

## **Privacy Commissioner's Submission to the Transport and Infrastructure Committee on the Land Transport (Drug Driving) Amendment Bill (317-1)**

### **Executive summary**

1. I am pleased to provide a submission on the Land Transport (Drug Driving) Amendment Bill (the Bill), including the Land Transport (Drug Driving) Amendment Bill Supplementary Order Paper (SOP) No 24.
2. The Bill amends the Land Transport Act (the Act) to introduce roadside oral fluid testing (OFT) for drug driving enforcement, together with an offence and penalty regime (infringement and criminal) for drug driving. The SOP proposes to add criminal and infringement limits in blood which are currently not included in the bill. These limits will determine whether the levels of a qualifying drug, which a driver has consumed, results in a criminal offence or infringement offence. The SOP also clarifies that drug driving offences apply only when a driver exceeds the relevant drug concentration level, to align the offences with drink driving offences.
3. The Privacy Act 2020 is New Zealand's main privacy law. One of the Privacy Commissioner's functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.
4. I have the following concerns about the Bill:
  - It could lead to drivers being penalised on the basis of inaccurate information.
  - It could effectively create a list of people who are believed to be drug users.
5. I do not support the Bill as currently drafted. I do not believe that the stated policy rationale is sufficiently robust to justify the significant intrusion on privacy.

### **The Bill**

6. Currently, if an enforcement officer has good cause to suspect a driver has taken drugs, the officer can require the driver to undertake a compulsory impairment test (CIT). A driver who fails a CIT is required to undertake an evidential blood test and if the blood test shows the presence of a qualifying drug in the driver's system, the driver can face significant criminal penalties.
7. One of the key changes that the Bill proposes is introducing a random roadside OFT regime alongside the CIT regime. An officer would be able to stop the driver of any motor vehicle and administer an OFT, without needing good cause to suspect the driver had taken drugs. The bill proposes that drivers who fail two consecutive OFTs would incur an infringement penalty, aligned to the drink driving infringement penalty. A driver who failed two consecutive OFTs could take an evidential blood test in order to challenge the result.

### Comparison to the drink driving regime

8. The approach to drug driving testing in the Bill has similarities to the existing regime for random breath testing of drivers for drink driving offences, including:
  - roadside testing without needing good cause to suspect a driver has consumed impairing substances
  - the option for drivers to take a blood test if they fail the roadside test
  - a penalty regime incorporating infringement and criminal offences.
9. A key difference between the existing drink driving regime and the proposed drug driving regime is that the use and possession of alcohol is legal, whereas qualifying drugs for drug driving offences are either controlled drugs under the Misuse of Drugs Act 1975 or prescription medicines. There is greater sensitivity about the collection and use of information purporting to show that an individual has consumed a controlled substance than there is with testing for a legal substance.
10. Another difference is that with drink driving there is a strong correlation of breath alcohol and blood alcohol concentration with impairment. By contrast, international research shows that the impact of drug consumption on driving ability is more difficult to assess<sup>1</sup>. I also note the comment in the Ministry of Transport's regulatory impact statement on enhanced drug driver testing that *'we cannot say for certain that the presence of a dose of a particular drug or substance in a driver's blood means they are impaired. In contrast to alcohol, there is not a clear linear relationship between dosages of drugs, when they are taken, and impairment.'*<sup>2</sup> Furthermore, devices for roadside testing for drugs appear to provide results that are less reliable than those from alcohol breath testing devices.

### Privacy interests

11. The compulsory collection of bodily fluids and analysis of those fluids for evidence of drug use raises significant privacy considerations. Privacy principle 4 of the Privacy Act states that personal information must not be collected by unlawful, unfair or unreasonably intrusive means. The compulsory collection of bodily fluids is both physically intrusive and intrusive on privacy of personal information. Furthermore, the information obtained through drug testing can be used as the basis for imposing penalties on individuals. It is therefore particularly important to ensure that the collection of this information is justified and that the information is accurate.
12. I note the Attorney-General's view, in his report on the Bill under the New Zealand Bill of Rights Act 1990 (NZBORA), that an OFT is likely to constitute a physical search of the person and seizure of a bodily sample for the purposes of section 21 of NZBORA.
13. The need to protect against intrusions on privacy may be outweighed by the public interest in preventing road deaths and accidents. To justify the intrusion on privacy,

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<sup>1</sup> European Monitoring Centre for Drugs and Drug Addiction, *Driving Under the Influence of Drugs, Alcohol and Medicines in Europe — findings from the DRUID project*, December 2012

<sup>2</sup> Ministry of Transport, *Updated Impact Statement: Enhanced drug driver testing*, July 2020, p. 11.

however, there would need to be a clear focus on reducing impaired driving and thereby improving road safety. The Bill currently does not have that focus; instead, the focus of the Bill is on the consumption of a drug rather than impaired driving.

### Concerns about the Bill

14. The policy rationale behind the OFT regime is not sufficiently robust to justify the significant intrusion on privacy involved. The Bill:
  - is too focused on the consumption of a drug and insufficiently focused on controlling impaired driving
  - could lead to drivers being penalised on the basis of inaccurate information
  - could effectively create a list of people who are believed to be drug users.

#### *Insufficient focus on impairment*

15. There is evidence that consumption of drugs can impair driving and contribute to risk of road accidents. However, the policy documents supporting the Bill do not provide a clear picture of the relative contribution of drug driving to accident risk, in comparison with other factors. According to the World Health Organization, *'there is insufficient evidence on the effectiveness of legislation to limit or prohibit drug-driving to establish best practice criteria'*<sup>3</sup>.
16. The Bill will set criminal limits for some qualifying drugs, meaning that a driver found to have a proportion of the drug in their blood at or above the limit will commit a criminal offence. The limits will be based on advice from an expert panel. The Bill as introduced did not include these limits, but the SOP now notes the high-risk blood concentration levels for drug-driving offences and the tolerance blood concentration levels for drug-driving offences. I note the comment by the NZ Drug Foundation that *'It is practically impossible to set limits at which impairment from a substance would be certain. The point at which consumption creates a risk of danger to road users will be arbitrary and could vary depending on the particular substance, interactions with other substances, the body characteristics of the user, and any tolerance that the user may have for the substance'*<sup>4</sup>. It will be important to ensure that a criminal limit for drugs, based on impairment, is supported by evidence.
17. In the case of infringement offences, drivers could face penalties without evidence of impairment. This would be the case if a driver fails two OFTs, or if a blood test shows the presence of a drug for which no criminal limit has been set and the driver has not undergone a compulsory impairment test. The infringement offences in the Bill would penalise people on the basis of drug presence rather than impairment. A threshold would be introduced through the requirement in clause 36 (inserting new section 168D) that approved OFT devices will return a positive result only if the device detects the presence

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<sup>3</sup> World Health Organization, *Global status report on road safety 2018*, Geneva, 2018, p46

<sup>4</sup> NZ Drug Foundation, *New Zealand Drug Foundation submission on enhanced drug impaired driver drug testing*, 26 June 2019

of a drug at a level that indicates recent use. However, this is still a threshold based on consumption of a drug rather than impairment.

*Accuracy of oral fluid testing devices*

18. Privacy principle 8 of the Privacy Act requires that agencies take reasonable steps to ensure that personal information is accurate, relevant and not misleading before using that information. Under the current proposal, there is a significant risk that an individual would face legal penalties when the evidence of wrongdoing is inaccurate.
19. Not only will infringement offences resulting from OFTs be based on the *presence* of drugs, rather than demonstrated *impairment*, there is also a further risk that the detection of drug presence itself will be inaccurate.
20. It appears from the Ministry of Transport's policy documents and other available information that the accuracy of OFT devices is uncertain and variable. There is a significant risk of false positive results (tests that indicate the presence of drugs where the driver has not in fact consumed drugs).<sup>5</sup>
21. The Ministry of Transport's cost-benefit analysis for enhanced drug driving testing indicates that the false positive rate could be between 0% and 10%, and assumes accuracy on 95% of occasions. The Ministry's regulatory impact statement quotes a range of evidence, including reported false-positive rates as low as 1% in some Australian states.<sup>6</sup> If, as anticipated, there are in due course 66,000 OFTs carried out per year, a 1% false positive rate would mean more than 600 people per year potentially facing infringement penalties on the basis of incorrect information.
22. One mitigation included in the Bill is the requirement for a second OFT if a driver fails the first one. However, the extent to which a second OFT reduces the risk of false positives is unclear. For example, if the false positive is due to operator error, a second test may not provide sufficient mitigation.
23. Another mitigation in the Bill is the right of drivers who fail two OFTs to challenge the result by taking a blood test. However, there are several disincentives to doing so. First, the driver is liable to pay the blood test fee if the test confirms that the driver has committed a criminal drug driving offence. Second, the blood test takes additional time and is intrusive.
24. The Government has expressed interest in the Select Committee's view on whether drivers should also be liable to pay for the evidential blood test if they have committed only an infringement-level offence. Such a requirement would be a further disincentive to opting for a blood test to challenge the results of OFTs.

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<sup>5</sup> There is also a risk of false negative results, which may have implications for road safety but are less concerning in terms of privacy impacts.

<sup>6</sup> Ministry of Transport, *Enhanced testing regime for drug-impaired driving: Cost-benefit analysis*, April 2020, pp. 26-27; Ministry of Transport, 'Updated Impact Statement: Enhanced drug driver testing', July 2020, pp. 4-5.

*Creation of a de facto list of drug users*

25. The purpose of the infringement offence regime that would be introduced by the Bill is to deter drug driving and reduce the incidence of driving that is impaired by use of drugs. However, infringement offences would be based on evidence of the presence of drugs and not on evidence of impairment. Infringement offences will, in effect, produce a list of people who are believed to have used drugs but whose driving may not have been impaired. Additionally, due to the risk of false positives from OFTs, some of these people may not have used drugs at all.
26. In most cases, the drugs in question are illegal. It could therefore be argued that the government has a legitimate purpose for recording information about individuals who have used these drugs. However, the Bill's purpose is connected with road safety, not with drug control or treatment. The creation of a government-held register of information about alleged drug users is not connected with this purpose.
27. Privacy Principle 1 of the Privacy Act states that organisations must only collect personal information if it is for a lawful purpose connected with their functions or activities, and the information is necessary for that purpose and Privacy Principle 10 states that organisations can generally only use personal information for the purpose it was collected. The creation of a list of people who are believed to be drug users could be a breach of both Privacy Principle 1 and 10.
28. It is also unclear what will happen to the information on this list of people who are believed to have used drugs, but whose driving may not have been impaired. There will be many privacy implications that need to be taken into account, such as whether this personal information will be shared with other agencies, the fact that the individual would need to be made aware that they end up on this list, and the fact that the individual has the right for access to this personal information. Decisions on these issues will have relevance in terms of compliance with the Privacy Act 2020.
29. It is unclear how the information about alleged drug users collected through the infringement regime may be used. Replacement section 73A(2) of the Act (inserted by clause 23 of the Bill) provides that neither a positive OFT nor a blood specimen taken under the relevant provisions of the Act may be used as evidence of the use of a controlled drug in a prosecution for an offence under the Misuse of Drugs Act 1975. This is an important protection, but the Bill does not impose general restrictions on the use or disclosure of information collected through the infringement offence process. The controls on use or disclosure under the Privacy Act would apply, but it would be appropriate for the Bill to impose restrictions on the use and disclosure of information about infringement offences imposed on individuals. I recommend a prohibition on the retention and/or use of test results showing the presence of a drug at a level below the tolerance blood concentration levels for drug driving offences.

### Addressing my concerns

30. A key argument for the changes implemented by the Bill is the need to deter drug driving and according to the Ministry of Transport, the OFT regime is said to be the most effective means of providing such a deterrent. However, in the absence of a clear focus on driver impairment, the deterrent argument does not outweigh the importance of protecting individuals against intrusions on their privacy.
31. Drug detection technology and scientific understanding of the impact of drugs on driving ability are continuing to improve. In time, a random roadside testing scheme, equivalent to the existing drink driving regime, may provide a sufficiently targeted and proportionate response to safety risks created by drug driving. For the time being, however, I recommend not proceeding with the Bill.
32. If the Bill proceeds, it should also be subject to a compulsory review of the operation of the new drug driving regime after three years. Monitoring of evidence of the regime's operation is proposed in the Ministry of Transport's regulatory impact statement, but I recommend a formal statutory review should be provided for in the Bill. The review should look at evidence of the impacts of the new arrangements within New Zealand, including differential impacts on Māori and other groups, and at the latest evidence on drug driving testing from other comparable jurisdictions.

### Conclusion

33. I recommend that the Bill **not proceed** in its current form. I would prefer to see more policy work and evidence-gathering, especially with regards to impairment levels, before a new drug driving regime is introduced.
34. If the Bill does proceed, I recommend that the Bill be amended to provide for:
  - restrictions on the use and disclosure of information about drug driving infringement offences imposed on individuals
  - a prohibition on the retention and/or use of test results showing the presence of a drug at a level below the tolerance blood concentration levels for drug-driving offences
  - a compulsory review of the drug driving regime three years after the commencement of the regime.
35. I also recommend that the Bill **not** be amended to make drivers who undergo a blood test liable for a blood test fee if they commit an infringement offence.

36. I trust my comments are of use to the Committee in its consideration of the Bill. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke.

John Edwards  
**Privacy Commissioner**

19 April 2021