

Proactive Release

This document is proactively released by Te Manatū Waka the Ministry of Transport.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

Listed below are the most commonly used grounds from the OIA.

<u>Section</u>	<u>Description of ground</u>
6(a)	as release would be likely to prejudice the security or defence of New Zealand or the international relations of the New Zealand Government
6(b)	as release would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by <ul style="list-style-type: none"> (i) the Government of any other country or any agency of such a Government; or (ii) any international organisation
6(c)	prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial
9(2)(a)	to protect the privacy of natural persons
9(2)(b)(ii)	to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information
9(2)(ba)(i)	to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public
9(2)(ba)(ii)	to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely otherwise to damage the public interest
9(2)(f)(ii)	to maintain the constitutional conventions for the time being which protect collective and individual ministerial responsibility
9(2)(f)(iv)	to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials
9(2)(g)(i)	to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty
9(2)(h)	to maintain legal professional privilege
9(2)(i)	to enable a Minister of the Crown or any public service agency or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities
9(2)(j)	to enable a Minister of the Crown or any public service agency or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)

In Confidence

Office of the Minister of Transport

Cabinet Economic Policy Committee

Legislative Amendments to Enable Roadside Oral Fluid Screening Tests

Proposal

- 1 This paper confirms my intention to proceed with amendments to the Land Transport Act 1998 (the Act), based on the policy direction that was agreed by Cabinet under the previous Government, to introduce a new compulsory roadside oral fluid screening test regime to better detect and deter drug driving.

Relation to government priorities

- 2 The amendments support the Government's commitments in the draft Government Policy Statement on Land Transport (GPS) to enact legislation to rollout roadside oral fluid drug testing. The amendments will ensure the New Zealand Police (Police) has the resources and powers to better detect and deter drug driving and ultimately help reduce deaths and serious injuries on our roads.

Background

- 3 Drug-impaired driving is a persistent and unacceptable issue on our roads. Over 2019-2023, an average of 96 people were killed each year in crashes where the driver had consumed impairing drugs before driving, representing around a third of all road deaths. During the same period, 89 people were killed each year in crashes where alcohol was a contributing factor. Impaired drivers put the lives of all road users at risk.
- 4 In May 2023, under the previous Government, Cabinet agreed to amend the Act to enable a new compulsory random roadside oral fluid screening test regime to improve the detection and deterrence of drug driving and enforcement efficiency [DEV-23-MIN-007]. These amendments sought to resolve issues with the Land Transport (Drug Driving) Amendment Act 2022 which meant that roadside oral fluid testing for drugs could not be implemented. At the time, however, bill drafting was unable to proceed and the amendments were unable to be enacted.
- 5 Random roadside oral fluid testing cannot be implemented at present because there is no currently available oral fluid test (OFT) device that meets the existing legislative settings for approval. Under the Act, the Minister of Police can approve a 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). Yet currently available devices can produce false positive and false negative results, cannot always detect an individual specified qualifying drug but rather classes

or families of certain drugs, and some drugs can be detected up to 24 hours, or longer, after consumption.

Proceeding with legislative amendments

- 6 This paper confirms my intention to proceed with the policy approvals agreed by Cabinet under the previous Government for amendments to enable the rollout of roadside oral fluid screening tests. At my direction, the Ministry of Transport has issued Bill drafting instructions to the Parliamentary Counsel Office to amend the Act based on the existing approvals.
- 7 The legislative amendments will introduce new approval criteria for OFT devices that will be used for roadside screening, with evidential testing of oral fluid in a laboratory before infringement notices are issued. A small number of additional measures to strengthen the roadside screening process will also be introduced.
- 8 The Minister of Police is responsible for approving OFT devices. The Minister's notice approving the device will set out the qualifying drugs that will be tested at the roadside. Typically, the devices can detect THC (the main psychoactive constituent of cannabis), methamphetamine, amphetamine, benzodiazepines (sedatives), cocaine and opiates (e.g. morphine). This is representative of the 25 qualifying drugs listed in Schedule 5 of the Act that could be the subject of OFT. These potentially impairing drugs were included in the 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.
- 9 OFT devices detect the presence of a drug above a preset cut-off threshold. The Minister of Police will only be able to approve a device that has a cut-off threshold that aligns with those set out in any relevant Standard. 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 the Standard are generally accepted as indicative of relatively recent drug use (as opposed to historical use or accidental exposure).
- 10 The Minister of Police will also issue a notice approving the evidential laboratory test. The specified drugs for the evidential test will also need to be from the list of qualifying drugs in Schedule 5 of the Act.
- 11 Under the new regime:
 - 11.1 the Police will have the power to screen drivers for specified qualifying drugs at the roadside using oral fluid screening devices without cause to suspect a driver has consumed drugs, similar to the approach to drink-driving enforcement;
 - 11.2 OFT devices typically collect a sample of oral fluid from a driver's mouth using a swab, which is then inserted into the testing device.

Tests can take 3 to 8 minutes (or longer) to produce a result, depending on the device;

- 11.3 if the oral fluid screening test is negative, the driver will generally be free to go. An exception would be if a police officer has good cause to suspect the driver has consumed a drug, and instigates a compulsory impairment test (CIT). This is a behavioural test that comprises eye, walk and turn, and 1-leg stand assessments. Failing a CIT means the driver is required to undergo a blood test. The CIT process is required under the new regime as oral fluid screening devices can only indicate the presence of a limited range of qualifying drugs;
 - 11.4 if the first oral fluid screening test is positive, the officer will conduct a second screening test. Drivers who return two positive results at the roadside will immediately be prohibited from driving for 12 hours;
 - 11.5 drivers who return a positive result at the roadside will have an oral fluid sample sent for evidential laboratory testing, and if that test confirms the presence of any specified qualifying drug at a level that indicates recent use, those drivers will be issued with an infringement fee and demerit points; and
 - 11.6 drivers who refuse to take a screening test will be issued with an infringement fee and demerit points at the roadside and be prohibited from driving for 12 hours.
- 12 OFT devices can produce false positive and false negative results. False positive results are particularly problematic, as they can result in enforcement action taken against drivers who have not recently consumed any qualifying drug.
 - 13 The amendments will reduce the impact of false positive results and the possibility of enforcement action being unduly taken against drivers who have not recently consumed any specified qualifying drugs. There is a very small chance (0.01% - 5.5%) that a driver will be forbidden from driving for 12 hours when they have not consumed any specified qualified drugs (based on two false positive OFT results).

International regimes

- 14 Oral fluid screening for drugs at the roadside is employed in many other jurisdictions (e.g., United States of America, Spain, Canada, Germany, France, Australia). Australia has implemented oral fluid screening across all states since the early 2000s. Each Australian state varies slightly in approach, but the regimes are designed to permit mass screening and all states use oral fluid devices to screen drivers at the roadside (most commonly for THC, methamphetamine, and ecstasy), followed by laboratory testing of oral fluid samples if positive results are returned at the roadside. New South Wales carries out the most tests (200,000 test per year), followed by Victoria

(150,000 tests per year). The regime proposed here closely aligns with those in Australia.

Cost-of-living, financial, legislative, climate, population and human rights implications

15 There are no direct implications (including cost-of-living, financial, population and human rights) arising from this paper.

16 s 9(2)(ba)(ii), s 9(2)(f)(iv)

17 A Regulatory Impact Statement (RIS) was submitted to the previous government in May 2023 when policy approval for these amendments was sought. The RIS drew on a 2020 cost benefit analysis completed on the current OFT regime in the Act (two OFTs at the roadside, with the option of drivers electing an evidential blood test if they dispute the OFT results), with updated benefit figures based on the new statistical value of life and adding in the estimated costs of the laboratory evidential tests. This resulted in estimated costs of approximately s 9(2)(b)(ii), s 9(2)(i) over a ten-year period, and compares to estimated benefits of \$812.5M;

17.1 The s 9(2)(b)(ii), s 9(2)(i) estimated costs includes Police costs of approximately \$26.3M taken from the cost benefit analysis and estimated laboratory evidential testing of s 9(2)(b)(ii), s 9(2)(i). These estimates are highly indicative, and won't be known until Police undertake a procurement process for the OFT devices and laboratory testing services.

17.2 The \$812.5M benefit figure was calculated based on the cost benefit analysis estimate that 65 lives would be saved and 431 death and serious injury crashes prevented over a 10-year period, with each life valued at \$12.5M.

18 The cost of implementing the oral fluid testing regime is yet to be confirmed as the cost of procuring testing devices and laboratory services has not been determined. The costs are highly indicative, and won't be known until Police undertake a procurement process for the OFT devices and laboratory testing services. The costs will mostly fall on Police and be met through the National Land Transport Fund (NLTF). Police will implement the new regime drawing on frontline police resource already funded through the NLTF road policing funding envelope. Additional costs such as the procurement and maintenance of OFT equipment and the costs of laboratory testing is intended to be met through the NLTF outside of existing road policing funding. NZTA will also have some implementation costs which are currently being scoped. These will also need to be met through the NLTF.

19 The proposals within this paper may have implications under the New Zealand Bill of Rights Act (BORA). In particular, the proposals are likely to raise considerations under the following sections:

19.1

s 9(2)(f)(iv)

19.2

19.3

20 A number of mitigations have been included in the proposed oral fluid screening regime to reduce the BORA implications. These include the procedural safeguard of two positive OFTs before a driver is forbidden to drive, the inclusion of an evidential laboratory test which removes the likelihood of an infringement being issued on the basis of a false-positive OFT result, and the sanction for failing an OFT and an evidential laboratory test or refusing an OFT being infringement fees rather than criminal charges.

21 Officials will continue to work with the Ministry of Justice and the Office of the Privacy Commissioner as the Bill is developed to mitigate any implications. The implications will also be outlined for Cabinet when decisions are sought on the draft Bill.

Advice on whether the Bill is consistent with the BORA will be provided to the Attorney General prior to the Bill going to the LEG Cabinet Committee.

Use of external resources

22 No external resources were used in the development of this paper.

Consultation

23 The following government departments were consulted on the development of this paper: New Zealand Transport Agency (NZTA), Police, Ministry of Justice, Office of the Privacy Commissioner. The Department of the Prime Minister and Cabinet was informed.

Privacy Commissioner comment

24 The Privacy Commissioner noted they have previously raised serious privacy concerns about the oral fluid testing regime as a whole, as well as specific policy proposals previously taken to Cabinet. They continue to hold these concerns. While they acknowledge the importance of road safety, they have yet to see evidence that the anticipated benefits from compulsory oral fluid testing for drugs are proportionate to justify the very serious privacy intrusion involved. The acknowledged risk of inaccurate test results means roadside

testing is likely to fall short of Privacy Act requirements for fairness and accuracy in the collection, use, and retention of highly sensitive personal information. They point out that proceeding with the proposed approach will risk hundreds of people being prohibited from driving due to false positive tests.

Response

- 25 The proposed new regime introduces a new evidential laboratory test before infringement notices can be issued. This is a highly accurate form of testing that addresses concerns about issuing financial penalties and demerit points on the basis of less accurate screening tests.
- 26 As noted above, 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 screening tests at the roadside. This needs to be weighed against the road safety risk posed by the vast majority of drivers who test positive for qualifying drugs they have consumed. I consider that the appropriate balance has been struck.
- 27 Regulations will be developed to set out procedures for the collection, handing, storage and use of oral fluid samples. Officials will engage with the Office of the Privacy Commissioner as work on the regulations progresses.

Proactive Release

- 28 I intend to proactively release this paper and associated papers within 30 business days of the Cabinet decision by publishing it on the Ministry of Transport's website. The release may be subject to redactions under the Official Information Act 1982.

Recommendations

The Minister of Transport recommends that the Committee:

- 1 **note** the existing random roadside drug testing regime cannot be implemented as there is no available OFT device that meets the legislative approval requirements set out in the Land Transport Act 1998;
- 2 **note** legislative amendments were agreed by Cabinet [DEV-23-MIN-007] under the previous Government to rectify issues with the device approval criteria and replace the current oral fluid testing regime in the Act with a new regime that uses OFT devices as screening devices, with evidential laboratory testing of oral fluid samples for specified qualifying drug(s) required before infringement notices are issued;
- 3 **note** the Minister of Transport has instructed officials to issue drafting instructions to the Parliamentary Counsel Office based on the policy direction as agreed by Cabinet under the previous Government;

- 4 s 9(2)(ba)(ii), s 9(2)(f)(iv)

s 9(2)(ba)(ii), s 9(2)(f)(iv)

- 5 **note** that the costs of implementing the new oral fluid screening regime (other than frontline police time) will need to be met through the National Land Transport Fund, outside of existing road policing funding.

Authorised for lodgement

Hon Simeon Brown

Minister of Transport

PROACTIVELY RELEASED BY
TE MANATŪ WAKA MINISTRY OF TRANSPORT



Cabinet Economic Policy Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Enabling Roadside Oral Fluid Screening Tests: Legislative Amendments

Portfolio **Transport**

On 8 May 2024, the Cabinet Economic Policy Committee **referred** the submission under ECO-24-SUB-0072 to Cabinet on 13 May 2024 for further consideration.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Nicola Willis (Chair)
Hon David Seymour
Hon Chris Bishop
Hon Shane Jones
Hon Simeon Brown
Hon Paul Goldsmith
Hon Judith Collins KC
Hon Mark Mitchell
Hon Matt Doocey
Hon Tama Potaka
Hon Simon Watts
Hon Melissa Lee
Hon Penny Simmonds
Hon Chris Penk
Hon Andrew Hoggard
Hon Mark Patterson
Simon Court MP

Officials present from:

Office of the Prime Minister
Office of Hon Simon Watts
Officials Committee for ECO



Cabinet

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Enabling Roadside Oral Fluid Screening Tests: Legislative Amendments

Portfolio Transport

On 13 May 2024, following reference from the Cabinet Economic Policy Committee, Cabinet:

- 1 **noted** that the existing random roadside drug testing regime cannot be implemented as there is no available oral fluid test (OFT) device that meets the legislative approval requirements set out in the Land Transport Act 1998 (the Act);
- 2 **noted** that in May 2023, the previous government agreed to amend the Act to:
 - 2.1 rectify issues with the device approval criteria;
 - 2.2 replace the current OFT regime in the Act with a new regime that uses OFT devices as screening devices, with evidential laboratory testing of oral fluid samples for specified qualifying drug(s) required before infringement notices are issued;

[DEV-23-MIN-0077]

- 3 **noted** that the Minister of Transport has instructed officials to issue drafting instructions to the Parliamentary Counsel Office based on the policy direction referred to in paragraph 2;

4 s 9(2)(ba)(ii), s 9(2)(f)(v)

- 5 **noted** that the costs of implementing the new oral fluid screening regime (other than frontline police time) will need to be met through the National Land Transport Fund, outside of existing road policing funding.

Rachel Hayward
Secretary of the Cabinet