failed a breath alcohol test had used cannabis, 1.6 percent had used methamphetamine, and 11 percent had used prescription drugs that carry warnings to restrict or avoid alcohol.

Analysis of crash data shows an increase in fatal crashes where a driver has consumed drugs

26. Data from the NZ Transport Agency's Crash Analysis System (CAS)[14] shows the number of fatal crashes occurring where a driver has been found to have consumed drugs has sharply increased to the point where fatal crashes involving only drugs exceed the number of fatal crashes involving only alcohol (refer Figure 1 below). Though part of the increase in the reporting of fatal crashes involving drugs stems from Police making more requests for drugs analysis following fatal crashes (since mid-2015), the data still reveals that fatal crashes involving drugs have overtaken fatal crashes involving alcohol.

Figure 1 – Fatal crashes with drugs and or alcohol) 1990-2017



Presence of a drug does not correlate with impairment

27. We acknowledge that the presence of a particular drug or drugs in a driver's blood system does not necessarily equate to impaired driving. There is not a clear linear relationship between when drugs are taken and when impairment occurs, as is largely the case with alcohol. People respond to individual drugs, combinations of drugs and different dosages of drugs in different ways. Different drugs are metabolised at different rates, meaning that evidence of some drugs can be detected a considerable time after they have been ingested, while in other cases evidence dissipates very quickly. To a lesser extent, this is also the case with alcohol, except there is a clearer correlation between use and impairment that makes it possible to set limits at which any person can be considered to be impaired.

28. Despite this, the rationale for consulting the public about presence-based drug testing as an option for enhancing New Zealand's drug driver testing and enforcement regime is sound. As discussed later in this paper, evidence demonstrates that presence-based testing with

[14] In New Zealand all traffic crash data reported by Police is recorded in the Crash Analysis System.

appropriate sanctions is effective for deterring drug driving and cost-beneficial for governments where there is prevalence of drug driving[15].

New Zealand's current drug driver testing regime

29. New Zealand's current approach to drug-driving enforcement is based on two elements – establishing that a driver is impaired and cannot drive safely and that the driver has qualifying drugs present in their blood. Impairment is assessed through a compulsory impairment test (CIT). The CIT is a behavioural test, undertaken by a specially trained Police officer. It comprises eye, walk and turn, and one-leg-stand assessments.

30. A Police officer must have 'good cause to suspect' a driver is under the influence of a drug or drugs before that driver can be required to undergo a CIT. Good cause may be formed from a driver's manner of driving, their demeanour when they are stopped and spoken to by the Police, or from external cues such as the smell of cannabis.

31. Police officers will determine the most appropriate place to require a driver to undergo a CIT, taking into account matters such as the safety of the surrounding environment and the presence of observers. This assessment often results in the driver being required to accompany an enforcement officer to a Police station to undergo the CIT. If a driver's performance on the test is unsatisfactory, a Police officer can require the driver to undergo a blood test to determine the presence of a qualifying drug[16].

32. Drivers taken to hospital or a doctor's surgery following a crash are required to give a blood sample if requested. This does not require a CIT. Police may request the sample be tested for drugs. Prosecution is taken only if the analysis shows the presence of Class A drugs.

Limitations of the current regime

33. The CIT test is effective for detecting drug drivers but is demanding on Police resources, due to the time it takes to complete (25-60 minutes to conduct a CIT and 30 minutes on average to complete a blood test if a CIT is failed) and because special training is needed to conduct the test. Police have an on-going training focus to provide a sufficient number of qualified officers to administer the CIT.

34. Police does not record the number of CITs conducted or the outcome of those tests, however, Police records show that 473 blood specimens were submitted for analysis in 2017/18[17]. The number of specimens submitted indicates that the total number of tests conducted is likely to be in the hundreds, not thousands, per annum. The low number of CITs completed limits the opportunity to achieve a general deterrence effect, meaning that the perceived and actual risk of detection is minimal. A University of Waikato survey of drivers in 2017[18] found that 60 percent of drivers thought people were likely to be caught by Police for drunk driving but only 26 percent thought people were likely to be caught for drugged driving.

[15] *Driving Under the Influence of Drugs, Alcohol, and Medicines in Europe – findings form the DRUID project,* Europram Monitoring Centre for Drugs and Drug Addiction, 2012.
[16] These are drugs categorised under Schedule 1, 2 and parts of Schedule 3 of the Misuse of Drugs Act 1975, as well as prescription medications.
[17] Ninety-two percent resulted in drug driving criminal convictions.
[18] *The prevalence and impairment effects of drugged driving in New Zealand*, University of Waikato, Starkey, N and Charlton, S, 2017.

35. The threshold of 'good cause to suspect' means that drivers who are impaired, but not obviously so, may also not be tested. Studies from Europe also demonstrate a significant percentage of false negatives from behavioural tests (as high as 50%), particularly when drivers have used stimulants such as methamphetamine[19]. Police are also frequently unable to CIT test drivers who are injured or in a state of shock or emotional distress following a crash.

36. Police do not currently request drug analysis when alcohol is found in a driver's blood sample for which a charge will be taken. This policy is for cost-benefit reasons, given the costs of drug analysis and the sanctions for drink driving are the same as for drug driving. The prosecution of drug driving cases based on hospital blood testing post-crash is limited to Class A controlled drugs only.

The Member's Bill: Land Transport (Random Oral Fluid Testing) Amendment Bill

37. The Member's Bill: Land Transport (Random Oral Fluid Testing) Amendment Bill was drawn from the ballot on 3 May 2018 and commenced its first reading on 5 September 2018. It proposes to address the limitations of the current drug driver testing regime by introducing random oral fluid testing in parallel to the current CIT testing regime. The drafting of the Member's Bill raises a number of issues, which include that it:

    37.1. does not describe the testing process in sufficient detail - Police powers, drivers' duties and rights, and sanctions for non-compliance are not clearly specified;

    37.2. does not clearly establish whether the test is for screening purposes or is an evidential test to be used as proof that an offence has been committed, and is also unclear how many oral fluid screening tests a driver might be required to undergo;

    37.3. presumes a court prosecution and criminal sanctions in all cases of drug driving.

38. These issues are fundamental to the appropriate design of an enhanced drug driver testing regime, and directly affect the extent that it is consistent with the New Zealand Bill of Rights Act 1990. The Attorney-General considered the Member's Bill in accordance with section 7 of the Bill of Rights Act and advised that it unjustifiably limits rights affirmed under that Act[20], in particular, sections 21, 22 and 25(c).

39. We recommend that the Government does not support the Member's Bill. In order to give full and proper consideration to these matters, we propose that the Government develops its own legislation to address drug driving, after undertaking a full analysis of the options available - the Member's Bill provides but one approach for how an enhanced drug driving testing regime could be implemented.

40. We note that since proposals to address drug driving were last presented to Government, there have been advances in technology and knowledge that need to be factored into cost-benefit and regulatory impact analyses and these will take officials some time to complete.

[19] *Fitness Impairment Testing/Detecting Driver Intoxication*, Verstraete, Alain G., 2014.

[20] www.justice.govt.nz/assets/Documents/Publications/bora-land-transport-random-oral-fluid-testing-amendment-bill.pdf

Objectives of drug driver detection and enforcement

41. We propose that a more effective drug driving detection and enforcement regime should support the following objectives:

    - deter people from driving under the influence of drugs;
    - remove impaired drivers from the road;
    - sanction impaired drivers in a way that is proportionate with risk;
    - be consistent with the National Drug Policy 2015-2020; and
    - not unjustifiably limit rights affirmed by the New Zealand Bill of Rights Act 1990.

42. There is tension between some of these objectives that will need to be carefully balanced. For example, if achieving greater deterrence requires high-visibility and high-volume testing, more New Zealanders will be detained at the roadside with greater impacts on the rights and freedoms affirmed in the Bill of Rights Act.

The current CIT regime should be retained as a part of any new model

43. While the current CIT regime has limitations, it is consistent with the objectives for a drug driver detection and enforcement regime set out above and should be retained as part of any new model. We agree with the general approach in the Member's Bill, which is to introduce a new mechanism of testing in parallel with the current CIT regime. Where applied, the CIT is highly effective at identifying drivers who are significantly impaired from drug use and are a danger to other road users – Police data shows that 92 percent of people who fail a CIT are confirmed with drugs in their system and face a criminal sanction. Retaining the CIT regime would also mean that drivers impaired by drugs or other substances that are not detected by, for example, oral fluid tests, will continue to be identified.

44. We have considered whether enhancing the current CIT regime could meet the objectives we have described, for example, by Police completing more CIT tests. However, even with a commitment to increased testing, the 'good cause to suspect' threshold limits the number of tests that can be achieved to a level below what is needed for credible general deterrence. Lowering the 'good cause to suspect' threshold for the CIT test to facilitate more tests would likely mean detaining drivers for a considerable period (on average 52 minutes) without reasonable justification. For these reasons, we consider that a more effective drug driver testing regime requires moving beyond the status quo or an enhanced version of the status quo.

Public consultation

45. Previous proposals on measures to address drug driving were not informed by public consultation. Given that any enhanced drug testing proposals are likely to involve encroachments on the rights and freedoms of New Zealanders, it is important that the public has an opportunity to comment on them. These include the rights affirmed under the Bill of Rights Act 1990, to be secure against unreasonable search and seizure (section 21), not to be arbitrarily arrested or detained (section 22), and to be presumed innocent until proved guilty (section 25(c). These matters will be addressed more fully in future papers, prior to any policy decisions. We note that similar concerns about random breath alcohol testing were countered by the public good imperative of diminishing the demonstrable social harm of drink driving.

46. Public consultation provides an opportunity to ensure the full range of public perspectives on drug driving are known. This is particularly important when there are likely to be diverse views on the issues under consideration. Accordingly, we propose that public consultation be undertaken on the matters that are critical to the make-up of an enhanced drug driving detection and enforcement regime. These should include:

- methods of testing for the presence of drugs or levels of drugs, for example oral fluid or blood testing;
- the types of drugs that may be tested for and the process for prescribing them;
- the circumstances in which drivers may be tested for drug driving, for example, randomly, following an incident, or when there is 'good cause to suspect';
- the evidence that would be required to establish that an offence has been committed;
- the sanctions that might apply to offences of drug driving, for example, criminal or infringement penalties.

47. We propose to seek this Committee's approval of a public discussion document in October 2018, to enable public consultation to take place this year. We propose to provide a draft updated Regulatory Impact Assessment and cost-benefit analysis to the Committee in October 2018, together with the public discussion document.

48. Subject to Cabinet's agreement to this approach, we intend to announce in September that there will be a public consultation process over a four-week period before the end of 2018. This will include targeted engagement with relevant stakeholder organisations on technical matters related to drug driver testing.

Matters for consultation

What method of drug testing should be used?

49. Evidence of drug use can be determined from urine, blood or oral fluid. Workplace drug testing in New Zealand is generally undertaken by urine sample[21], however, for practical reasons oral fluid testing is the standard internationally for screening for drug driving. This is because screening for drugs is generally undertaken at the roadside and needs to be completed swiftly, both to minimise driver detention and to enable sufficient testing to achieve a deterrence effect. Given the more intrusive nature of blood and urine testing, these methods are not likely to be considered to be justifiable and reasonable limits on the freedom of individuals for drug screening purposes.

50. Oral fluid screening devices work by detecting the presence of a drug (or active ingredient of a drug) by swiping the top a driver's tongue against a test pad on the device. Drug screening devices currently take around three minutes to produce a result[22], which is considerably less than it takes to undertake a CIT, however, significantly longer than an alcohol breath test.

What drugs should be tested for?

51. The ability to test for the presence of specific drugs is governed by the method of testing. The Member's Bill specifies three drugs (methamphetamine, cannabis and MDMA (ecstasy),

[21] Oral fluid testing is used in some cases.
[22] Timing may vary depending on the number of and type of drugs being tested for.

however, the technology of oral fluid drug detection devices has been improving so that now basic devices can also detect some of the drugs in the opioid and benzodiazepine classes, and amphetamines. A recent study of the performance of a pool of drug screening devices[23] available in 2017 found that, considering all drugs/drug categories tested for together, the screening devices collectively performed as follows[24]:

- in 87 percent of cases where a person had used one of the substances included in the screen, it was detected by the screening device;
- the 'correct rejection rate', where subjects had not used any of the substances included in the screen was 93 percent;
- when a drug was detected by the screening device, in 96.5 percent of cases the positive result was confirmed by laboratory analysis.

52. Currently, devices cannot detect synthetic cannabinoids and other 'designer drugs', the use of which is a growing concern in New Zealand. Blood testing can determine the presence of several hundred illicit and medicinal drugs. As drugs are often present in combination, it could be that a blood test following a positive screening test identifies drugs not picked up by the screening test.

53. Though this is a technical area, we propose that the discussion document for public consultation seeks views on the drugs that should be selected for testing and the process for selecting them. These are important considerations, given the constantly changing landscape of drugs available and drug detection technology.

In what circumstances should drivers be tested for drug driving?

54. Options for an enhanced drug driver testing regime could include:

    54.1. **random testing** along the lines of the current breath alcohol testing model - in an operational setting, drug screening would most likely occur when Police undertake alcohol screening. Evidence demonstrates that random testing is the most effective for achieving an increased deterrent effect and will have the most road safety benefits. This is because random testing models provide the greatest increase in the public perception of the possibility of being caught drug driving. However, it is also the model with the greatest potential to impact the rights and freedoms affirmed in the Bill of Rights Act and is the most expensive option, due to the volume of tests;

    54.2. **testing under the current 'good cause to suspect' criterion** – under this approach Police would undertake drug screening using the current 'good cause to suspect' criterion. This option has the least impact on affirmed rights and freedoms under the Bill of Rights Act. It could facilitate faster testing, but is limited by the ability of Police to identify drivers to test. Police has estimated they might undertake 1,000 oral fluid tests using this approach, which is unlikely to produce an increased general deterrent effect and will have limited road safety benefits;

    54.3. **targeted testing following an incident** comprising either a suspected driving offence or a driver's involvement in a motor vehicle crash – this would provide a wider

[23] Douglas J. Bierness & D'Arcy R. Smith (2017) *An assessment of oral fluid drug screening devices*, Canadian Society of Forensic Science Journal.
[24] Results presented are averages and vary by drug type.

pool of potentially drugged drivers, including drivers who may be injured or in a state of shock or emotional distress who cannot fairly be requested to complete a CIT. This option would target drivers who are a potential road safety threat. Testing following an accident is a common approach following workplace accidents where people are involved in safety sensitive roles. While this option provides a greater pool of drivers that can be tested, officials believe it is unlikely to produce an increased general deterrence effect and will have limited road safety benefits.

What evidence would be required to establish an offence?

55. Decisions need to be made about what type of testing is satisfactory for evidentiary purposes, to confirm an offence has been committed. Some jurisdictions use oral fluid on an evidentiary basis (e.g. Victoria, Australia). Others use oral fluid testing as a screening tool, followed by an evidential blood test.

56. Some countries have established *per se* limits for certain drugs, or multi-level offences, as we have in New Zealand for alcohol, in recognition that driving with certain levels of a drug does not increase road safety risk.

What sanctions would be appropriate?

57. Sanctions should be proportionate with risk. Oral fluid screening cannot determine whether a driver is impaired, establishing only presence of a drug. In cases where presence of a drug is established, but impairment is not, an infringement offence regime, similar to that currently used for lower level drink driving offences, may allow for a more proportionate sanction to be applied. Infringement penalties would result in much lower costs to the Justice sector, however, introducing an infringement regime could lead to a risk of drug driving being perceived as low-level offending.

Public education should be a key element of any regime

58. Education campaigns should be a complementing element of any proposal to address drug driving to ensure that drivers fully understand the consequences of drug use on driving, particularly the effects of combinations of drugs, and drugs and alcohol (even amounts of alcohol under legal limits).

Timing of legislation

59. An indicative timeline for policy decisions, and if agreed, the passage of legislation to introduce a Government Bill, is set out in Table One below.

Table One – Indicative timetable

Cabinet approves public consultation document	Oct 2018
Public consultation on options for drug driver testing	Nov 2018
Analysis of submissions	Dec 2018
Cabinet approves policy options for drug driver testing	March 2019
Legislation drafted and introduced	Sept 2019
Legislation enacted	March 2020
Legislation comes into force	Sept 2020

Consultation

60. The following departments were consulted during the development of this paper: New Zealand Police, the NZ Transport Agency, the Ministries of Justice, Health and Social Development, the Department of Corrections, ACC, the Treasury, Te Puni Kōkiri and WorkSafe New Zealand. The Department of the Prime Minister and Cabinet was informed of the paper.

Financial Implications

61. There are no financial, fiscal or economic implications arising directly from this paper. The proposed public consultation will inform the development of policy options with financial implications to be addressed in future papers.

Legislative Implications

62. There are no legislative implications arising directly from this paper. The proposed public consultation will inform the development of policy options with legislative implications to be addressed in future papers.

Impact Analysis

63. The Ministry of Transport has previously prepared two Regulatory Impact Statements (RISs) in relation to proposals to address drug driving. The Regulatory Quality Team at The Treasury agrees that no formal separate Regulatory Impact Assessment (RIA) is required in support of the proposal to undertake a public consultation process to seek the public's views on the design of enhancements to New Zealand's current drug driver detection and enforcement regime. Extensive Regulatory Impact Analysis already undertaken should enable the preparation of a full and informative discussion document, leading in turn to a well-informed public debate and eventually a well-evidenced RIA in support of any regulatory proposals. We will provide an updated RIA and cost-benefit analysis to this Committee in October 2018, together with the public discussion document.

Human Rights

64. This paper does not include policy proposals, however, the matters proposed to be consulted on do have human rights implications - introducing a presence-based random testing regime is likely to engage several rights affirmed and protected by the New Zealand Bill of Rights Act – in particular the rights to be secure against unreasonable search and seizure (section 21), not to be arbitrarily arrested or detained (section 22), and to be presumed innocent until proved guilty (section 25(c). These matters will be addressed more fully in future papers, prior to any policy decisions.

Gender Implications

65. There are no gender implications arising directly from this paper. The proposed public consultation will inform the development of policy options with gender implications to be considered in future papers.

Disability Perspective

66. There are no disability implications arising directly from this paper. The proposed public consultation will inform the development of policy options with disability perspectives to be considered in future papers.

Publicity

67. Subject to Cabinet's agreement to the approach, we intend to jointly announce in September that there will be a public consultation process before the end of 2018, prior to the Government introducing new legislation to the House in 2019.

68. The issues to be canvassed are complex and public views on them are likely to be diverse. The consultation process is likely to provoke significant media and public comment.

Proactive Release

69. We intend to release this paper proactively by publishing it on the Ministry of Transport's website.

Recommendations

The Acting Associate Minister of Transport and the Minister of Police recommend that the Committee:

1. **note** that the number of road deaths in New Zealand has been rising since 2013 and to reverse this trend the Government has put safety at the forefront of decision-making on land transport in the Government Policy Statement on Land Transport 2018 and is developing a new road safety strategy;

Drugs that impair driving are being used by drivers in New Zealand

2. **note** that, though there are some limitations in the data available, research demonstrates there are number of recreational and prescriptions drugs and other substances that have the potential to impair driving ability and increase crash risk;

3. **note** that a significantly large number of New Zealanders are using impairing drugs and driving;

New Zealand's current drug driver testing regime has limitations

4. **note** that New Zealand's current drug driving detection and enforcement regime is based on a behavioural test that is effective for identifying drug drivers but is resource intensive and the New Zealand Police is not able to undertake enough tests to provide effective general deterrence of drug driving;

Land Transport (Random Oral Fluid Testing) Amendment Bill

5. **note** that the Member's Bill: Land Transport (Random Oral Fluid Testing) Amendment Bill commenced its first reading on 5 September 2018 and sought to introduce oral fluid testing as an enhancement to the current CIT testing regime;

6. **note** that the Member's Bill raised issues that are fundamental to the design of an enhanced drug driver testing regime that need to be considered more fully, including that the Bill's provisions limit rights and freedoms affirmed under the Bill of Rights Act 1990;

7. **agree** not to support the Member's Bill;

8. **agree**, subject to the development of satisfactory policy options, to develop a Government Bill to progress legislation for an enhanced drug driver testing regime;

Objectives of a drug driver detection and enforcement regime

9. **agree** that the framework for a drug driver detection and enforcement regime be based on the following objectives:

    9.1. deter people from driving under the influence of drugs;

    9.2. remove impaired drivers from the road;

    9.3. sanction impaired drivers in a way that is proportionate with risk;

    9.4. be consistent with the National Drug Policy 2015-2020; and

    9.5. not unjustifiably limit rights affirmed by the New Zealand Bill of Rights Act 1990.

10. **agree** that the current behavioural test for drug driving be retained as part of any enhanced drug driver detection and enforcement regime;

Public consultation

11. **agree** to undertake public consultation to inform the development of policy options for enhancements to the current drug driver testing regime, including:

    11.1. methods of testing for the presence of drugs or levels of drugs, for example oral fluid testing;

    11.2. the types of drugs that may be tested for and the process for prescribing them;

    11.3. the circumstances in which drivers may be tested for drug driving, for example, randomly, following an incident, or when there is 'good cause to suspect';

    11.4. the evidence that would be required to establish that an offence has been committed;

    11.5. the sanctions that might apply to offences of drug driving, for example, criminal or infringement penalties.

12. **note** that we propose to seek the Cabinet Economic Development Committee's approval of a public discussion document in October 2018, to enable public consultation to take place before the end of 2018;

13. **note** that we intend to consult over a period of four weeks before the end of 2018 and report back to Cabinet on policy options by the end of March 2019.

Publicity

14. **note** that following Cabinet's consideration of this paper, we propose to announce that we will undertake public consultation on options to enhance New Zealand's drug driving testing regime before the end of 2018, to inform the development of new legislation in 2019.

Authorised for lodgement

Hon James Shaw

Acting Associate Minister of Transport

(__ / __ / 2018)

Hon Stuart Nash

Minister of Police

(__ / __ / 2018)