
Land Transport (Drug Driving) Amendment Bill

9/04/2021

Submission on the Land Transport (Drug Driving) Amendment Bill

1. Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Land Transport (Drug Driving) Amendment Bill (**the Bill**).
- 1.2 Legislative reform to address drug driving was first considered by Parliament in 2018, when a member's bill – the Land Transport (Oral Fluid Testing Regime) Amendment Bill – was introduced. The member's bill did not pass first its reading, and the Government signalled its intention to introduce a more comprehensive package of reforms. Following consultation in 2019, the Bill was introduced as a Government Bill on 30 July 2020.

2. Executive summary

- 2.1 The Law Society considers there are a number of significant issues with the Bill as currently drafted. The proposed measures in the Bill, including the creation of new infringement offences and criminal offences, risk over-criminalising the problem of harm caused through drug-impaired driving. The proposal for random testing without cause, and the potential for criminal sanctions following a positive test (regardless of whether this can be equated to impairment), means the legislation lacks appropriate safeguards for individual freedoms.
- 2.2 The aim of the Bill, to reduce drug-impaired driving, is commendable. However, the Bill as drafted is premised on the basis that the minutest amount of any controlled drug impairs driving, without any supporting scientific or empirical analysis advanced in the regulatory material accompanying the Bill. Individuals will be unable to identify actions that would constitute offences or to challenge or raise effective defences to offences under this Bill.¹ The lack of guidance about relevant criminal levels of qualifying drugs will confuse drivers as they will likely be unsure whether they can or should drive. There is also a risk that drivers may commit infringement offences even after taking careful steps to avoid becoming an impaired driver. In addition, uncertainty in the proposed regime may have perverse effects where a person decides not to take important prescription medication because of a fear that this may cause them to commit a driving offence.
- 2.3 Therefore, the Law Society considers the Bill, as drafted, establishes infringement and criminal sanctions that are not clearly linked to the underlying policy objective. The Law Society endorses the concerns of the Attorney-General as set out in his section 7 report and discussed in more detail below. The consequence of the current drafting is an unclear and disproportionately punitive regime. However, there are some amendments that may address these concerns. These include:
 - a. the adoption of the Attorney-General's recommendations in the section 7 report;²
 - b. amendments to the process for setting the levels of qualifying drugs for infringement and criminal offences; and

¹ See the Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Drug Driving) Amendment Bill at [24].

² Ibid at [4].

- c. revisiting the range of available defences to ensure that they adequately address the nature of the specific offences – including with regard to the use of prescription medication and passive ingestion of drugs.
- 2.4 The Law Society also notes the Regulatory Impact Statement (**RIS**)³ briefly addresses the potential for the oral fluid testing regime to have a disproportionate effect on Māori particularly given the overrepresentation of Māori in the criminal justice system. In addition, the proposed regime may have an uneven impact on persons who have medical conditions which require regular use of therapeutic drugs of the kinds covered by the principal Act under section 2. On present drafting it is arguable that those persons are likely to be unduly and unfairly impacted by the legislation. We invite the Committee to explore these issues in more detail.
- 2.5 The Law Society wishes to be heard on this Bill.

3. The Bill

- 3.1 The Bill aims to address an increasing number of fatalities from vehicle crashes in which a driver consumed drugs other than alcohol prior to driving.⁴ The explanatory note to the Bill states that “[a]ddressing drug driving is necessary to reduce road trauma and make our roads safer” and that it “is clear that our current approach is not effective in deterring drug driving on our roads”.

New testing regime

- 3.2 The Bill amends the Land Transport Act 1998 (**the Act**) by:
- a. establishing a new random oral fluid testing regime aimed at detecting recent use of a qualifying drug;⁵
 - b. creating new infringement offences relating to driving while subject to controlled drugs;⁶ and
 - c. creating new criminal offences relating to driving while subject to controlled drugs.⁷

Relationship to existing compulsory impairment testing regime

- 3.3 Although the Bill preserves Police officers’ ability to administer a compulsory impairment test (**CIT**) where they have good cause to suspect that a person has consumed a drug or drugs, the new random oral fluid testing regime allows officers to test **all** drivers without the good cause requirement required for a CIT.
- 3.4 The Bill therefore creates two parallel testing regimes: an oral fluid testing regime, which does not require officers to have good cause to suspect that a person has consumed a drug or

³ Regulatory Impact Statement, Enhanced Drug Driving Testing, 28 July 2020, at 6.2.

⁴ Explanatory note to the Bill, at 1.

⁵ Land Transport (Drug Driving) Amendment Bill, at cl 20.

⁶ Ibid, at cl 9.

⁷ Ibid.

drugs, and a CIT, which does require good cause. While the two testing regimes operate independently, officers may follow a positive random oral fluid test with a CIT.⁸

4. New Zealand Bill of Rights Act 1990 analysis

Overview

- 4.1 The Law Society endorses the Attorney-General's view and analysis in his section 7 New Zealand Bill of Rights Act 1990 (**NZBORA**) report that the Bill as drafted is inconsistent with the rights to be:⁹
- a. secure against unreasonable search or seizure (section 21);
 - b. not arbitrarily detained (section 22); and
 - c. presumed innocent until proved guilty (section 25(c)).
- 4.2 The scheme of the Bill – to test for use of controlled drugs and penalise for any recent use, regardless of any suspected or actual impairment – engages all three interconnected rights. As presently drafted, the Bill undercuts these rights in a manner that the Law Society agrees cannot be reasonably justified, for the reasons set out by the Attorney-General and discussed in more detail below.
- 4.3 The Law Society also notes that the Attorney-General's analysis of the Bill is similar to previous 2018 advice in relation to the Land Transport (Random Oral Fluid Testing) Amendment Bill, which was also found to be inconsistent with the same NZBORA rights.¹⁰
- 4.4 The Attorney-General proposes two related amendments to the Bill to achieve greater consistency with NZBORA:
- a. introducing an infringement offence threshold, below which the presence of a qualifying drug would not be an infringement offence; and
 - b. a consequential amendment to the approval of the oral fluid testing device to include only those devices that are likely to detect the presence of drugs at this infringement offence level.
- 4.5 The Law Society endorses the Attorney-General's recommendation to introduce an infringement level of impairment in the Bill linked to the recent use threshold.¹¹ Further, we consider infringement levels should be established by reference to scientific evidence linking those levels to impairment that would make an individual unsafe to drive. We consider that both the infringement levels and the criminal levels for qualifying drugs should be set following public debate and consultation, as discussed further below.

Relevant levels of a qualifying drug for an infringement offence

- 4.6 Clause 9 of the Bill sets out the range of offences applying where a person is found driving with qualifying drugs in their system. This includes the introduction of new strict liability

⁸ Given the operational constraints on performing CITs, it seems likely that Police would commence with a random oral fluid test. If this returned a positive result, Police could then take the necessary steps to perform the CIT.

⁹ Above n 1.

¹⁰ Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Random Oral Fluid Testing) Amendment Bill (12 May 2018).

¹¹ Above n 1, at [27].

offences (through an infringement regime) which shift the onus of proof onto the defendant, by requiring them to disprove an element of the offence in order to escape liability.

4.7 Clause 25 of the Bill relevantly provides that:

- a. If two oral fluid tests indicate use of a controlled drug, then in the absence of proof to the contrary it is presumed that the person's oral fluid contains a qualifying drug.
- b. Positive results from a first and second oral fluid test are not admissible in evidence for an infringement offence if there is a failure to follow a specified procedure.

4.8 A driver who produces two positive oral fluid tests will incur an infringement penalty and will have the option to undergo an evidential blood test.¹² If the driver then selects an evidential blood test and the amount of the qualifying drug meets or exceeds the levels specified in Schedule 5, they will commit a criminal offence in line with existing strict liability offences for driving with excess breath or blood alcohol.¹³

4.9 Oral fluid testing devices do not display the amount of a qualifying drug in a driver's oral fluid, simply indicating the presence or lack of qualifying drugs, and can detect up to six different drugs depending on the device used. Although estimates of the devices' accuracy vary significantly, the Ministry of Transport has estimated the devices are 95% accurate.¹⁴ It is important to note that the Bill does not specify what the device will be or how the test will be carried out (this is to be notified in the Gazette).¹⁵

4.10 The Law Society agrees with the Attorney-General's primary concern that the Bill currently does not specify the levels of qualifying drugs that will incur infringement offences.¹⁶ This can result in outcomes that are not connected to the objective of reducing drug-impaired driving. Although clause 36 of the Bill provides that oral fluid testing devices must be calibrated to exclusively detect "recent use" quantities of qualifying drugs, "recent use" has not been defined in the Bill.¹⁷ In the Law Society's view this is unsatisfactory.

4.11 We also agree with the Attorney-General's statement, at para 24, that:

"The Bill uses 'recent use' as a proxy for impairment – essentially deeming someone who has recently used qualifying drugs to be impaired. The Bill does not define recent use. While this may be justifiable, the issue is that, as drafted, the proportion of the qualifying drugs that constitutes an infringement offence is not specified in the Bill. This means it cannot effectively be challenged."

4.12 The Minister of Police, and not the legislature, controls the approval of oral fluid testing devices calibrated to the "recent use" levels. As such, there is no requirement in the Bill for public consultation on relevant levels of qualifying drugs for infringement offences. This lack of public consultation is a concern.

¹² Above n 5, at cl 9: see new sections 57A(3) and 71D; Departmental Disclosure statement, at 3.

¹³ Ibid: see new sections 57A(1), 57B(1) and 57C(1); Departmental Disclosure statement, at 3.

¹⁴ Above n 3, at 5; Ministry of Transport *Enhanced testing regime for drug-impaired driving cost benefit analysis* (April 2020).

¹⁵ Above n 5, at cl 36.

¹⁶ Above n 1.

¹⁷ Ibid.

- 4.13 The Attorney-General has noted that introduction of an infringement level of impairment in the Bill linked to the recent use threshold would address many of the rights issues with this current approach.¹⁸
- 4.14 Such an amendment to the Bill would follow the model for alcohol-related driving offending provisions in sections 56(1)-(2A) of the principal Act by having effectively three levels of drug presence: a high one which is sufficient for the more serious charge; a medium one which suffices for an infringement offence and a lower one which incurs no liability at all. The Bill requires the establishment of approximate comparisons between the impairment that will result from particular levels of known drugs in a driver's system and the impairment from certain levels of intoxication; the proposed threefold classification simply requires the application of the same process to fix the thresholds of three rather than two levels.
- 4.15 Without such a threshold, drivers could be penalised for accidental or passive exposure to controlled drugs or in circumstances where they have low residual levels of a drug that have not necessarily impaired their driving. Such a consequence is arbitrary.
- 4.16 In this regard, the scheme is inconsistent with the existing breath blood alcohol regime which does not penalise adults for the mere presence of breath alcohol, but only if a certain concentration level is exceeded on the basis that impairment is unlikely to have occurred under a blood alcohol concentration of 80 mg per 100 ml. It can be contrasted with the United Kingdom's drug driving legislation which only penalises a driver if a threshold amount of a controlled drug is found.¹⁹ No infringement offence regime similar to that proposed here is provided for.
- 4.17 The Law Society therefore endorses the Attorney-General's recommendation and recommends that any infringement levels be established by reference to scientific evidence linking those levels to potential impairment that would make an individual unsafe to drive. The proposed levels should also be subject to public debate and consultation, similarly to the approach outlined below in relation to criminal levels for qualifying drugs.

Relevant levels of a qualifying drug for a criminal offence

- 4.18 Depending on the proportion of the qualifying drug(s) in their blood, a person may either commit an infringement offence or a criminal offence. It will be a criminal offence if the proportion is at or above the limit specified in proposed new schedule 5 (see clause 31 of the Bill). Criminal offences, similar to the infringement offences, may arise from use of a qualifying drug, two or more qualifying drugs, or a qualifying drug in combination with alcohol.
- 4.19 No levels for qualifying drugs are presently listed in Schedule 5 of the Bill, with the Ministry of Transport proposing to insert Schedule 5 by Supplementary Order Paper (**SOP**) during the Committee of the Whole House stage of the Bill. Any amendments post-commencement will be made by the Governor-General by Order in Council on recommendation from the Ministry of Transport and the Police. Although post-commencement amendments are governed by clause 35 of the Bill – which provides that prior to any recommendation in respect of proportions of a qualifying drug, Ministers must seek and receive advice from independent experts, give interested persons a reasonable time to make submissions and also consult

¹⁸ Ibid, at [27] and [34].

¹⁹ Road Traffic Act 1988, s 5A(1)-(2).

appropriate individuals – no such obligations apply in respect of the creation of relevant levels for qualifying drugs.

- 4.20 Introducing schedule 5 in this way creates a number of concerns. In contrast to alcohol, there is no established linear relationship between levels of drug consumption and impairment.²⁰ Further information and research is needed to identify levels of drugs that can be equated with impairment. This would allow further consideration of factors such as individuals' different experiences with drug consumption and impairment.
- 4.21 Public consultation and engagement about the socially acceptable level of risk are integral to ensuring criminal offences are established in a principled way. In this case scientific research and public consultation as to the acceptable level of risk would contribute to a regime that could appropriately sanction and deter reprehensible drug driving, not merely driving by individuals who may have consumed drugs some time prior to driving.
- 4.22 The Legislation Guidelines²¹ state that because of the possible consequences, criminal offences should be created with care. The legislation must precisely define the prohibited conduct with convictions being possible only if imposed by a court where the offence is proved by the prosecution to the standard of "beyond reasonable doubt" following a fair process (including the minimum standards of criminal procedure set out in the New Zealand Bill of Rights Act 1990).²² The objective of the Bill is an important one, but not such as to justify not following the Legislation Guidelines at the expense of protecting important rights.
- 4.23 Use of an SOP to introduce these significant changes to the Bill is also inconsistent with best Parliamentary practice. In the leading text *Constitutional and Administrative Law in New Zealand*, Professor Philip Joseph notes that in 1995 the Standing Orders Committee indicated that SOPs should only be used to introduce technical or drafting amendments, and that SOPs containing substantive amendments should be referred to select committee for a full public hearing.²³ Legislation by "piecemeal", as is occurring here, should be avoided. The full impact of the Bill should be subject to proper scrutiny by the select committee and the public, prior to enactment.
- 4.24 Therefore, the Law Society recommends that such (criminal) limits are determined before the Bill is enacted and with the opportunity for public consultation.

5. Specific clauses – comments

Clause 15 - The (limited) statutory defences in s 64 LTA

Infringement offences

- 5.1 Clause 15 amends section 64 of the principal Act to extend the medical defence to the new proposed offences where a blood sample shows the presence of drugs. Notably, the extension of section 64 does not apply to the infringement offence provisions where the results of two oral fluid tests are positive and indicate use of the same qualifying drug and that person has not elected to have a blood test – see for example sections 57A(3) and 57B(3).

²⁰ Above n 3, at 7.

²¹ Legislation Design and Advisory Committee, Legislation Guidelines, 2018 Edition, Chapter 24.1

²² Ibid.

²³ Philip A Joseph Constitutional and Administrative Law in New Zealand (3rd ed, LexisNexis, Wellington,) at 315.

- 5.2 Section 64 provides a defence to charges under a range of sections if the person charged establishes that the consumption of the relevant drug was for medicinal purposes, pursuant to a prescription from a medical practitioner and in accordance with the directions of the medical practitioner and the manufacturer of the relevant drug. This will be important in a system of randomised testing given that the definition of a relevant drug in section 2 of the Act includes a very large number of drugs which are widely used for valid therapeutic purposes (such as tranquilizers, anti-anxiety drugs and sleeping pills).
- 5.3 The RIS²⁴ only touches briefly on the risks of impaired driving arising from the taking of prescribed drugs, although noting that many drivers may be unaware of the need to avoid driving for a period after ingestion of some prescribed drugs. It is not clear whether there is any evidence which indicates, one way or the other, whether drivers who have complied with their doctor's instructions and those of the manufacturer as to the taking of a prescription drug, may or will have some residual trace of these medicines in their bodily fluid. Under the Bill such drivers are, without any true fault on their part, liable to be penalised by way of an infringement offence.
- 5.4 It is also notable that the Attorney-General's report and the RIS do not consider the consequences where a person may have passively ingested a qualifying drug. For example, it is unclear whether inhalation of cannabis smoke by a person present when others are smoking it could create a low level of relevant chemicals in the body's fluids. In such cases it may be possible the oral fluid test produces a positive result for drugs in circumstances where the driver has no moral fault. As discussed above, the Bill creates an infringement, rather than criminal, offence regime in circumstances where any trace of a controlled drug is found and the person does not elect a blood test. While clause 25 amends section 77A of the principal Act to allow a driver to prove their oral fluid did not contain a qualifying drug, this would be an expensive and time-consuming process and may undermine the effectiveness of the ability to challenge the results of oral fluid test. As well, the medical defence in section 64 has not been extended to include the new infringement offences.
- 5.5 The Law Society therefore recommends that the section 64(1A) defence is applied equally to the infringement offences as well as criminal offences. Further, the Law Society considers it would not be unreasonable to provide a general lack of fault defence where a driver who is charged with either a criminal or infringement offence, could avoid conviction or liability by establishing that any ingestion of the relevant drug was involuntary and that the offender reasonably believed that he or she was either not affected at all by any drug or perhaps not affected sufficiently to impair her/his driving ability.

6. Mandatory prohibitions – clauses 27-33

- 6.1 Clauses 27-28 of the Bill introduce new powers for enforcement officers to prohibit or suspend drivers from driving following positive oral fluid, blood or compulsory impairment tests.

Clause 27 - new section 94A

- 6.2 The proposed new section 94A requires an enforcement officer to forbid a person from driving for twelve hours if a driver has completed two oral fluid tests and "it appears to the

²⁴ Above n 3, at p 11.

enforcement officer that the results of both tests are positive”.²⁵ The power is non-discretionary (an officer *must* forbid the driver if the criteria are fulfilled) and potentially impacts individuals’ right to freedom of movement.

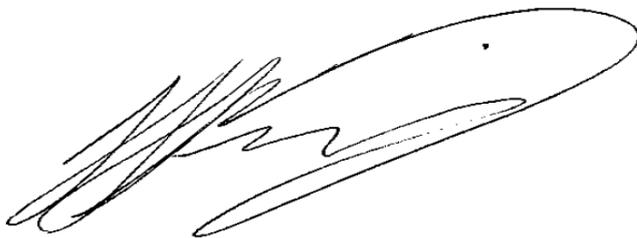
6.3 The requirement that the results of both tests *appear* positive to the enforcement officer is distinct from the similar provisions of the Act, which require that enforcement officers have a belief on reasonable grounds.²⁶ It is also distinct from other powers given to enforcement officers under other legislation. For example:

- a. the Search and Surveillance Act 2012 (see sections 6, 7, 8, 9, 10, 11),
- b. the Customs and Excise Act 2018 (see sections 178, 191),
- c. the Health and Safety at Work Act 2015 (see sections 168, 169, 170).

6.4 The word “appears” is more commonly used in relation to judicial decision-making and/or assessment of individuals’ personal characteristics. For example:

- a. Rule 167 of the Family Court Rules 2002 provides for a specific process for certifying an affidavit if the individual *appears* to be wholly or partly blind or unable to read or has severe difficulty in reading.
- b. Section 134D of the Copyright Act 1994 refers to consent by an occupier of a property, and notes that “any person who *appears* to be under 14 years of age may not be treated as the occupier”.
- c. Section 190(3) of the Armed Forces Discipline Act 1971 provides that a judge may leave to military members the issue whether an individual is insane where: “it *appears* in evidence that he may have been insane at the time of the commission of the offence.”

6.5 Given the non-discretionary nature of the power and the potential impact on individual rights from the enforcement officers’ exercise of the power, the Law Society recommends “appears” is substituted with a “belief on reasonable grounds”. Replacing the test of “appears” with a “belief on reasonable grounds” test would provide greater guidance for enforcement officers and ensure human rights, including the right to be secure against unreasonable search and seizure and the right to freedom of movement, are not infringed arbitrarily. This is particularly so given the criminal level of qualifying drugs is not specified in the Bill and the testing devices are only likely to be 95 per cent accurate.



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9 April 2021

²⁵ Above n 5, at cl 27.

²⁶ See, for example, Land Transport Act 1998, ss 95(1) and 96(1).