

BRIEFING FOR THE MINISTER OF POLICE			
Priority	<input type="checkbox"/> Urgent <input checked="" type="checkbox"/> Time-Sensitive <input type="checkbox"/> Routine		
Title	<b>Oral Fluid Testing Procurement Process Findings: Policy and Implementation Implications</b>		
Date	10 November 2022	Ref	BR/22/107CH

### Executive summary

1. The Land Transport (Drug Driving) Amendment Act 2022 (the Act) introduces the use of a random roadside Oral Fluid Test (OFT) regime. The introduction of random roadside OFTs is to detect and deter drug driving involving the drugs most prevalent in road user harm as part of a significantly enhanced impaired driving programme. The regime requires two consecutive positive roadside tests for the same qualifying drug to establish an infringement offence. The legislation comes into force on 11 March 2023.
2. Currently available OFT devices are designed as screening tests requiring a confirmatory laboratory test to identify the specific drug that the device has detected in a driver's oral fluid sample. They lack the specificity and accuracy required to meet the criteria the Act sets out for the Minister of Police to approve their use. These issues were confirmed through the Police procurement process, which tested currently available devices.
3. The Police procurement report is currently being finalised. It will provide detail around the compliance matters identified through testing and expert analysis of available OFT technology. The report will also consider the implications of these findings on the ability of current devices to meet the intent and requirements of legislation and potential impacts on public trust and confidence in Police.
4. Given there is no device that Police is able to recommend you approve for use, you may need to decide, with the Minister of Transport, to delay the rollout of OFT devices until compliant technology becomes available, or to amend the Act to enable the introduction of OFTs as screening devices in the same way other jurisdictions currently use them. You have asked for advice on other potential options and these will be fully canvassed in joint advice currently being prepared for you and the Minister of Transport.
5. The OFT rollout is designed to detect and deter drug driving. The maintenance of trust and confidence in Police and the OFT process (including confidence in the OFT tests themselves) is critical if these policy objectives are to be met.
6. Police is working closely with officials from the Ministry of Transport and Waka Kotahi to further explore and develop joint advice for you and the Minister of

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Transport on potential responses that support the road safety outcomes the introduction of OFTs is intended to deliver.

### Recommendations

Police recommends that you:

- a) **note** the contents of this briefing
- b) **forward** this briefing to the Minister of Transport Yes/No
- c) **note** that Police is working closely with officials from the Ministry of Transport and Waka Kotahi to prepare joint advice for you and the Minister of Transport on options to achieve the policy intent underpinning the introduction of OFTs

### Minister's comments and signature

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Hon Chris Hipkins

Minister of Police

## **BRIEFING FOR THE MINISTER OF POLICE**

### **Oral Fluid Testing Procurement Process Findings: Policy and Implementation Implications**

#### **Purpose**

1. This briefing:
  - a. advises you that the Police procurement process for Oral Fluid Test (OFT) devices has confirmed there is no currently available device that Police assesses as fully meeting the requirements for you to approve its use under current legislative settings
  - b. outlines the implications of the procurement findings for the ability of Police to implement the OFT component of the Land Transport (Drug Driving) Amendment Act 2022
  - c. notes that Police are working with officials from the Ministry of Transport and Waka Kotahi to prepare joint advice for you and the Minister of Transport that will include potential options that respond to these issues.

#### **Random Roadside Oral Fluid Testing is designed to detect and deter drugged driving**

2. The Land Transport (Drug Driving) Amendment Act 2022 (the Act), introduces the use of a random roadside OFT. This is a key plank in the amendments designed to improve road safety outcomes by detecting and deterring drug driving involving the drugs most commonly identified in road accidents. The Act allows for an infringement offence if a driver returns two consecutive positive OFTs for a qualifying drug. The OFT can be conducted as a random test, similar to the random alcohol breath screening approach. A primary policy intent of the infringement approach is to enable the detection and infringement of drivers that have recently used a qualifying drug, without creating a criminal offence.
3. The Act requires that a driver return two consecutive OFTs for a qualifying drug in order for an infringement to be issued. In practice this means a Police officer must identify the specific qualifying drug the OFT has detected, and the same qualifying drug must be detected in both tests.
4. The OFT testing process within the Act is unique to New Zealand. All other jurisdictions use OFTs to screen drivers for the presence of drugs with positive results requiring laboratory confirmation of either a second oral fluid or blood sample. As such, OFTs currently on the market are intended as screening tools and are not designed to have the levels of accuracy required for evidentiary purposes.

#### **The Act requires the Minister of Police to approve any OFT device for use, based on it meeting specific criteria**

5. The Act details the requirement for the Minister of Police to approve an OFT device and the manner in which the test must be carried out.

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### Section 71G

(2) Before approving the device the Minister must:

- a. Consult the Minister of Transport and the Science Minister [Minister of Research, Science and Innovation]
- b. Have regard to the accuracy of the device; and
- c. Be satisfied that any device proposed to be approved...and used in a manner proposed to be approved...will return a positive result only if the device detects the presence of a qualifying drug at a level that indicates recent use of a specified qualifying drug.

(3) In determining for the purposes of subsection (2)(c) whether a device will return a positive result only if the device detects the presence of a qualifying drug at a level that indicates recent use of a specified qualifying drug, the Minister must have regard to any relevant New Zealand Standards or joint Australian/New Zealand Standards.

### **Police is finalising the procurement report for Oral Fluid Testing devices and considers that no currently available device meets the legislative criteria for approval**

6. Following the passing of the legislation, Police commenced a rigorous procurement process to identify OFT devices that met the requirements of the Act, including those necessary for the Minister of Police to approve the use of the device.
7. The Act establishes an infringement offence if a driver returns two consecutive positive OFT results for the same qualifying drug. This differs from other jurisdictions that use the OFT as an initial screening device with a confirmatory laboratory test required to establish an offence. As such, OFT devices currently on the market are designed for screening rather than evidentiary testing purposes.
8. The procurement report will identify that while two OFT devices comply with the relevant Joint Australian and New Zealand Standard for device accuracy<sup>1</sup>, there are no devices currently available that Police considers meet the accuracy requirements of the legislation. False positive results were observed across the devices tested and the available OFT devices were unable to specifically identify a number of qualifying drugs (outlined in paragraphs 11-14 below).
9. The procurement process has confirmed that currently available OFTs detect only two of the qualifying drugs, with no device being capable of isolating and identifying all of the specified qualifying drugs contained in the Act. Current technology for OFTs allows for the detection of THC and cocaine, but opioids and benzodiazepines are tested by reference to the presence of a 'parent' drug,

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<sup>1</sup> The standard identifies the permissible proportion of false results a device may return. It also specifies the manner in which the test is conducted, including that a further oral fluid sample be collected and laboratory tested for evidentiary purposes.

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meaning the specific qualifying drug that the OFT detects cannot be identified (and therefore cannot lead to an infringement) except by confirmatory laboratory testing.

### **There are operational implications resulting from the procurement findings, including limitations in the use of an OFT under current legislative settings**

10. Aside from the issue of devices complying with the requirements for Ministerial approval, there are operational implications for any current device that might be used under the existing legislative settings.

#### *OFTs are limited in the specific qualifying drugs they can identify*

11. The Criminal Procedure Act 2011 requires that a driver being issued an infringement based on two positive OFTs must be advised of the specific qualifying drug they tested positive for. Because current OFTs can only detect THC and cocaine to this specificity, these are the only two drugs for which an infringement could be issued. s9(2)(g)(i)

[REDACTED]

12. Police would also need to make a decision as to whether to procure a device in which the testing channels for parent drugs are 'turned off' as recommended by legal advice. This has the potential to undermine deterrence impacts for drivers using other drugs given the test would either not detect opioid or benzodiazepine use or (if the channel remains active) a positive test for these drug types would have no consequence.

#### *OFTs cannot differentiate between some specific qualifying drugs and family types*

13. Cross-reactivity between some drug types mean OFTs may fail to correctly identify the specific drug or parent drug detected. In particular, the procurement process has confirmed that current OFT tests cannot differentiate between Methamphetamine and MDMA, or Amphetamines and MDA. In effect this means current devices are unable to accurately test for two of the principal drug types roadside testing is intended to detect without a confirmatory laboratory test.

#### *Current OFT accuracy levels are open to legal challenge*

14. The accuracy of current OFTs, even those complying with the Australian and New Zealand standard, means any court challenge to an infringement issued on the basis of a roadside OFT test alone is likely to be successful. The requirement for two consecutive positive tests to be returned was intended to mitigate potential concerns about device accuracy. However, it does not eliminate the likelihood that a small number of people tested will return two consecutive false positive tests, nor does it mitigate cross-reactivity issues. s9(2)(g)(i)

[REDACTED]

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15. Were the accuracy of the roadside OFT to be successfully challenged in court, this would undermine the entire regime, rendering it largely redundant.

**Police considered a number of options to respond to these issues and considers two to be viable if no device can be approved**

*A number of options did not support the policy intent, were impractical or unlikely to stand if legally challenged*

16. Police considered a number of options that might mitigate the issues identified through the procurement process. These included:
- a. testing only for certain qualifying drugs with the option to turn off testing channels for parent drugs in OFT devices
  - b. amending legislation to allow for any two repeated positive test results (including the detection of parent drugs without the need to specify the qualifying drug detected) to establish an infringement offence
  - c. amending legislation to add the Compulsory Impairment Test to the process if two positive OFTs are returned.
17. Development and full assessment of these options were not progressed as they failed on one or more counts that they:
- a. would be unlikely to stand if legally challenged
  - b. did not maintain the policy intent of the legislation
  - c. were time consuming or impractical to implement at the roadside
  - d. created a potential criminal pathway as opposed to an infringement pathway when an OFT returned a positive result
  - e. have the potential to undermine trust and confidence in Police and in the random roadside drug testing process.
18. At this point, Police considers two options could be pursued at this time and these are outlined below. We are working with the Ministry of Transport to further assess these options, consider any other options and provide you and the Minister of Transport with joint advice.

*Government may wish to delay implementation of the OFT component of the Act*

19. Given the lack of any suitable OFT device on the market at this time, Government has the option to delay implementation of this component of the legislation until a suitable device is developed that resolves the issues identified in the procurement process. The balance of the Act amendments can still be implemented without the introduction of OFTs on 11 March 2023.

20. s9(2)(b)(ii) [REDACTED]  
[REDACTED]  
[REDACTED]  
s9(2)(g)(i) [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]

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s9(2)(g)(i)

21. A delay in introducing random roadside drug testing also impacts the short to medium-term delivery and success of Road to Zero outcomes in a key area that has been the subject of significant attention through the process of policy and legislative development.

*Government may wish to amend the Act to enable use of current OFT devices as a screening test*

22. The current settings for the Act are based on a model of evidential roadside testing (ie the evidentiary threshold for a drug driving infringement offence to be established is met at the roadside stop without confirmatory laboratory testing). As noted earlier, New Zealand is the only jurisdiction in the world proposing to use OFT devices in this way.
23. The findings of the procurement process align with the design intent of current OFT devices to be used as an initial screening, rather than an evidentiary, testing tool. Being designed for this purpose, current OFTs are not manufactured to have the levels of specificity or accuracy mandated in the Act. The option is available to amend the Act to introduce the random roadside OFT as a screening tool. This would require a confirmatory laboratory test of an oral fluid sample to establish an offence. This option can be used instead of the delay option outlined above, or it could be utilised as an interim measure until suitable technology is developed to enable an evidential roadside OFT testing regime.
24. Amending legislation to introduce random roadside OFT screening retains the policy intent of the legislation and introduces OFTs as a tool to detect and deter drug driving in line with the Road to Zero strategy and action plan. Any legislative amendment would need to ensure that the confirmatory sample can only be used to establish an infringement offence unless there are specific grounds for a blood sample to be taken for evidence of criminal level offending. This option would generate demand for large numbers of lab-based tests, which could have cost implications. These have not yet been fully explored.

### **You have asked for advice on other options that may address the issues raised**

25. At your Officials' meeting on 7 November, you asked Police to consider options that would enable the introduction of an OFT regime. These included approaches of making an infringement notice final (ie not subject to appeal) if an evidentiary test is not requested at the time the infringement is issued, and how the OFT could be utilised in situations where the specific drug detected cannot be identified.
26. An initial scan of these options has identified significant issues with the Bill of Rights Act 1990 and the Criminal Procedure Act 2011 that will require further assessment. Some of these issues have previously been considered as part of the legislative development and Select Committee processes, including the potentially prohibitive cost to individuals of an evidentiary blood test (\$1,800) and

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the ability of Police to issue infringement notices should the designated drug concentration be detected at a criminal threshold in the evidentiary sample.

27. s.9(2)(g) OIA [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
28. Police is already working closely with Waka Kotahi and the Ministry of Transport to prepare joint advice for you and the Minister of Transport on options that respond to the issues identified through the OFT procurement process. This advice will incorporate and expand on the specific queries you have raised and canvas a range of options that may support road safety outcomes through the impaired driver programme of work.

### Next Steps

29. We anticipate you will wish to discuss the outcome of the procurement process and this briefing with the Minister of Transport. We recommend that you share this briefing with your colleague.
30. Police will continue to work closely with officials from the Ministry of Transport and Waka Kotahi to provide joint advice for you and the Minister of Transport that will identify options for consideration to maintain the intent, delivery and integrity of any roadside OFT regime.
31. Police will pause the procurement process once the procurement report is finalised in order for Ministers to receive advice, determine your preferred approach and for officials to progress a response.



Bruce O'Brien

Assistant Commissioner – Deployment and Road Policing

<b>First contact</b>	Bruce O'Brien, Assistant Commissioner – Deployment and Road Policing	s9(2)(a) [REDACTED]
<b>Second contact</b>	Jeremy Wood - Executive Director, Policy and Partnerships	s9(2)(a) [REDACTED]