

## Land Transport (Drug Driving) Amendment Bill

### Introduction

1. I welcome the opportunity to submit on this Bill.
2. Under the Privacy Act 2020, the functions of the Privacy Commissioner include examining new legislation for possible impacts on individual privacy. It is also part of my role to monitor emerging privacy issues, and to offer guidance on how businesses, government agencies, and people across society can uphold their privacy obligations.
3. Privacy is a basic right which is increasingly visible and important to New Zealanders. My submission focuses on the privacy impacts of the proposed approach, and whether the policy case and evidence are strong enough to show that these are justified. In short, do the policy benefits outweigh the impacts on New Zealanders' privacy?
4. I agree that deterring drug-impaired driving is an important public policy objective, which can justify some level of intrusion on privacy. However, in my view the present Bill involves serious intrusions on privacy which are not in proportion to the policy benefit.
5. Roadside testing for drug impaired driving may be a useful step to improve road safety, but it depends on the availability of tests which are accurate, specific, and timely. Current law already allows the use of such tests if thresholds around these key safeguards are met.
6. My view is that this Bill should not proceed in its present form. If the Bill is to proceed, I recommend changes which would support its policy objectives while substantially mitigating impacts on New Zealanders' privacy, namely:
  - A. Retaining the current requirement for oral fluid tests to be accurate, specific, and timely in order to be approved under s 71G of the Land Transport Act ("the Act");
  - B. Adding an explicit purpose limitation, to ensure that information collected from oral fluids, blood, and test results can only be used for the purpose of detecting and deterring drug-impaired driving, as a logical extension of already proposed limits on use of this information.
7. These changes would support the aims of this Bill while better protecting privacy.

### Mandatory roadside saliva testing presents serious privacy concerns

8. Roadside saliva testing involves serious intrusions on New Zealanders' bodily and informational privacy. The process of collecting saliva samples is physically intimate, involving bodily contact and intrusion into personal space. The information collected is highly sensitive. As well as testable markers of potential drug use, collected saliva samples can also reveal a person's DNA and other markers of health status.

9. My Office has raised privacy concerns about oral fluid testing since 2020, engaging with officials and submitting on an earlier Bill before the Transport and Infrastructure Committee which established the current rules for saliva testing of drug-impaired driving.
10. My principal concern is whether the approach to testing will be accurate and fair. Medical experts submitting on the 2022 Bill raised serious concerns about whether saliva tests could accurately detect impaired driving, with the Royal Australian and New Zealand College of Psychiatrists saying “[t]he presence of drugs in a person’s oral fluid or blood does not directly relate to impairment. We call for greater research in understanding the link between substance misuse and a person’s impairment”.<sup>1</sup>
11. I note that the Attorney General has issued a Bill of Rights report stating that the present proposals are inconsistent with the right to be free from unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act 1990.<sup>2</sup> As the report states, the touchstone for this right is a reasonable expectation of privacy.
12. The Attorney General’s report assesses the proposed approach as involving an intrusion on privacy which is not proportionate to the public interest objective, and with insufficient safeguards, due to:<sup>3</sup>
  - A. The physical collection of an oral fluid sample or a blood sample involving a significant intrusion on bodily privacy, in a context where refusing a test would itself be an infringement offence;
  - B. At the time a saliva sample would be taken for the first oral fluid screening test, there would be no basis to suspect an individual is affected by any impairing drug;
  - C. Requiring a later laboratory test cannot mitigate the intrusion on privacy involved in the earlier roadside screening tests;
  - D. This contrasts with the approach to a compulsory impairment test, where there does need to be good cause to suspect a driver has consumed an impairing drug.
13. I agree with the concerns raised by the Attorney General’s report that roadside fluid testing as proposed involves an unreasonable intrusion on bodily privacy.
14. In addition, as set out below, I am concerned that the risk of inaccurate test results would present an unreasonable intrusion on informational privacy. New Zealanders expect that decisions affecting them, particularly in the law enforcement context, are based on accurate information which is well-supported by evidence of reliability.

---

<sup>1</sup> From commentary on the earlier [Land Transport \(Drug Driving\) Amendment Bill 317-2](#) as reported from the Transport and Infrastructure Committee.

<sup>2</sup> Hon Judith Collins KC, “Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Drug Driving) Amendment Bill” (29 July 2024), <[justice.govt.nz](https://justice.govt.nz)>

<sup>3</sup> Above n 2, at [37]-[41].

### The current law permits the use of accurate, specific, and timely drug testing

15. The goal of improving road safety is served by accurately detecting and deterring the behaviour of driving while impaired by drugs. Current law supports this goal by requiring that oral fluid drug tests must be accurate, specific, and timely. To be approved for use, oral fluid tests must reliably detect recent use of a specific drug.<sup>4</sup>
16. No currently available test has been found to meet these requirements. In response, the present Bill proposes to relax the requirement for accurate, specific, and timely tests.
17. I am concerned that relaxing these requirements will lead to inaccurate test results that unfairly penalise New Zealanders. Permitting the use of inaccurate tests may also compromise public confidence in and compliance with road safety rules more broadly.

### Relaxing accuracy requirements will lead to false positive test results

18. Clause 22 of the Bill proposes to relax existing requirements and allow the use of tests with “a high accuracy rate”. This will permit use of tests that produce false positives.
19. The vast majority of drivers on the road are not affected by drugs that impair driving. A 2022 study for NZTA Waka Kotahi suggested that at a given time 95-99% of drivers are not affected by drugs that impair driving, and would be at risk for false positive tests.<sup>5</sup>
20. Testing for rare conditions can lead to a surprisingly high rate of false positives. The table below illustrates how a 95% accurate test can lead to 50% false positives (in other words, it is a coin flip whether a driver stood down was actually affected by drugs).

Indicative false positive and negative rates at 50,000 tests and 95% accuracy			
Test result	Positive test (at 95% accurate, 5% error rate)	Negative test (at 95% accurate, 5% error rate)	TOTALS
Drivers using drugs (5%)	2,375	125	2,500
Drivers not using drugs (95%)	2,375	45,125	47,500
TOTALS	4,750	45,250	50,000

21. I have not seen clear evidence of how many false positives are likely in practice.
22. I understand it is proposed to test 50,000 drivers each year.<sup>6</sup> Even with a low error rate, false positives will affect many New Zealanders. Even a 99% accurate test would lead to hundreds of drivers falsely testing positive each year.<sup>7</sup>

<sup>4</sup> Land Transport Act 1998, s 71G.

<sup>5</sup> Ipsos for NZTA Waka Kotahi, “Prevalence of drugged and/or medicated driving in New Zealand” (June 2022) <[nzta.govt.nz](https://nzta.govt.nz)>

<sup>6</sup> Hon Simeon Brown “Drunk and drugged drivers targeted by new road policing programme” (18 August 2024) <[beehive.govt.nz](https://beehive.govt.nz)>

<sup>7</sup> Assuming 95% of drivers are not affected by drugs, testing 50,000 drivers with a 1% false positive rate would lead to 475 drivers receiving a false positive test result and a 12 hour stand down.

23. The Bill proposes to reduce the risk of false positives by requiring two consecutive tests. However, it is unclear how much this will reduce the risk of false positives in practice. False positive may be due to errors in administering the test, or to specific details of a person's biology, in which case a second test may suffer the same limitations. I have not seen evidence on how much a second test will improve accuracy in practice.

### **False positive tests will lead to hundreds of drivers being unfairly stood down**

24. False positive tests will lead to New Zealanders being unfairly stood down from driving, with an immediate 12 hour driving ban. This will be stressful for these people, their whānau, and those they are travelling with. In the moment, false positive tests may lead to tension between drivers and law enforcement officers. In the longer term, they present a risk of undermining public trust and confidence in road safety rules more broadly.
25. The proposed approach relies on rules that deem tests to be reliable once approved. This is similar to the approach with other aspects of road safety enforcement, such as rules on detecting blood alcohol. My concern is that the same level of reliability has not been established for oral fluid tests detecting drug impairment. Relaxing current requirements for accurate, specific, and timely tests will put New Zealander drivers in a position where they have no way to challenge or correct false positive drug test results.
26. There is also the risk of unfair impacts on specific groups of people. If there is discretion in who gets tested, then groups who face unconscious bias in the law enforcement context may be unfairly burdened with the impacts of inaccurate testing.
27. To avoid these increased risks of false positive roadside drug tests, I recommend retaining the existing requirements for approval of oral fluid tests set out in s 71G of the Land Transport Act.

### **A strict purpose limitation should apply to any information from these tests**

28. I welcome the proposal to limit the use of information from drug screening tests and think that this should go further.
29. At clause 24, the Bill includes provisions to prevent information from oral fluid testing and blood samples being used for prosecutions under the Misuse of Drugs Act 1975.
30. I think further steps are needed to uphold New Zealanders' expectations of informational privacy in respect of saliva and other bodily samples. While the policy intent is to test for drugs that impair driving, these samples contain DNA and other sensitive health information which could be used for other purposes.
31. These samples would be collected for the purpose of detecting and deterring drug-impaired driving to improve road safety. The Privacy Act requires that personal information is only used for the purpose for which it is collected or a directly related purpose. Any use of information from these samples for other purposes would be a serious breach of trust and would challenge public confidence in law enforcement.

32. To avoid this risk, I recommend adding a broader and explicit purpose limitation to the Bill, mandating that oral fluid samples, blood samples, test results and related information collected for the purpose of detecting and deterring drug-impaired driving to improve road safety can only be used for that purpose.
33. In my view this would be a logical extension of the Bill's current proposal to prevent the use of information collected from oral fluid and blood samples for prosecuting drug offences. Similarly, there is no rationale for retaining samples which have tested negative for the presence of drugs. I recommend requiring immediate destruction of samples which have tested negative.
34. Adding a clear and explicit purpose limitation to the Bill would help to mitigate privacy impacts whether or not proposed changes to the testing approach proceed into law.

### **Improving data management will be critical to upholding public trust**

35. My Office has been working with Police for some time on how they collect and manage personal information, including photographs of young people. A joint report by my Office and the Independent Police Conduct Authority found a lack of awareness of Police of their obligations under the Privacy Act led to officers taking, using and retaining photographs of young people when it was not lawful to do so.<sup>8</sup>
36. The requirement to find and delete unlawfully collected photographs has revealed significant weaknesses in Police information management systems. Lack of meta-data (tags applied to photographs to enable automated search) means that the photographs held by police across multiple systems cannot be searched and therefore non-compliant images cannot be identified and deleted. In response, Police acknowledged a need to implement better data management practices and put in place new information management systems.<sup>9</sup> Police also note that fiscal constraints have resulted in deferral of a digital evidence management system required to appropriately store photographs and videos containing images of members of the public.<sup>10</sup>
37. If Police are to collect saliva and blood samples as proposed, with the potential for DNA and other health information to be revealed, public trust will depend on achieving much better standards for managing this sensitive personal information. As the Privacy Commissioner I will be keen to understand what steps are being taken to achieve this.

---

<sup>8</sup> Office of the Privacy Commissioner, "IPCA/OPC Joint Inquiry into Police conduct when photographing members of the public" (8 Sep 2022) <[privacy.org.nz](https://www.privacy.org.nz)>.

<sup>9</sup> New Zealand Police, "Police response to joint IPCA/OPC investigation" (8 Sep 2022) <[police.govt.nz](https://www.police.govt.nz)>.

<sup>10</sup> New Zealand Police, "Progress update on aspects of Police photographing and fingerprinting practices" (July 2024) <[police.govt.nz](https://www.police.govt.nz)>.

## Conclusion

38. As set out above, I think this Bill presents serious privacy concerns, and there is not a strong policy case showing these concerns are in proportion to the benefits achieved.
39. I recommend that this Bill not proceed in its present form.
40. If the Bill is to proceed, I recommend either or both of the following steps:
  - A. Retaining the current requirement for oral fluid tests to be accurate, specific, and timely in order to be approved under s 71G of the Land Transport Act;
  - B. Adding an explicit purpose limitation, to ensure that information collected from oral fluids, blood, and test results can only be used for the purpose of detecting and deterring drug-impaired driving.
41. I do not seek to be heard on this submission, but am open to appearing if that would assist the Committee.

Aku mihi,



Michael Webster  
**Privacy Commissioner**