



23 March 2023

OC230213

Hon Kiri Allan

Action required by:

Associate Minister of Transport

Monday, 27 March 2023

LEGISLATIVE AMENDMENTS TO ENABLE ROADSIDE ORAL FLUID TESTING

Purpose

To provide you with a draft Cabinet paper which seeks agreement to amendments to enable random roadside oral fluid testing for drugs, with an accompanying Regulatory Impact Statement (RIS). This paper also outlines potential risks with the current preferred option.

Key points

- On 11 March 2023, amendments to the Land Transport Act 1998 (the Act) came into force to introduce a random oral fluid test (OFT) regime. The regime was intended to enable Police to test drivers for the presence of the highest risk drugs that impair driving, similar to the alcohol breath testing regime.
- You were recently advised that the random roadside oral fluid testing regime cannot be implemented as initially designed. A recent procurement process conducted by New Zealand Police (Police) confirmed that there is no available OFT device that meets the current legislative approval criteria [OC221027 refers].
- In response, Te Manatū Waka Ministry of Transport (Te Manatū Waka) and Police identified three initial options for discussion:
 - **Option One:** delay implementation of the random roadside oral fluid testing regime until a device is developed that meets legislative requirements
 - **Option Two:** amend the legislative approval criteria under the current regime to address the issues identified through the procurement process
 - **Option Three:** introduce a new regime, where an OFT device is used at the roadside as a screening tool, with any positive tests subject to laboratory confirmatory testing.
- At a meeting on 21 February 2023 to discuss these options, we received Ministerial direction to progress with policy work on Option Three. Part of this direction was to maintain alignment with the original legislative intent, which acknowledges the known limitations of currently available devices. Additionally, Ministers indicated a preference that if and when a device is manufactured that meets the original legislative approval criteria, the legislation should enable the original regime to be implemented.

- We have drafted a Cabinet paper and RIS in line with this direction. These documents propose the replacement regime include a mechanism for enabling the current roadside testing regime to be reimplemented (possibly by Order-in-Council) in place of the roadside screening regime if OFT devices advance to the point where they meet current legislative approval criteria. We would need to design a mechanism for revoking the redundant regime.
- Through further policy development, we have identified some key design elements to be aware of with the preferred approach if the current regime is retained:
 - The current drafting of section 71G of the Act (which sets out the OTF device approval criteria) sets a high threshold and there is no certainty there will ever be a device that meets these criteria. Even if devices improve in accuracy (the likelihood of false positive results) and specificity (being able to identify a single qualifying drug, as opposed to a family of drugs), recent use detection issues remain. This is because some drugs can remain in a person's system for up to 24 hours, or even 3 days (for habitual users) after use.
 - Given that the device technology is unlikely to develop to the point where devices can meet current approval criteria, retaining the current regime in the Act will add unnecessary complexity. If it is retained, the Act will need to provide two sets of approval criteria for the devices, different evidence standards, procedural requirements and offence provisions, and there will need to be detailed consideration of how and when to transition between the two regimes. Police has advised there will be significant operational difficulties with having both regimes in the legislation.
- Further, we have identified additional design elements to be aware of if the regime is replaced or retained:

○ s 9(2)(b)(ii), s 9(2)(g)(i)

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- The proposals are likely to raise compliance issues with the New Zealand Bill of Rights Act 1990. We will be consulting with the Ministry of Justice as the legislation is developed.
- A draft Cabinet paper accompanies this briefing that seeks agreement to amend the Act to introduce a new random roadside oral fluid drug screening regime, with any positive tests subject to laboratory confirmatory (Option Three), while retaining the provisions for the current regime should it be able to be implemented. A draft

Regulatory Impact Statement exploring the three options outlined above is also attached.

- Te Manatū Waka and Police note these papers have been developed at speed in direct response to the identification of issues around current legislative settings. We will seek advice as required from technical experts in parallel to the development and drafting of legislation to identify and confirm the availability of technology and testing processes within New Zealand to give effect to these proposals. Policy issues are likely to arise during the drafting process and we will seek further direction from you as required.

Recommendations

We recommend you:

- 1 **indicate** your preferred approach:

proceed with Option Three, retaining the current regime (not recommended by Te Manatū Waka or Police, but we have drafted the Cabinet paper and accompanying RIS in line with this approach), or Yes / No

proceed with Option Three, removing the current regime (strong preference of Te Manatū Waka and Police. If you agree to this option, we will provide you with an amended Cabinet paper and RIS for Ministerial consultation) Yes / No

- 2 **indicate** if Te Manatū Waka is to proceed with departmental consultation from Monday 27 March through Friday 31 March (noting Ministerial consultation will need to run concurrently) Yes / No

- 3 **note** there are some risks (including compliance with the New Zealand Bill of Rights Act 1990, uncertainty about the timeframe for procuring confirmatory laboratory testing, and potential cost pressures) associated with implementing Option Three Yes / No

- 4 **refer** this briefing to the Minister of Police Yes / No

PP 

Helen White
Manager, Mobility and Safety

23 / 3 / 2023

Hon Kiri Allan
Associate Minister of Transport

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- Minister's office to complete:**
- Approved Declined
- Seen by Minister Not seen by Minister
- Overtaken by events

Comments

Contacts

Name	Telephone	First contact
Helen White, Manager, Mobility and Safety	s 9(2)(a)	
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PROACTIVELY RELEASED BY
TE MANATU WAKA MINISTRY OF TRANSPORT

LEGISLATIVE AMENDMENTS TO ENABLE ROADSIDE ORAL FLUID TESTING

Background

- 1 Enhancing the drug driving testing regime is an action under Road to Zero, the Government's road safety strategy. On 11 March 2023, amendments to the Land Transport Act 1998 (the Act) came into force. The amendments introduced a random roadside oral fluid test (OFT) regime that is intended to enable New Zealand Police (Police) to test drivers for the presence of the highest risk drugs that impair driving, similar to the alcohol breath testing regime.
- 2 Police has completed a procurement process for OFT devices. The procurement process confirmed that there is no currently available device that meets the existing legislative approval criteria. The devices did not meet accuracy (false positive rate), specificity (identification of individual drugs rather than families) and recent use (detecting drugs only when used within a certain timeframe before the test is administered) criteria. As a result, the roadside oral fluid testing regime cannot be implemented under current legislative settings.
- 3 To clarify these issues, Te Manatū Waka Ministry of Transport (Te Manatū Waka) and Police jointly sought Crown Law advice ^{s 9(2)(b)} [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- 4 In response, Te Manatū Waka and Police identified three options for Ministers [OC221027 refers]:
 - 4.1 **Option One:** delay implementation of the random roadside oral fluid testing regime until a device is developed that meets legislative requirements;
 - 4.2 **Option Two:** amend the legislative approval criteria under the current regime to address the issues identified through the procurement process;
 - 4.3 **Option Three:** introduce a new regime, where OFT devices are used as a screening tool at the roadside, with any positive tests subject to laboratory confirmation testing.
- 5 At a meeting on 21 February 2023, the Minister of Transport, the Attorney-General, and the then-Minister of Police directed officials to progress with Option Three. The new regime was to align as closely as possible to the original legislative intent, taking account of the known limitations of currently available devices.
- 6 Ministers also directed officials to retain the current OFT regime so that if and when a device is manufactured that meets current legislative approval criteria, the legislation would enable the original regime to be implemented.

We have provided a Cabinet paper and Regulatory Impact Statement for your consideration

- 7 The attached Cabinet paper seeks Cabinet agreement to amend the Act to enable a new compulsory roadside oral fluid drug testing regime to detect and deter drug driving. The paper proposes to retain the current OFT regime and introduce a new regime that addresses issues identified through the procurement process by enabling confirmatory laboratory testing before Police issue an infringement notice.
- 8 The Regulatory Impact Statement (RIS) (also attached) explores the three options identified below in more detail. It notes:
 - 8.1 the Ministerial preference that the new random roadside oral fluid testing regime is to align as closely possible to the original intent while taking into account the known limitations of currently available devices;
 - 8.2 that there is limited time to obtain policy decisions and progress legislative amendment prior to the 2023 pre-Election period;
 - 8.3 that there was extensive consultation with key stakeholders and the public during the development of the initial regime, which has informed the analysis of the current options, but no consultation has been undertaken on the current options;
 - 8.4 that we have not updated the cost-benefit analysis from the original OFT proposals, and;
 - 8.5 that certain assumptions have been made (e.g., the time of OFT testing at the roadside and any associated costs).
- 9 The intention is for the Cabinet Business Committee to consider the proposal and associated papers on 11 April 2023, with power to Act from Cabinet (as Cabinet doesn't meet until 1 May 2023). To meet this timeframe, we have factored in one week for Ministerial and Caucus consultation. Te Manatū Waka will undertake departmental consultation concurrently.

We identified three options to enable random roadside oral fluid testing

- 10 **Option One (not recommended)** involves delaying implementation of the random roadside oral fluid testing regime until manufacturers develop a device that meets the legislative requirements. While Police anecdotally understand new products may be in development, it is likely to be some years before these devices are available (if they become available at all) and there is no clear indication of their potential capabilities. Note we do not have certainty that future developments would meet the requirements of the current approval criteria.
- 11 **Option Two** requires amending the device approval criteria to allow for currently available devices to be used for evidential purposes to issue an infringement offence at the roadside. While this would address the issues identified through the procurement process, previously identified risks, such as the one to five percent chance of a driver being issued an infringement notice at the roadside (based on two false positive OFT results) where they have not consumed any qualifying drug/s or the likelihood of a successful legal challenge, remain.

- 12 **Option Three** will introduce a new OFT regime, where Police will use OFT devices as a screening tool at the roadside. Following two positive tests, an oral fluid sample from the driver will be sent for laboratory analysis, and a police officer would forbid that person from driving for 12 hours. This addresses the immediate road safety risk. An infringement notice would only be issued following a confirmatory positive test in a laboratory. This would allow infringements to be issued for all qualifying drugs.
- 13 Per Ministerial direction, the draft Cabinet paper propose that Option Three includes a mechanism for enabling the current roadside testing regime to be reimplemented (possibly by Order-in-Council) in place of the roadside screening regime if OFT devices advance to the point where they meet current legislative approval criteria. We would need to design a mechanism for revoking the alternative regime.

There are some outstanding policy issues to work through

There are added complexities with both retaining the current OFT regime, and introducing a new regime

- 14 We previously received Ministerial direction that the regime, as currently set out in the Act, is to be retained. If and when a device is manufactured that meets the current approval criteria, the original regime could then be implemented. The attached Cabinet paper and RIS have been drafted along these lines.
- 15 While we understand Ministerial desire to ultimately implement the current regime, we have concerns about the feasibility of this plan. s 9(2)(h)

s 9(2)(h)

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¹ To identify a specific drug, a confirmatory laboratory test (normally spectrographic analysis) is required.

- 17 Given these complexities, if Ministers wish to proceed with Option Three Te Manatū Waka and Police strongly recommend not retaining the current regime on the basis it is unlikely there will ever be a device that meets that legislative threshold. This would simplify the drug driving regime as the Act would not need to provide two sets of approval criteria for the devices, and different evidence standards, procedural requirements and offence provisions.² Police has also advised it has significant concerns with having both regimes in the legislation, including issues around retaining two sets of infringement offences (depending on the testing method used), and the potential for changes in technology to mean the legislation retained to enable its use may not be fit for purpose for the nature of the technology in the future.
- 18 Alternatively, if Ministers want to implement the current regime, progressing Option Two would allow for this. However, Te Manatū Waka and Police do not recommend pursuing this as it carries almost certain risk of successful legal challenge and may have further implications in terms of compliance with the New Zealand Bill of Rights Act 1990. We note Option Three will also interact with the Bill of Rights Act.³ We will discuss these issues with the Ministry of Justice as we proceed with policy and legislative development.
- 19 We note that policy issues are likely to arise during the drafting process and we will seek further direction from you as required.

s 9(2)(i), s 9(2)(g)(i)

s 9(2)(i)

- 21 The infringement fee is currently \$200 for a single qualifying drug and \$400 for a combination offence. s 9(2)(i)

s 9(2)(i)

- 22 s 9(2)(i)

s 9(2)(g)(i)

² For example, current offences are defined with reference to two positive oral fluid tests, whereas under the preferred option, the offences would reference two positive oral fluid screening tests, plus a positive confirmatory laboratory test.

³ Both options will interact with section 21 (unreasonable search and seizure) and section 22 (arbitrary detention).

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s 9(2)(g)(i)

We have consulted with Police and the Crown Law Office on these papers

24 Police strongly supports the introduction of an approach requiring a screening test at the roadside followed by a confirmatory laboratory testing where two screening tests return positive results.

25 Police identifies significant potential issues with a decision to retain the existing roadside oral fluid testing regime in the legislation. As already identified, this approach will require that the evidentiary roadside testing approach is retained but not activated, with approval criteria and specific offences related to that testing process held 'on the books' while a separate screening process with its own processes, infringement offences and device approval criteria is 'active on the books'.

26 Given the technology does not exist to deliver the current approach and is unlikely to for a number of years, Police considers retaining the current approach in legislation in the hope it may be implemented in the future carries the risk of being confusing for the public, by having 'unactivated' legislative elements. There is a strong likelihood that even if technology becomes available to implement the current regime at some point in the future, the nature of the technology may mean that legislative settings that were retained will still need to be amended to enable its introduction.

27 Police also wishes to advocate for a small number of amendments to be introduced to improve road safety outcomes, including the ability of a police officer to move to a Compulsory Impairment Test if a clearly drug impaired driver passes two OFT screening tests, and establishing a new offence for refusal to provide an oral fluid sample. Te Manatū Waka notes under the original regime, there was a deliberate policy decision to limit the ability to switch to a CIT only after the first oral fluid test. Additionally, Te Manatū Waka notes there is a pathway if a person refuses an OFT, they are required to give blood. If the driver refuses a blood test, they will be liable for an offence.

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s 9(2)(h)

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Next steps

- 31 Te Manatū Waka will consult with wider departments, including the Ministry of Justice, Manatū Hauora Ministry of Health, Te Puni Kōkiri, Waka Kotahi NZ Transport Agency, and any other relevant agencies during departmental consultation.
- 32 Our current indicative timeline is set out in the table below:

Milestone	Date
Ministerial and Departmental consultation (concurrent)	27 March – 31 March 2023
Revised papers provided to your office	5 April 2023
Lodge for CBC	6 April 2023
CBC (with power to Act approved)	11 April 2023
Cabinet (if no power to Act)	1 May 2023
Drafting instructions issued	After date of Cabinet approval (or CBC approval, if power to Act is granted)

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