Office of the Associate Minister of Transport

Chair
Cabinet Economic Growth and Infrastructure Committee

REDUCING ROAD TRAUMA: RANDOM DRUG TESTING FOR DRIVERS

Proposal

1. I propose New Zealand introduces a random drug testing regime for drivers. The new regime would run in parallel with the current drug-driving impairment regime.

2. This paper also seeks approval to issue drafting instructions to amend the Land Transport Act 1998 (the Act) to implement the random drug-driving testing regime. Drafting instructions will also extend the list of qualifying drugs for the current impairment-based offence.

Executive summary

Background

3. The road toll for the 12 months to 11 August 2016 is 328 which is 12 higher than for the same period last year. While it is still too early to determine the factors that may have contributed to the increase, it emphasises the need for a continued focus on interventions that are likely to reduce road trauma.

4. On 11 April 2016, Cabinet considered a proposal to introduce random drug testing of drivers. Cabinet deferred consideration of the paper and, instead, it invited the Minister of Health, in consultation with the Minister of Justice and other relevant portfolio Ministers, to bring an item to the Cabinet Strategy Committee on the issues concerning illegal drug use. The Associate Minister of Health, Hon Peter Dunne, took an item on New Zealand's National Drug Policy to the Cabinet Strategy Committee on 27 June 2016 [STR-16-MIN-0002 refers]. The purpose of this proposed policy to reduce the harm caused by drug-driving. The Ministry of Health view is that the proposal appears to be inconsistent with New Zealand's National Drug Policy 2015 to 2020. The National Drug Policy emphasises a proportionate response to minimise drug-related harm. A driver who returns a positive test for the presence of drugs does not necessarily represent a risk to road safety.

5. Given that Cabinet Strategy Committee meeting has taken place, I am bringing the random drug testing proposal back to Cabinet to determine whether it wishes to proceed with the proposal.

Random drug testing of drivers to address New Zealand's drug-driving problem

6. The Ministry of Transport (the Ministry) reviewed the extent of New Zealand's drug-driving problem. This review also investigated whether the current drug-driving enforcement model should remain as the preferred model.

7. The review estimated that the drug-driving problem has a social cost of between $96.8 million and $731.4 million per annum, with a central estimate of $250.5 million. The central estimate translates to approximately 23 deaths, 112 serious injuries, and 304 minor injuries per year. The social cost was estimated using several sources, such as New Zealand crash data, studies of New Zealand deceased drivers and international research.

8. The current drug-driving regime relies on good cause to suspect a driver has taken a drug or drugs. The Ministry's review identified weaknesses with this regime. To help reduce drug-driving, I recommend random drug-driving testing be introduced using roadside screening devices. The Police would not need to establish good cause to suspect a driver has taken drugs before testing them for drugs. This would allow a much larger number of drug tests to be conducted, which would deter drug-driving. Random drug testing would be an additional tool to combat drug-driving because the current drug-driving testing regime would continue in parallel.

9. Under the random drug testing process, drivers would be stopped by the Police and undergo an oral fluid screening test. If that test were positive, a second oral fluid screening test would be given. If the second test were positive, an evidential blood test would be taken. The presence of drugs in the blood sample would be sufficient evidence for an offence. Each oral fluid test would take between three and five minutes to complete. If the rate of improvement in oral screening devices continues, there may be quicker devices available by the time Police start random testing.

10. If a Police officer stops a vehicle, and there is evidence of drug use (for example, utensils/drugs) and there is good cause, then a search can be undertaken using Search and Surveillance legislation. However, the officer also has the option of requiring the driver to undergo a Compulsory Impairment Test under the Act. The driver cannot be subjected to both the Act and Misuse of Drugs Act 1975.

11. Random drug testing would test for drugs specified by Order in Council, such as methamphetamine ("P"), THC (the active ingredient in cannabis) and MDMA (ecstasy). THC and methamphetamine are the two most commonly detected illicit drugs in blood samples taken from drugged-drivers, and are of greatest concern to road safety. An oral fluid screening process could detect the active component of THC for up to 5 hours after cannabis had been smoked. New Zealand Environmental Science and Research (ESR) advises that it is highly unlikely that a person exposed to second-hand smoke due to passive ingestion will record a positive result following a roadside oral fluid screening test.

Assessment of random drug testing

12. Several potential enforcement regimes were assessed. These regimes included the current regime, three regimes based on good cause to suspect a driver has used a drug or drugs, and two random testing regimes.

13. A presence-based random drug-driving testing regime offered the highest benefit cost ratio (BCR).

Infringement penalty

14. If a presence-based regime is introduced, there is a question whether drivers found to be driving with drugs in their system should receive infringement penalties or criminal penalties. Criminal penalties would involve a driver being prosecuted in court and facing serious penalties similar to those that apply to serious drink-driving offences. An infringement offence does not result in a criminal conviction.

15. I propose an infringement offence. It balances the need for a strong sanction with the need to acknowledge that the offence will be presence-based and impairment will not be demonstrated. It is also the most cost effective option.

Implementation

16. Once fully implemented, the random drug testing with an infringement offence would cost around $6.95 million per annum. I would expect random drug testing to begin on 1 July 2017 at the earliest if enabling legislation were enacted by the end of 2016.

17. The delivery of random drug testing would be an operational decision for the Police. Some random drug testing may be delivered alongside alcohol check points. The Police need to retain flexibility to adapt the enforcement model to address any new drug-driving risks that emerge.

Bill of Rights issues

18. Introducing a random, presence-based regime may be inconsistent with the New Zealand Bill of Rights Act 1990 (Bill of Rights Act). For example, it is likely to limit several rights affirmed and protected by the 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 proven guilty (section 25(c)). The Attorney-General will undertake a final assessment of the consistency of the proposals with the Bill of Rights Act once a Bill has been drafted.

Background

19. The Government has previously considered the effectiveness of the drug-driving enforcement regime, and has received several reports on drug-driving (for example, EGI Min (12) 7/2 and EGI Min (10) 4/5 refer).

20. The Ministry undertook a further review recently, to identify the extent of the drug-driving problem and determine whether the current drug-driving enforcement model should remain as the Government's preferred model. The drug-driving review originates from the Safer Journeys Action Plan 2013-15, which includes investigating opportunities to strengthen the existing drug-driving enforcement model.

21. The Ministry reported on the findings of the review to the Associate Minister of Transport on 31 July 2015. The review recommended changes to the drug-driving enforcement regime to help minimise the harm resulting from drug-driving.

22. On 11 April 2016, Cabinet considered an earlier version on this paper and deferred consideration of the paper. Instead, it invited the Minister of Health, in consultation with the Minister of Justice and other relevant portfolio Ministers, to bring an item to the Cabinet Strategy Committee on the issues concerning illegal drug use. The Associate Minister of Health, Hon Peter Dunne, took an item on New Zealand's National Drug Policy to the Cabinet Strategy Committee on 27 June 2016 [STR-16-MIN-0002 refers]. Given the Cabinet Strategy Committee meeting has taken place, I am bringing the random drug testing proposal back to Cabinet to determine whether it wishes to proceed with the proposal.

Current drug-driving problem

23. The Ministry estimates that drug-driving has a social cost between $96.8 million and $731.4 million per annum, with a central estimate of $250.5 million. The central estimate translates to approximately 23 deaths, 112 serious injuries, and 304 minor injuries per year. In comparison, in 2014, there were 70 alcohol-related deaths.

24. Specific data on drug-driving is limited, as studies do not clearly show the extent of the issue. Instead, the Ministry estimated the size of the drug-driving problem using several data sources, including New Zealand crash data, which has been compiled in a cost benefit analysis. While the cost benefit analysis is subject to a range of unknowns and uncertainties, it has used best practice methods to provide a more robust picture of the likely range of benefits and costs of various regimes. Under current operational practices and data collection methods, it is not possible to analyse further the extent of the drug-driving problem and its associated harms. The costs and ethical issues associated with collecting the types and volume of data needed to realise more fully the extent of the drug-driving problem, mean that this is not possible.

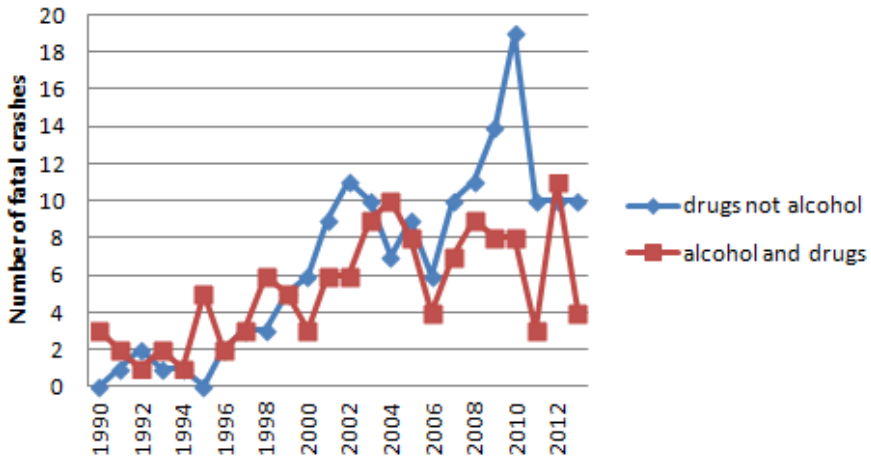
25. Three data sources were used to estimate the scale of the drug-driving problem: data from New Zealand's Crash Analysis System (CAS) that includes all traffic crash data reported by the Police, data from the United Kingdom, and a 2010 ESR study of drivers killed in road crashes.

26. Unlike alcohol, there is no comprehensive data showing the relationship between the dosages of various drugs, the level of impairment and crash risk. The World Health Organisation notes a meta-analysis that compiled information from 66 studies showed an increase in the risk of crashes for 11 different drugs[1]. However, it is not possible to disaggregate the social cost and attribute it to particular drugs and dosages, when taken on their own or in combination with others.

Empirical evidence of drug-driving in New Zealand

27. CAS data shows the number of fatal crashes occurring where a driver has consumed drugs. Although the numbers are small and subject to fluctuations, Figure 1 below outlines that the number of fatal crashes occurring between 1990 and 2013 where drivers have consumed drugs is now higher than in the 1990s.

Figure 1 – Fatal crashes with drugs (or combined with alcohol) 1990-2013



[1] Global Status Report on Road Safety 2015; World Health Organization: p.40

28. An ESR study of at-fault deceased drivers found that of 1,046 deceased driver blood samples analysed, 500 (48 percent) of the deceased drivers had alcohol or other drugs in their blood that may have impaired their ability to drive safely. Of the 500 drivers, 92 (18 percent) had used cannabis alone, 142 (28 percent) had used a combination of alcohol and cannabis, and 127 (25 percent) had used some other combination of drugs. Another ESR study of blood samples taken from 1,999 drivers who had an evidential blood sample taken as part of the alcohol testing process (but had not been injured in a crash), were screened for evidence of the use of a limited range of other drugs. The analysis found that 35 percent had used cannabis as well as alcohol, and 2 percent had used alcohol and some other drug.

29. There are several studies pointing to the prevalence of the use of certain drugs generally and in driving. The Ministry of Health's 2007/08 New Zealand Alcohol and Drug Use survey found the most commonly used recreational drugs in the 12 months before the survey were cannabis (14.6 percent), BZP party pills (5.6 percent), MDMA (2.6 percent), and amphetamines (2.1 percent). In that year, buying BZP party pills was legal, so the number of people using BZP has likely dropped since then.

30. In 2014, the Ministry introduced a new question about driving while affected by drugs with or without alcohol, to the Ministry's Public Attitudes to Road Safety survey. Nine percent of participants said they had driven while affected by prescription or pharmacy drugs, including two percent combined with alcohol. Four percent said they had driven while affected by other drugs (whether legal or not), including two percent combined with alcohol.

31. The Ministry of Health's Cannabis Use 2012/13: New Zealand Health survey, found that 11 percent of adults reported using cannabis in the 12 months before the survey. Of this 11 percent, 36 percent of cannabis users reported driving under the influence of cannabis in the last 12 months. This equates to around 133,000 adults. Men were 1.5 times more likely than women to report they had driven under the influence of cannabis.

New Zealand's current approach to drug-driving enforcement is based on non-random testing for impairment

32. The current drug-driving enforcement regime was introduced in 2009. It is not a random testing regime. A Police officer must have good cause to suspect a driver has taken drugs before that driver can be tested. Good cause may be formed from a driver's manner of driving, or their demeanour when they are stopped and spoken to by Police.

33. If good cause exists, the officer can require the driver to undergo a Compulsory Impairment Test (CIT). A CIT is a behavioural test designed to assess impairment due to drug use. A trained Police officer carries out the test, which comprises eye, walk and turn, and one-leg-stand assessments. If a driver's performance on this test is unsatisfactory, a Police officer can require the driver to undergo a blood test for the presence of at least one qualifying drug.

34. Police officers need special training to be able to conduct a CIT. The CIT process can be quite demanding on Police resources, taking on average 52 minutes to complete. This time is inclusive of travel to and from a Police station. For safety reasons, a CIT cannot be done by the roadside, so drivers are usually taken to a Police station to undergo the test.

35. Section 57A of the Act makes it an offence to drive while impaired, and with evidence in the bloodstream of a qualifying drug. A conviction for this offence depends on both an unsatisfactory performance on a CIT and the subsequent blood test showing the presence of at least one qualifying drug.

36. Another offence exists, under Section 58(1)(b) of the Act that can be applied if a driver is hospitalised due to a crash. If a driver has a blood test taken in a hospital that shows the presence of a Class A[2] drug (such as methamphetamine), they can be prosecuted. A CIT is not needed.

37. A high proportion (90 percent) of blood samples taken after an unsatisfactory CIT test positive for the presence of a qualifying drug or drugs. From November 2009 to December 2013, 1,004 blood tests were taken, of which 903 tested positive for qualifying drugs. Data on the overall number of CITs undertaken is not collected.

New Zealand's current drug-driving regime has some weaknesses

38. Non-random testing is positive from a human rights perspective because a Police officer must have good cause to suspect the consumption of a drug. Police officers cannot detain drivers who are not yet suspected of having committed an offence. This carries a reduced risk of subjecting innocent drivers to unnecessary detention and testing.

39. When Police are able to find good cause to suspect and can apply the CIT, this regime is effective in removing those visibly drug-impaired drivers from the road. However, the Police find the current regime challenging in two respects:

    a. Police officers must establish good cause to suspect that a driver is operating a vehicle after consuming a drug

    b. providing a sufficient number of officers who are suitably qualified to administer the CIT.

40. These factors mean that both the perceived and actual risk of detection is unlikely to be maximised.

41. Therefore, the drug-driving enforcement regime does not create the conditions for general deterrence as compared to random breath testing for alcohol. General deterrence relies on highly visible Police enforcement and perceived likelihood of being caught, as well as the consequences that follow for a drugged driver. Random breath testing has been found to be very effective in deterring and therefore reducing drink-driving.

Practicalities of random drug-driving testing

42. Random drug testing of drivers is where a Police officer can stop any driver who is driving a motor vehicle on a public road and drug test them, without first needing good cause to suspect the driver has taken drugs. New Zealand already uses a random alcohol-testing regime known as Compulsory Breath Testing (CBT).

43. If a Police officer does not need to make a judgement of good cause to suspect the use of a drug, then they need an alternative way to determine who can be detained for further evidential testing.

44. While random testing has been used for drink-driving enforcement for many years, cost and practicality is a major issue for random drug testing. Even if random testing was allowed under legislation, selecting drivers randomly and requiring them to undergo a CIT would be impractical due to the length of time a driver would be detained while being tested. On average, this is around 52 minutes, including travel time to a Police station.

[2] Class A drugs are set out in Schedule 1 of the Misuse of Drugs Act 1975.

45. A device that screens a driver's oral fluid is the most practical and least invasive roadside drug screening method available. Oral fluid screening devices are used in other countries, but do have limitations.

46. A range of devices is available which vary in the number of drugs they can test for, how the sample is provided, and the time the test takes. These devices work by detecting the presence of a drug in an oral fluid sample obtained from a driver by swiping the top of their tongue against a test pad on the device. Drug screening devices currently take between three and five minutes to produce a test result, which is longer than the time taken to administer a passive breath alcohol test, which takes only a few seconds.

47. The number of drugs that can be tested for is currently limited. The devices used by the Australian state of Victoria test for methamphetamine, THC (the active ingredient in cannabis) and MDMA (ecstasy) only. Random roadside drug testing can detect THC several hours after its use (around five hours). The exact time can vary, depending on the amount and potency of the cannabis used and the individual's metabolism. Inactive THC residue in the body of a driver from cannabis use in previous days or weeks will not be detected by the oral fluid screening tests. ESR advises that it is highly unlikely that a person exposed to second-hand cannabis smoke due to passive ingestion will record a positive result following a roadside oral fluid screening test.

48. ESR has indicated that blood samples taken from impaired drivers, who do not satisfactorily perform the CIT, show that cannabis and methamphetamine are the drugs most commonly used. While drivers sometimes report taking ecstasy, blood samples indicate that drivers think they have taken ecstasy, when actually taking a different type of drug.

49. Drug screening tests are much more costly than drink-driving screening tests, costing around $35 - $44 per test. There are oral fluid screening devices that test for a wider range of drugs, but they are more expensive and the time to test a driver increases. The devices used in the Australian state of Victoria are the basis for the cost benefit analysis underpinning this paper, as the costs are well known. However, cheaper devices may be available by the time random drug testing is introduced.

50. While the accuracy of oral fluid screening devices has improved over recent years, the devices currently available can produce false positive results, (i.e. when the device incorrectly indicates the presence of a drug). The false positive rate of the proposed regime will be ascertained if the regime is implemented and the appropriate data recorded. The cost benefit analysis completed expects a total false positive rate of 1.5 percent, which includes all false positive results that would occur along the testing process. Like other outputs of the cost benefit analysis, the estimated total false positive rate is based on many assumptions that cannot be easily validated.

51. The best method for mitigating the risk of false positives is for a second oral fluid screening test to be undertaken at the roadside followed by a blood test for evidential purposes. Blood tests are conclusive and provide no false positives.

52. Oral fluid drug screening technology is developing, which could have positive impacts on the costs of devices, their reliability and testing speed, and the range of drugs that can be identified.

Random testing regime options

Two random drug-driving testing regimes were assessed by the Ministry

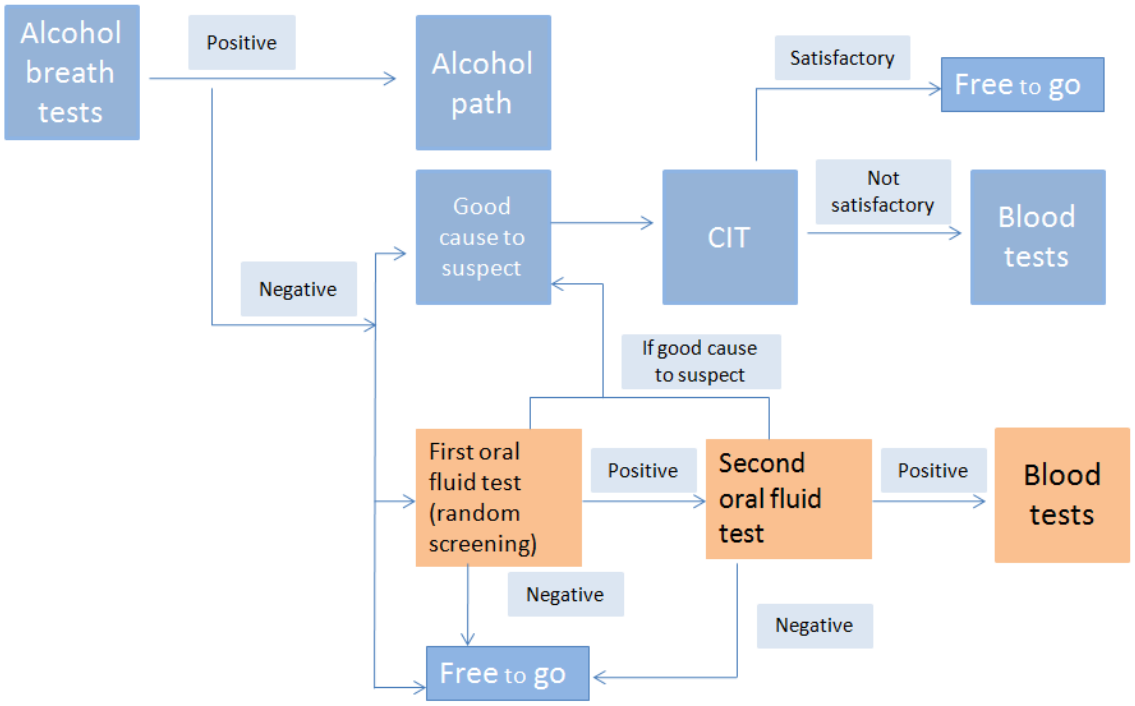
53. Two random drug-driving testing regimes were considered during the Ministry's review. These were compared against several non-random options, for example, replacing the CIT with an oral fluid screening test. These options are described more fully in the accompanying Regulatory Impact Statement. The non-random options were discounted, as they are unlikely to achieve the safety benefits associated with general deterrence effects of random testing. These non-random options were also not cost effective.

54. The two random testing regimes considered by the Ministry are outlined below. Both regimes assume that the Police would retain the power to conduct CITs, if they had good cause to suspect, as drivers may be impaired by drugs that cannot be tested for using an oral fluid screening device.

Presence-based random testing regime (preferred approach)

55. The preferred regime in this paper is largely based on the approach used in the Australian State of Victoria since 2004, and would introduce a random oral fluid screening. Under this approach, there would be a roadside oral fluid screening test, followed by a second oral fluid screening test if the driver fails the first screening test. If the driver passes the second screening test, they will be free to go. However, if the driver fails the second screening test, then a blood specimen would be taken and analysed for the presence of particular drugs.

56. The following diagram outlines the process that would be followed under this regime.



57. The diagram above assumes that a Police officer would first undertake an alcohol screening test before undertaking an oral fluid test for drugs. In an operational setting, this is the most likely path that would be followed. However, a Police officer would have the ability to require the driver to undertake an oral fluid test without first having taken an alcohol breath test.

58. I propose that the drugs that would be tested for be specified by Order in Council. This preserves flexibility to adapt to changing patterns of drug use and devices that can test for a wider range of drugs, while providing Cabinet oversight on the selection of the drugs to be tested for. Based on current knowledge, it is likely that the three drugs that would be initially specified under this regime would be methamphetamine, MDMA (ecstasy) or THC (the active ingredient of cannabis).

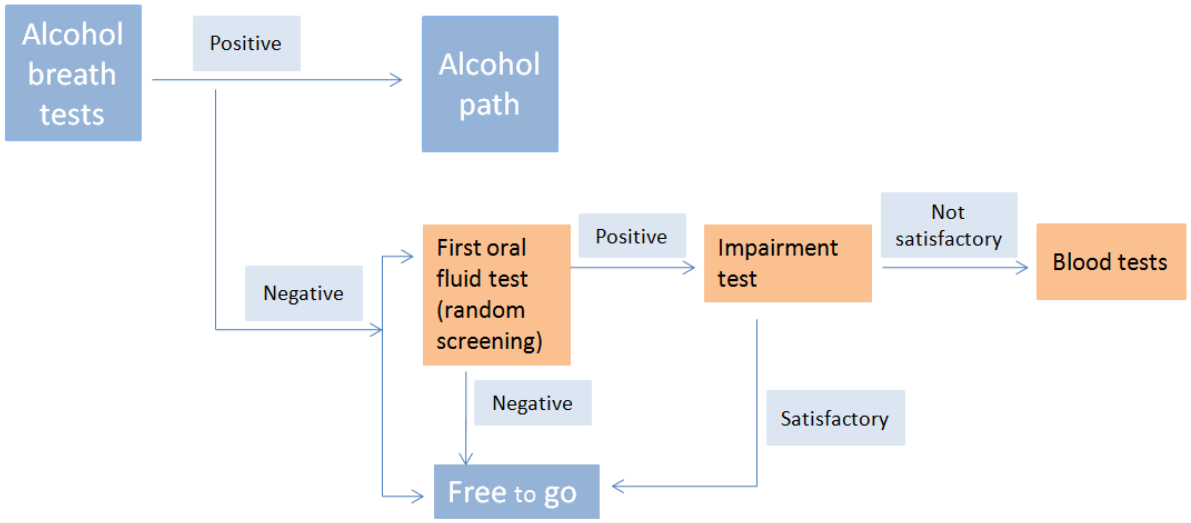
59. Random drug testing would not require the Police to prove impairment. Unlike alcohol, it is difficult to attribute the use or amount of a drug in a person's body to whether a driver has impaired fitness to drive. Drugs affect people differently and as such this regime would operate a zero tolerance policy. The presence of any specified drug detected in the evidential blood analysis would be sufficient proof of an offence. However, this approach is a shift from the status quo enforcement regime, which is based on proving a person is impaired, and has drugs present in their blood. This could lead to drivers who do not present a road safety risk being sanctioned.

60. This preferred regime offered the highest BCR of the options considered.

Impairment-based random testing regime

61. As an alternative to the presence-based approach, an impairment-based random drug-driving testing regime was considered. This would involve an oral fluid roadside screening test being administered randomly to drivers, followed by a CIT if the driver failed the oral fluid screening test. If the driver did not satisfactorily perform the CIT, a blood specimen would be taken for analysis.

62. The following diagram outlines how the process would be followed under this regime.



63. Due to it being difficult to link a drug in a person's body with their fitness to drive, basing a random testing regime on impairment coupled with presence would be desirable, if this can be done operationally. This is because it combines the benefits of a random testing regime with the benefits of the existing good cause to suspect, impairment-testing regime.

Random presence-based drug-testing should be introduced

64. Analysis of the two random testing regimes shows that both offer improved road safety outcomes. However, the Police believes an impairment-based random drug-driving testing regime would be operationally challenging, if not unfeasible. Because of this, on balance, I propose a presence-based random drug-driving testing model be introduced, running in parallel with the current impairment-based regime. This would allow a much larger number of drivers to be drug tested than the current regime, and this would assist in deterring drug-driving.

65. The New Zealand Automobile Association (AA) surveyed its members in 2009. This survey found that 89 percent of the members surveyed supported introducing roadside saliva testing for drugs. However, the survey did not explain the process that is involved with oral fluid drug-screening tests nor the time it would take to screen a driver's oral fluid for drugs. The AA advises that this level of support remains consistent with a rolling survey that it conducts quarterly, where members are asked if they support or oppose introducing saliva based drug testing to detect drug-driving. In the last survey of around 900 members, 83.9 percent expressed support.

66. Table One below outlines the strengths and weaknesses of the two random testing regimes.

Table One: Strengths and weaknesses of the two random drug-driving testing regimes

	Presence-based random drug testing regime (45,000 tests)	**Impairment-based random drug testing regime (45,000 tests)**
Road safety impact	Estimated reduction of 10.8 drug-related fatalities per annum Good impact on deterring drug-users from drug-driving	Estimated reduction of 10.8 drug-related fatalities per annum Good impact on deterring drug-users from drug-driving
BCR – central estimate	5.15 with an infringement offence 2.01 with a criminal offence	2.16
Cost for 45,000 tests	$70 million over 10 years with and infringement offence, or $132.51 million with a criminal offence	$101 million over 10 years
Operational acceptability	The Police supports this regime, due to: • the ability to deliver higher levels of testing across the general driving population, delivering greater general deterrent value in line with policy objectives • the option to pursue impairment offences through the current CIT process • the time taken to process a driver to the point of having a blood sample taken is expected to be around 15 minutes representing less impact on motorists and Police resources.	The Police does not support this regime as it believes there would be considerable operational risks, due to: • the potential for first oral fluid screening result to bias the administration of the CIT • the time taken to process a driver to the point of having a blood sample taken is expected to be at least one hour. Officers would be removed from the frontline during this time • the concern regarding undue detention due to the first oral fluid screening test returning an inaccurate test result • the Police not having sufficient resources to deliver the higher level of testing the proposal assumes, therefore undermining the assumed benefits of the BCR, which are based on 45,000 tests per annum.

	Presence-based random drug testing regime (45,000 tests)	Impairment-based random drug testing regime (45,000 tests)
Impacts on private benefits and freedoms	The regime would impact these sections of the New Zealand Bill of Rights Act: • unreasonable search and seizure • arbitrary arrest or detainment • the right to be presumed innocent until proved guilty according to law. The Ministry of Justice is particularly concerned with this regime in relation to the right to be presumed innocent, as presence of a drug would not necessarily indicate impairment.	The regime would impact these sections of the New Zealand Bill of Rights Act: • unreasonable search and seizure • arbitrary arrest or detainment • the right to be presumed innocent until proved guilty according to law. The Ministry of Justice is particularly concerned with this regime, in relation to arbitrary detainment, as a false positive on oral fluid screening test could lead to a driver being detained for an unduly long amount of time (an average CIT takes 52 minutes).
Public acceptability	There appears to be a high level of support for random testing. However, there may be some risks due to the presence of drugs being tested for, rather than impairment. This may be reliant on the severity of any New Zealand Bill of Rights Act issues.	The public are likely to be largely in favour of this policy. This may be reliant on the severity of any New Zealand Bill of Rights Act issues.
Impacts on Justice sector	The impact on the Justice sector will vary depending on the type of offence created. If a criminal offence is used, this regime would result in a larger increase in drivers processed by the Justice sector. This is because there may be drivers identified who have drugs in their system but who are not impaired. If an infringement offence is used, then the impact on the Justice sector would be much less because there are significantly lower administrative costs compared to a criminal prosecution.	This regime would result in an increase in drivers processed by the Justice sector.

Infringement penalties or criminal penalties?

67. If a presence-based regime is introduced, there is a question whether drivers found to be driving with drugs in their system should receive an infringement penalty or a criminal penalty. Criminal penalties would involve a driver being prosecuted in court and facing serious penalties similar to those that apply to the current drug-driving impairment offences. An infringement does not result in a criminal conviction.

68. I propose that offences detected through offenders identified through the current impairment regime should continue to receive criminal penalties. Downgrading the current impairment criminal penalties to infringement penalties would undermine the message that drug impaired driving is unacceptable.

Advantages and disadvantages of infringement offence

69. Infringement penalties would result in much lower costs to the Justice sector, as infringements do not generally result in a court hearing unless the driver requests a defended hearing. However, introducing an infringement regime could lead to a risk of drug-driving being perceived as a minor offence. This would depend on the infringement penalties applied. An infringement fee coupled with demerit points could offer a reasonable deterrent, commensurate with the nature of the offence and the social harm caused. Infringement penalties would also not put as much pressure on the Justice sector as criminal-based sanctions. Infringements also offer a swifter way of sanctioning drivers than a court prosecution.

70. Table Two outlines the infringement penalties that apply for low-level drink drivers under the random alcohol testing regime. Criminal penalties apply for when drivers have higher breath alcohol readings than this.

Table Two: Drink-driving infringement offences and penalties

Offence	**Penalty**
Drivers under the age of 20 with between 0 and 150 micrograms (mcg) of alcohol per litre of breath	$200 infringement fee and 50 demerit points
Drivers aged 20 and over with breath alcohol levels between 250 and 400mcg of alcohol per litre of breath	$200 infringement fee and 50 demerit points

71. Because driver licences are suspended for three months once 100 or more demerit points have been accumulated within a 2-year period, 50 demerit points is a strong deterrent. If Cabinet agrees to implement an infringement offence for random drug testing, I propose implementing the same infringement penalty as outlined in Table Two above for all drivers who fail an evidential blood analysis. There is a risk that this level of penalty may be considered too severe because, unlike low level alcohol offences, there is no correlation with impairment.

72. Operating the random oral fluid screening regime and the impairment regime together could produce quite different legal consequences for a driver. These consequences would depend on what testing method the Police officer chose to use. For example, a driver subjected to the random oral fluid test could receive an infringement offence. However, they could be charged with a criminal offence if they were tested under the impairment regime although, there is a higher evidentiary threshold for the impairment regime. This potential inconsistency in outcomes is difficult to reconcile because it is desirable to retain the impairment regime alongside the random testing regime.

73. A possible mitigation to this potential inconsistency is to allow the Police, under certain conditions, to switch from the random testing process to the impairment testing process. A switch could be made, if after starting the random testing process, a Police officer formed good cause to suspect a driver had used drugs. For example, a driver who passed the first oral fluid screening test but admitted to the Police they had taken drugs or they appeared to be under the influence of drugs. This would allow a driver to face the more serious criminal penalty if they were impaired following the unsatisfactory completion of a compulsory impairment test and subsequent analysis of a blood sample, regardless of which testing process the officer started with. Also, the risk of an impaired driver avoiding a sanction would be reduced when they had used a drug that the oral fluid screening device could not detect.

74. A switch to the impairment testing process should not be permitted once the driver has failed two oral fluid screening tests. In addition, a Police officer would not be able to switch back to the oral fluid screening process. This would avoid the random drug testing process being regarded as capricious or unreasonable.

Advantages and disadvantages of criminal offence

75. Imposing a criminal penalty for the random drug testing offence would mitigate the concern of two individuals being treated differently under the law, depending on whether they went through the random testing regime, or the impairment regime.

76. Criminal sanctions would act as a strong deterrent to drug-driving. However, a presence-based regime would not indicate whether a driver was impaired, and as such would not show conclusively whether that driver was a road safety risk.

77. The current drug-driving laws are focussed on harm caused by driving whilst impaired by a drug. Without conclusive evidence that the presence of a drug has affected a person's ability to drive, the imposition of a criminal sanction may be viewed as unjustified. Therefore, the imposition of an infringement rather than a criminal offence appears more appropriate where the focus is purely on the presence of drugs.

78. A disadvantage of criminal-based sanctions is the workload and cost they will place on the court system. Based on the Police screening 45,000 drivers a year, the Ministry of Justice has estimated the cost to be around $930,000 per year. There will also be cost pressure on the Department of Corrections of $6.22 million per year, for their management of sentences.

79. There would be no specific offence for failing or refusing to undergo an oral fluid screening test. The consequence would be that the process moves to the next stage (i.e. to the second oral fluid test, and if that is also failed or refused, to a blood test). Failing or refusing a blood test is currently an offence. This is similar to the process that currently applies if a person fails or refuses to undergo a breath screening test, or an evidential breath or blood test.

Preferred approach to offences

80. After weighing the advantages and disadvantages, I recommend a new infringement offence be created. This balances the need for a strong sanction with the need to acknowledge that it will be a presence-based offence and impairment will not be demonstrated. It is also the most cost effective option.

81. I suggest that the Ministry, along with Justice sector agencies, be directed to review the adequacy of the penalties in deterring offending. This review would be included in a broader review of the new regime's efficacy and impacts on individuals, and whether the regime reflects international best practice, which would take place once three years of data about the regime is available.

Drivers hospitalised by a crash who show the presence of drugs

82. If a driver is taken to hospital, or a doctor's surgery because of an accident or incident involving a motor vehicle, I propose that Police officers be able to require the person to provide a blood sample. The sample would be tested for the presence of a specified drug. If a specified drug were detected, the driver would have committed an offence. The nature of this offence (infringement) will be equivalent to that proposed for the offence under the roadside oral fluid screening regime.

83. This approach will ensure that drivers, who are involved in a crash and cannot undergo the oral fluid screening as a result of any injuries received, can be sanctioned. If this offence is an infringement offence, there will be an inconsistency with an existing offence under section 58 of the Act.

84. Under section 58 of the Act, it is currently a criminal offence if the person's blood is taken in hospital, or doctor's surgery and contains evidence of a Class A drug[3] (which is usually methamphetamine). If the hospitalised driver tests positive for a Class A drug, they will continue to be liable for the existing criminal offence. By comparison, a hospitalised driver whose blood tested positive for THC, would liable for an infringement offence only.

Medical defence

85. The Act currently allows a medical defence to a drug-driving prosecution. This defence applies in cases where a court is satisfied that a person has consumed a qualifying drug in accordance with a current and valid prescription written for them by a health practitioner, and have complied with the instructions for using the drugs from a health practitioner or manufacturer of the drug. I propose that a similar medical defence is provided for the new offence detected from roadside oral fluid screening.

86. This medical defence would not be available for illicit drugs that are not approved or prescribed for legitimate treatment purposes. It is possible for people to be prescribed medicinal cannabis, such as the Sativex mouth spray, for specified conditions if their medical specialist obtains the appropriate approvals. In time, the Government may decide to extend the list of specified drugs to include other controlled drugs (such as opiate-type drugs) that are available under prescription for treatment purposes.

Implementation of random drug testing

Number and delivery of tests

87. The proposed regime would be phased in over a three year period, culminating in 45,000 random oral fluid tests per year. I propose that 15,000 random drug tests be funded in the first year, increasing to 30,000 tests in the second year and 45,000 tests in the third and subsequent years.

88. The proposed rollout of screening tests allows the Police to adjust to the new testing regime, and make adjustments as necessary. The Police will determine the most efficient and effective method of delivery for targeting drug-driving risk, allowing the method to adapt to address new risks as they develop. Some drug-driving enforcement may be delivered alongside random alcohol checkpoints.

Implementation date

89. It may take some time to begin testing following enabling legislation being enacted. The Police would need to develop their operational requirements, find a suitable oral fluid screening device via a competitive tendering process, and have the new device approved for use. The Police would also need to develop and implement a programme to train Police officers to use the device. If the legislation were enacted by the end of December 2016, I would expect an implementation date of 1 July 2017 at the earliest.

[3] as specified in Schedule 1 of the Misuse of Drugs Act 1975

Approval process for new devices

90. The approval process for screening devices needs to be flexible enough to allow for new testing equipment to be adopted if the equipment meets Police operational requirements. The Police would be able to take advantage of new technology that improves the accuracy of results, expands the range of drugs that can be tested for, and minimises delays to motorists.

91. I propose that the Minister of Police approve the preferred device by Notice in the New Zealand Gazette, after consulting with the Minister of Science, Minister of Justice and Minister of Transport. The Police would need to determine and make provision for any additional operational requirements.

Amendments to the definition of qualifying drug in the Land Transport Act

92. Currently, under the Act, a person may not drive or attempt to drive a motor vehicle while impaired, with that person's blood containing evidence of a qualifying drug.

93. The Act's current definition of a qualifying drug includes controlled drugs specified in Schedule 1, Schedule 2, and Part 1, 4, or 7 of Schedule 3 of the Misuse of Drugs Act (MODA), benzodiazepine drugs in Part 5 of the MODA, and prescription medicines. This definition currently excludes some drugs in Schedule 3 of the MODA that may impair drivers. There is no justification, on road safety grounds, to exclude them.

94. I propose that the definition of a qualifying drug be amended to include all of the drugs listed in Schedule 3 of the MODA, except for Part 6. Amending the definition will add all drugs in Part 2 (such as codeine) and the remaining drugs in Part 5 of Schedule 3 of the MODA to the definition of qualifying drug. This amendment will only relate to offences detected and prosecuted under the current impairment-based regime and will not apply to the random oral fluid screening regime.

95. I also propose adding drugs in Part 3 of Schedule 3 of the MODA. Most are not used as medicines in New Zealand, except for pholcodine, which is available in cough mixtures and can be abused by opiate addicts. Part 6 of Schedule 3 relates to preparations and mixtures, and is not relevant to a driving application. Appendix Two lists the drugs I propose adding to the definition of qualifying drug.

96. This will assist in future proofing the Act if any adjustments are made to Schedule 3 of the MODA. The proposed amendment will not remove any of the drugs that are currently qualifying drugs for the section 57A offence.

97. I propose retaining the current legal defence in section 64(1A) of the Act that applies to drivers who take a qualifying drug (including the additional drugs) for legitimate therapeutic purposes. Currently, this defence is provided if the driver has a current and valid prescription for the drug and is taking it in line with the health practitioner's or manufacturer's instructions.

New Zealand's National Drug Policy

98. The National Drug Policy's goal is "To minimise alcohol or other drug-related harm, and promote and protect health and wellbeing", relates to random drug testing for drivers. Also applicable is the framework's objective of "reducing illness and injury from alcohol and other drugs".

99. Random drug testing seeks to improve road safety by reducing the potential harm caused from drug-driving. In the Ministry of Health's view, the proposal appears to be inconsistent with New Zealand's National Drug Policy 2015 to 2020. The National Drug Policy emphasises a proportionate response to minimise drug-related harm. A driver who returns a positive test for the presence of drugs does not necessarily represent a risk to road safety.

Stakeholder engagement

100. The Ministry held a stakeholder workshop in May 2015. Attendees included a range of government departments, treatment providers, university academics, and several interest groups such as the AA and the NZ Drug Foundation. Thirty stakeholder groups were invited to this workshop, and four provided written feedback on the proposals.

101. Stakeholders expressed a view that drug-driving affects all ages, and involves both prescription and illicit drugs. The low number of drug tests being done under the current regime also concerned them. Some stakeholders were concerned about presence-based testing, as the mere presence of a drug or drugs in a specimen does not mean a person is impaired.

102. There was no consensus on the best way forward. Some stakeholders favoured adopting the Victorian regime while others were opposed due to inconsistencies of this regime with the New Zealand Bill of Rights Act.

103. The policies discussed in this Cabinet paper were developed in a joint working group, with the NZ Transport Agency (Transport Agency), Ministry of Health, Ministry of Justice, Department of Corrections, the Accident Compensation Corporation and the Police.

104. If Cabinet agrees to changes to the Act, there would be further public engagement at Select Committee. As noted previously, surveys by the AA suggest good support for random drug testing among its members.

Consultation

Minister of Transport

105. The matters covered in this paper are within my portfolio of responsibilities. I have consulted the Minister of Transport on those matters and he agrees with the submission of the paper.

Departments and agencies consulted

106. The Police, the Ministry of Justice, the Department of Corrections, the Ministry of Health, the Transport Agency and the Accident Compensation Corporation participated in the reference group for the drug-driving review and provided feedback on the Ministry's drug-driving review paper as well as this Cabinet paper. Other departments consulted on this paper were the Treasury, the Office of the Privacy Commissioner, Te Puni Kōkiri, the Ministry of Social Development, and the Crown Law Office. The Department of the Prime Minister and Cabinet was informed of this paper.

Comment from the Office of the Privacy Commissioner

107. The Office of the Privacy Commissioner states it recognises the societal harm the proposal seeks to address. However, it is concerned the proposed testing regime would lead to arbitrary detention and prosecution where there is no indication of impairment. It supports the concerns raised by the Ministry of Justice regarding the potential impacts on personal freedoms the proposal entails in terms of the New Zealand Bill of Rights Act.

108. The Office of the Privacy Commissioner believes the proposed random approach and the significant false positives likely to result from the roadside screening devices also raise concerns in relation to principle 8 of the Privacy Act 1993. Section 8 requires agencies to take reasonable steps to ensure information is accurate, relevant, and not misleading before use. There is established evidence that alcohol impairs driving and the current drink-driving testing regime is based on thresholds that reflect recognised levels at which alcohol impairs driving. However, an empirical basis for the proposed presence-based drug-driving regime is not well established.

109. The Office of the Privacy Commissioner also stated that the paper proposes enabling legislation with no statutory limits on scope. Given the proposed extension of qualifying drugs, it had concerns in terms of the potential for expansion beyond the three drugs noted to encompass more commonly prescribed prescription or over the counter medications, should testing technology became available.

Comment from the Department of Corrections

110. The Department of Corrections supports the Ministry's goal to reduce the harm caused by impaired drug-drivers. Any costs to the Department that are significantly above the estimates in the paper will not be able to be met within baseline funding.

Comment from the Ministry of Justice

111. The Ministry of Justice (MoJ) has contributed to the human rights implications statement below. The MoJ agrees that reducing the harm of drug-impaired driving is an important objective and supports that objective. However, it believes that the proposals as presented are a significant intrusion on the values of personal dignity, liberty and privacy affirmed in the Bill of Rights Act. As a result, the proposals risk inconsistency with the Bill of Rights Act. The proposals should be carefully considered in light of the evidence available and whether alternative, more proportionate, means of solving the problem are available.

Comment from the Treasury

112. Treasury acknowledges and supports the overall intention of the proposal is to improve safety for road users but has concerns in relation to how this fits with the broader strategy to improve road safety. An understanding of the broader strategy would support this proposal, in order to identify the extent of the problem and relative priority of the introduction of random drug testing for drivers.

113. Since this paper was initially considered by Cabinet, the focus of work has been on placing the proposal within the broader context of the National Drug Policy 2015 to 2020. While it is helpful to place the proposal within this broader framework, Treasury continues to have concerns about decisions being made on this proposal until further work is undertaken to better understand the costs and benefits of introducing random drug testing for drivers generally, as well as in relation to the process for random drug testing set out in the paper. This is of particular importance given the New Zealand Bill of Rights Act implications of random drug testing for drivers, as identified by the Ministry of Justice.

114. The particular areas for further work identified by the Treasury are:

    a. a detailed assessment of the costs of implementing this proposal supported by a cost benefit analysis, at present the paper notes that funding will be sought from the between budget contingency but does not provide information on the potential quantum

    b. a robust process for managing the shortcomings of drug-testing technology, in terms of both the number of drugs that can be tested for and the inability of the oral fluid test to indicate impairment

    c. an assessment of potential impact on the Justice sector, in the context of the rising prison population as well as in relation to the implementation of the proposal

    d. a public consultation process, given the significance of this proposal and number of people it could impact.

115. The above gives rise to concerns about decisions being made at this time on the introduction of the proposed process for random drug testing for drivers.

Financial implications

116. A new random drug-driving testing regime will result in costs for the Crown. These costs are worthwhile because they will reduce the social cost of drug impaired driving. Changes to the testing regime for drug-driving will need additional funding or will require funding to be diverted from elsewhere.

117. The additional costs and savings to the Crown were estimated as part of the Ministry's cost benefit analysis. Table Three below outlines the estimates of total net costs for the first three years of the infringement regime, introduced in conjunction with infringement penalties.

Table Three: Potential financial implications for the infringement offence (GST excl.)

	Cost in year 1 (15,000 tests) $m	**Cost in year 2 (30,000 tests) $m**	**Cost in year 3 (45,000 tests) $m**
NZ Police	2.65	4.91	6.83
NZ Transport Agency	0.00	0.00	0.01
Ministry of Justice	0.04	0.07	0.10
Department of Corrections	0.00	0.01	0.01
One-off costs	1.85	-	-
Total financial implications	**4.55**	**5.00**	**6.95**

118. The final cost of the regime will depend on the detail of the statutory regime eventually enacted by Parliament and the results of the procurement processes undertaken by the Police to obtain oral fluid screening devices.

119. Over 85 percent of the added costs fall on the Police, and result from the process involved with testing drivers for drugs. These costs include the cost of purchasing drug screening devices and the cost of taking and analysing evidential blood samples. However, the Police state that some of these costs may be overestimated, while others may already exist within their baseline.

120. Drug-driving and drink-driving enforcement costs are met from the National Land Transport Fund under the Road Policing Programme of the National Land Transport Programme. The Road Policing Programme of around $300 million per annum would need to be varied to accommodate the new regime. The Police state that new funding above their current baseline funding for new costs, such as the purchase of equipment, will need to be provided. The Police currently spend around $42 million per annum on alcohol and drug-driving enforcement, with most of this money being spent on alcohol enforcement. Diverting existing drink-driving enforcement funding to drug testing could risk undermining drink-driving enforcement.

121. The Department of Corrections believes annual additional costs arising from the proposed infringement regime and additional random stops will be in the order of $0.6-0.8 million when the policy is fully implemented[4]. It states that these costs cannot be met from within baseline funding.

122. The Transport Agency has stated that there would not necessarily be cost impacts from drivers incurring demerit points from the infringement offence included as part of the preferred option. However, it states that there may be cost impacts if the new offence led to significantly more people being suspended, due to drivers having additional demerit points added to their record due to drug-driving. The cost of administering the demerit point system (and suspensions) is funded through the driver licence reinstatement fee people pay after being suspended.

123. I propose that the Transport Agency, in conjunction with the Ministry of Transport, review the driver licence reinstatement fee that applies for drivers after being suspended, to ensure the fee is sufficient to cover the increased volume of licence suspensions.

124. If Cabinet agrees to the merit of these policy proposals, I recommend that the Ministry, in conjunction with the Transport Agency, the Police, the Ministry of Justice and Department of Corrections, will submit a budget bid seeking appropriate funding.

125. It is expected that the Land Transport Amendment Bill will be passed by December 2016. The proposed regime could be implemented 6 months after the legislation has been enacted. However, this will require funding to be secured before this date. Funding bids would need to be submitted before Budget 2017 against the between Budget contingency in order for the regime to be implemented by July 2017.

Human rights implications

126. 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)).

127. Increasing road safety by preventing the deaths and injuries caused by drug-driving is an important public policy objective that may justify limiting rights in order to achieve it.

128. However, justification requires that the chosen means of attaining the objective be both rational and proportionate. Considerations include:

    a. Is there evidence of a clear causal link between introducing a presence based random testing regime and deterrence of drug-driving (a rational connection)?

[4] If Police are seeking funding to allow for additional police time to conduct the drug tests, the cost to Corrections will be in the region of $0.6-0.8m per year. If the Police are not seeking additional time to meet the demands of drug testing, the cost to Corrections is only $0.01m per year.

b. Have less intrusive alternatives been considered, and would they be capable of sufficiently deterring drug-driving (a proportionate response)?

129. The Ministry of Justice has expressed concerns that a sufficiently strong evidential base has not been presented to justify limiting people's rights in this way.

130. The need to establish reasonable grounds to detain and search a person is an important procedural safeguard in preventing unreasonable detentions and searches. This may affect both people who are not drug-driving and people who have trace amounts of drugs in their systems, but are not impaired in their driving. Either group could unreasonably be subject to temporary detainment and an invasive search, or to a false positive leading to further consequences.

131. The key policy questions for Cabinet to consider and be satisfied upon are:

a. Is there strong evidence that presence based random testing deters drug-driving significantly more than other methods of deterring drug-driving?

b. If so, does that evidence of effectiveness at deterring drug-driving justify arresting and detaining people who may pose no actual road safety risk?

132. The Ministry of Justice notes that final assessment of the consistency of the proposals with the New Zealand Bill of Rights Act will be undertaken by the Attorney-General once a Bill has been drafted.

Legislative implications

133. The Act will need to be amended to introduce random drug testing. Cabinet has agreed to include a Land Transport Amendment Bill in the 2016 legislative programme with a category 3 priority (to be passed in 2016 if possible). This Bill will be introduced in the near future. In the event, these proposals can not be included in the Land Transport Amendment Bill, another legislative vehicle will need to be identified.

Regulatory Impact Analysis

134. The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.

135. The Regulatory Impact Analysis Team at the Treasury (RIAT) has reviewed the RIS and prepared by the Ministry of Transport and cost-benefit analysis (CBA) and considers that the RIS does not meet the quality assurance criteria.

136. The RIS contains useful information, but RIAT does not consider the preferred option follows convincingly from the analysis. The RIS summarises the available evidence from New Zealand and overseas, discussing a range of options to implement testing. The RIS acknowledges that little data exists on the extent of drug-driving in New Zealand or the extent to which impairment caused by drug driving causes harm. The RIS acknowledges that the analysis of a drug-driving problem is subject to a range of unknowns and uncertainties.

137. The argument for the preferred option is driven strongly by the CBA results and the objective to "deter drivers from driving drugged". RIAT considers little weight should be given to the CBA given the RIS acknowledges considerable uncertainty about the magnitude of the problem (drug-impaired drivers causing harm).

138. The review of the drug-driving enforcement regime does not consider the alternative option of redesigning the Compulsory Impairment Test (CIT). The way the CIT is currently administered is expensive, but changes to reduce costs were not explored. A cheaper CIT test would also have a significant impact on the CBA result and unlike the oral fluid test, the CIT can detect impairment.

139. The options in the RIS have not been subject to public consultation. This is concerning given the large number of people the proposed changed could impact. The analysis of the "public acceptability" objective is therefore not convincing, although the RIS does acknowledge the lack of consultation.

140. RIAT considers there is a stronger case supporting the option to delay a decision on offences or infringements until public consultation is carried out; more data on the underlying problem is collected; and testing technology is developed further (acknowledging, for example, the high but declining incidence of false positives).

Gender implications

141. The Ministry conducts a survey named Public Attitudes to Road Safety yearly. A new question about driving while affected by drugs with, or without alcohol was introduced in 2014. Six percent of males responding to this survey said they had driven while affected by 'other drugs' with or without alcohol, compared with two percent of females. This suggests that a greater percentage of males than females would be affected by the introduction of a random drug-driving testing regime.

Disability perspective

142. There are no disability implications arising from this paper, as the current drug-driving enforcement regime provides for situations where a CIT is unfeasible. The Ministry of Health notes that the proposed random drug testing regime could have a disproportionate impact upon people with health conditions and disabilities who use drugs to manage their symptoms.

Publicity

143. I intend to issue a media statement should Cabinet agree to the proposals in this paper. I also intend to publicly release relevant documents, including this paper and the Ministry's cost benefit analysis and Regulatory Impact Statement, once the announcement has been made.

144. The Treasury is not supportive of a media release. The Ministry of Justice considers that funding should be secured before a media release is issued and legislation is introduced. Similarly, the Treasury states that because funding may be subject to a Budget bid, it believes issuing a media statement will put undue pressure on Budget Ministers to support the proposals at Budget.

145. A communications plan will be developed by the Ministry, in consultation with the Transport Agency and the Police to ensure the public is aware of the changes and the reasons for them.

Recommendations

146. The Associate Minister of Transport recommends the Committee:

Outcomes of the drug-driving review

1. **note** a review of the approach to drug-driving has found:
    i. the estimated social cost of the drug-driving problem is between $96.8 million and $731.4 million per annum, with a central estimate of $250.5 million (approximately 23 deaths, 112 serious injuries, and 304 minor injuries per year)
    ii. random drug-driving testing should be added to the driver drug testing regime because random testing regime has a general deterrence effect, and is cost effective
    iii. internationally, impairment-based regimes, similar to the current regime, are consistently used, often in parallel with other approaches

Random drug testing

2. **agree** to introduce a random drug testing regime where an enforcement officer can stop and administer an oral fluid screening test to any driver of a motor vehicle on a road, without first needing good cause to suspect that the driver has consumed a drug or drugs
3. **agree** the random drug testing regime would run in parallel with the current impairment testing regime and would involve the following elements:
    i. a random roadside oral fluid screening test for any drugs that are specified by the Governor-General by Order in Council for the purpose of the test
    ii. a second oral fluid screening test if the driver produces a positive test result for any of the specified drugs
    iii. an evidential blood test if the second oral fluid test is positive for any of the specified drugs in the first or second screening test
4. **note** that the probable drugs that will be tested for, under the testing process outlined in recommendation 3, will be methamphetamine, THC (the active ingredient in cannabis) and MDMA (ecstasy)
5. **agree** that drivers who fail or refuse to undergo the first oral fluid screening test when requested, or who have a positive result on the first test, be required to undergo a second oral fluid screening test
6. **agree** that drivers who fail or refuse to undergo the second oral fluid screening test when requested, or who have a positive result on the second test, be required to undergo an evidential blood test
7. **agree** that up until the result of the second oral fluid test is shown, Police officers can switch from the oral fluid screening regime to the compulsory impairment testing process, if they develop good cause to suspect the driver has taken drugs
8. **agree** that, once the Police officer has started the second oral fluid test, the Police officer must wait until a result is shown on the testing device; if the result is positive the Police officer must proceed with the infringement path; and if the test is negative the Police officer may switch to the impairment regime if they have good cause to suspect the driver has used drugs

9. **agree** that, once a Police officer has switched to the impairment testing regime, they cannot switch back to the oral fluid screening process

Proposed offences

10. **agree** to create an infringement offence of driving or attempting to drive a motor vehicle on a road where the driver's blood contains evidence of any specified drug, where offenders would receive an infringement fee of $200 along with 50 demerit points

11. **agree** that the NZ Transport Agency in conjunction with the Ministry of Transport, review the driver licence reinstatement fee that applies for drivers after being suspended, to ensure the fee is sufficient to cover the increased volume of licence suspensions

12. **agree** to create an offence for drivers who fail or refuse to permit a blood specimen to be taken, where drivers would face the same penalties as drivers failing or refusing to permit a blood specimen to be taken under section 60(1) of the Act

Enforcement procedures and powers

13. **agree** that Police officers have the power to arrest without warrant, any driver who refuses to accompany a Police officer for the purposes of the roadside oral fluid screening process, or fails or refuses to remain for the test, or for the result of the test to become available

14. **agree** that the penalties for refusing to accompany a Police officer for the purposes of the oral fluid screening process, or failing or refusing to remain for the test or for result of the test to become available, are the same as those that currently apply under the current drug-driving impairment regime

15. **agree** to reproduce, where appropriate, the enforcement procedures and powers and penalties set out for the alcohol testing regime

Medical defence

16. **agree** to create a medical defence for the offences detected by the presence-based regime that would allow a driver a defence if they had consumed a specified drug in accordance with a current and valid prescription written for that person and had complied with instructions from a health practitioner or the manufacturer

Approval of roadside drug oral fluid screening devices

17. **agree** that the Minister of Police may approve a device or devices for the purposes of oral fluid screening, after consulting with the Minister of Science, Minister of Justice and Minister of Transport, by notice in the *Gazette*

Hospitalised drivers

18. **agree** that a person who is under examination, care, or treatment at a hospital or doctor's surgery, as a result of an incident or accident involving a motor vehicle, must supply a blood specimen to be taken for the purposes of testing for the presence of a specified drug or drugs.

19. **agree**, if the person whose blood is taken in hospital or a doctor's surgery shows the presence of a specified drug, they will be liable for the offence agreed to under recommendation 10, unless the drug detected is a drug listed in Schedule 1 of the Misuse of Drugs Act 1975, in which case they would qualify for the existing offence under section 58(1)(b) of the Act

Implementation

20. **agree** to implement the new random drug-driving testing regime over three years, with 15,000 random drug tests a year being funded in the first year, rising to 30,000 tests in the second year, and 45,000 tests in the third and subsequent years

21. **direct** the Ministry of Transport, along with Justice sector agencies, to provide the Minister of Transport, the Minister of Police and the Minister of Justice with an assessment of the effectiveness of the random drug-driving regime, including the adequacy of the penalties in deterring offending, once three years of data are available

Amendment to the definition of qualifying drugs in the Land Transport Act 1998

22. **agree** that the definition of a qualifying drug in the Land Transport Act 1998 be amended to include all of the drugs listed in Schedule 3 of the Misuse of Drugs Act 1975, except for Part 6 of Schedule 3

Financial and operational implications

23. **note** that the proposal to introduce random drug testing of drivers will have significant cost implications for the NZ Police, and these would need to met by a variation to the Road Policing Programme under the National Land Transport Programme

24. **note** the proposal to introduce random drug testing of drivers will have cost implications for the NZ Transport Agency, the Justice system, ACC and the Department of Corrections

25. **note** that the Land Transport Amendment Bill has a confirmed priority of category 3 on the Government's legislation programme, which means that it should be passed by the end of December 2016

26. **note** that, in order for the random drug-driving regime to be implemented by 1 July 2017, funding bids would have to be submitted before Budget 2017 against the between Budget contingency

27. **agree** the Ministry of Transport, in conjunction with the NZ Transport Agency, the New Zealand Police, the Ministry of Justice and the Department of Corrections, will submit a bid seeking funding before Budget 2017 against the between Budget contingency

28. **direct** the NZ Transport Agency, in conjunction with the Ministry of Transport, to review the driver licence reinstatement fee that applies for drivers after being suspended, to ensure the fee is sufficient to cover the increased volume of licence suspensions

Human rights implications

29. **note** that the random drug testing proposals raise significant consistency issues with the New Zealand Bill of Rights Act 1990

30. **note** that an assessment of human rights implications will be completed once resulting legislation has been drafted

Legislative implications

31. **note** that a Land Transport Amendment Bill, which will implement the legislative proposals agreed to by Cabinet, has been included in the 2016 legislative programme with a category 3 priority (to be passed if possible in 2016)

32. **note** that the Land Transport Amendment Bill is expected to be introduced in the near future and, in the event, that random drug testing cannot be included in this Bill, another suitable legislative vehicle will be identified

33. **invite** the Associate Minister of Transport to issue drafting instructions to give effect to the relevant recommendations above, including any necessary consequential savings and transitional provisions

34. **authorise** the Associate Minister of Transport to make decisions, consistent with the overall policy decisions in this paper, on any issues that may arise during the drafting process

Publicity

35. **note** that a communications plan will be developed by the NZ Transport Agency in consultation with the NZ Police to ensure the public is aware of the changes and the reasons for them

36. **note** I plan to:

    i. issue a media statement announcing Cabinet's decisions

    ii. publish relevant documents on the Ministry of Transport's website once the announcement has been made, which include this paper and its accompanying Regulatory Impact Statement and the Ministry of Transport's cost benefit analysis

Hon Craig Foss
Associate Minister of Transport
Dated:

Appendix One - Data used in the Ministry's Cost Benefit Analysis on Drug-Driving

Source	Data Provided
Crash Analysis System	Crash data on drivers found to have used drugs or alcohol
Environmental Science and Research	Proportion of killed drivers with impairing drugs in their bloodstream
Max Cameron's report *"Random drug testing in Australia, analogies with RBT, and likely effects with increased intensity levels"*	Cost per random drug test in Australia Proportion of random oral fluid tests undergoing a second oral fluid test Proportion of random oral fluid tests undergoing lab tests Time for a first oral fluid test Time for a second oral fluid test
NZ Police	Number of CITs that result in a blood test from Nov 2009 to Dec 2013 Number of blood samples positive for drugs from Nov 2009 to Dec 2013 Proportion of positive blood tests Time it takes for: Initial stop for CIT CIT Blood test Transport to station Transport back to vehicle and address Prosecution Lawyer How much it costs for: A blood kit Blood collection Value for time saving Blood specimen analysis Prosecution
NZ Transport Agency	Number of drivers in New Zealand

Appendix Two - Drugs in Schedule 3 to be added to the definition of a 'qualifying drug'

Part 2 –Codeine (3-methylmorphine)
Dihydrocodeine
Propoxyphene (α-4 (N, N-dimethylamino)-1, 2-diphenyl-3-methyl-2-propionoxybutane)

Part 3 Acetyldihydrocodeine
Ethylmorphine (3-ethylmorphine)
Nicocodine (6-nicotinylcodeine)
Nicodicodine (6-nicotinyldihydrocodeine or nicotinic acid ester of dihydrocodeine)
Norcodeine (*N*-demethylcodeine)
Pholcodine (morpholinylethylmorphine)
Propiram (*N*-(1-methyl-2-piperidinoethyl)-*N*-2-pyridylpropionamide).

Part 5 -Amfepramone (2-(diethylamino) propiophenone)
Aminorex
Barbital (5,5-diethylbarbituric acid)
Clorazepate
Ethchlorvynol (ethyl-2-chlorovinylethynyl-carbinol)
Ethinamate (1-ethynylcyclohexanol carbamate)
Mazindol (5-(4-chlorophenyl)-2, 5-dihydro-3H-imidazo [2, 1-a]-isoindol-5-ol)
Meprobamate (2-methyl-2-propyl-1,3-propanediol dicarbamate)
Methylphenobarbital (5-ethyl-1-methyl-5-phenylbarbituric acid)
Methylprylon (3,3-diethyl-5-methylpiperidine-2,4-dione)
Pemoline
Phenobarbital (5-ethyl-5-phenylbarbituric acid)
Phentermine (2-amino-2-methyl-1-phenylpropane)
Pipradrol (1,1-diphenyl-1-(2-piperidyl)methanol)
SPA ((−)-1-dimethylamino-1,2-diphenylethane)