

2/2/23

BRIEFING FOR THE MINISTER OF POLICE			
Priority	<input checked="" type="checkbox"/> Urgent <input type="checkbox"/> Time-Sensitive <input type="checkbox"/> Routine Approval required by 4.00pm 8 February 2023		
Title	Land Transport (Blood Test Fee) Notice 2023		
Date	3 February 2023	Ref	BR/23/02

Executive summary

1. This briefing seeks your agreement to the increased blood sample testing fees for drugs and alcohol by signing the attached fee notice.
2. The Land Transport (Drug Driving) Amendment Act (the Amendment Act) comes into effect on 11 March 2023. One of the changes introduced by the Amendment Act is a change in blood sample testing for drugs from a simple test for presence of a drug to a test for both presence and concentration. This more complex testing requirement will result in an increase to the cost of testing a blood sample for drugs from \$668.94 currently (last set with ESR in 2018) to \$1784.77 (incl GST) from 11 March.
3. The costs of blood test fees for alcohol by ESR were renegotiated and updated in 2022 but the fee notice was not updated at the time. The cost to Police rose from \$111.99 to \$115.34 (incl GST) and it is proposed that this increase also be reflected in the updated fee notice.
4. Section 67 of the Land Transport Act 1998 (the LTA) empowers you to prescribe a fee for a blood test by notice. No Cabinet or committee decision is required for this power to be exercised.
5. A copy of the proposed fee notice is attached for your consideration and approval. If the 28-day rule for Gazetting is adhered to, the notice requires your approval on, or before, 4.00pm on 8 February 2023. This will ensure the new fees are in place when the drug testing amendments take effect.

s9(2)(g)(i)

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Recommendations

6. Police recommends that you:

- a) **note** that s67(2) of the Land Transport Act 1998 empowers you to prescribe a fee for a blood test by notice
- b) **approve** and sign the attached fee notice by 4pm 8 February 2023
- c) **note** that Police via PCO will arrange for the notice to be published in the Gazette by 10 February 2023, so that the new fees are in place when the Land Transport (Drug Driving) Amendment Act 2022 comes into force
- d) either:
 - (i) **forward** this briefing to your colleagues the Ministers of Finance, Transport and Justice; or
 - (ii) **discuss** this briefing with your colleagues the Ministers of Finance, Transport and Justice

YES/NO

YES/NO

YES/NO

Minister's comments and signature

 7/02/2023

Hon Stuart Nash
Minister of Police


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Land Transport (Blood Test Fee) Notice 2023

Purpose

1. This briefing seeks your agreement to the increased blood sample testing fees for drugs and alcohol by signing the attached fee notice.
2. The increased fees are due to apply from when the Land Transport (Drug Driving) Amendment Act 2022 (the Amendment Act) comes into effect on 11 March 2023.

A person may be liable to pay a blood test fee - generally this is only enforced when the person is charged with an offence

3. A driver may be required to undergo a blood test for drugs and/or alcohol for a number of reasons including:
 - a. failing a Compulsory Impairment Test
 - b. the driver has been arrested for a driving offence and there is good cause to suspect the person is under the influence of drugs or alcohol either because a medical practitioner believes this to be the case, or the person has refused to be examined
 - c. the driver has been hospitalised as the result of a vehicle accident.
4. The Land Transport Act 1998 (the LTA) and the Amendment Act identify that the person **may be liable** for the costs associated with the blood test. The costs incorporate both the recovery of the minimum test cost to Police and the actual costs for a health practitioner to draw the blood sample.
5. The Amendment Act also provides for the costs to be waived or refunded if no offence is established as a result of the test. In practice, Police normally does not apply for the costs unless a criminal offence is established. In these cases the fee and costs are sought by Police as part of the court process. While Police will always seek the amount set in the fee notice, the Judiciary has discretion to determine the level of costs granted taking into account the circumstances of the individual from who costs are sought. 
6. Police does not currently seek recovery of costs (testing fee and health practitioner costs) in cases where an infringement offence is established. This is because recovery is a civil process and the expense and resource effort required outweighs the value of the costs recovered. Police does not anticipate changing this approach for the new drug driving infringements, including at the point an oral fluid testing regime is introduced. This means costs would only be sought through the court system when the driver has requested a blood test to establish a defence against an oral fluid test result and the test subsequently proves a criminal drug driving offence.

The Amendment Act 2022 changes the offence framework for drug driving

7. Under current settings in the LTA, a driver commits an offence if an analysis of a blood specimen evidences the presence of a qualifying drug (s57A(1)(b)).

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Currently, the analysis is required only to demonstrate the presence of the drug in the blood sample – not the level at which it is present.

8. The Amendment Act introduces an infringement regime for driving after recent use of a qualifying drug. The infringement offence is established if a blood test (elected by the driver or required under other circumstances such as those outlined in paragraph 3) identifies one or more qualifying drug(s) present in the sample below the notified threshold level for that drug or drugs. A concentration at or above the threshold establishes a criminal offence (Amendment Act s57). An infringement offence is also established if two positive oral fluid tests are returned, however the oral fluid testing component of the regime will not be introduced on 11 March 2023 (see para 13).

The changes mean blood testing for drugs will be more complex and expensive

9. When the Amendment Act comes into effect on 11 March 2023, blood samples will need to be tested for both the presence and concentration of qualifying drugs. This is a more complex testing requirement and consequently the test is more expensive. The change affects all blood samples taken for the purpose of evidential testing for drug presence and concentrations.
10. Police has negotiated a contract with ESR for the provision of the new testing processes. The minimum cost of the new test is \$1784.77 (incl GST) (representing an increase of \$1095.83) although the test may be more expensive should additional confirmatory testing be required. Police proposes setting the fee at the minimum cost and this is reflected in the attached notice. Police has budgeted for this approach.
11. If approved, the fee will be charged from 11 March 2023. This will be the first increase in blood testing charges in relation to drugs since the contract was negotiated with ESR in 2018. An outline of the specific blood testing process and associated costs is attached as Annex A. This identifies the 'cascading' testing approach with costs associated with each level of testing. As illustrated, the proposed fee reflects the lowest cost to Police for testing.
12. The new ESR testing processes have been designed to balance the minimum testing requirements for the purpose of running an effective road safety programme (testing for the most prevalent and high-risk drugs in relation to road safety) and keeping the cost impact of the new legislation to a minimum. This has meant samples will only be tested until a result is obtained (at the appropriate enforcement level), and the number of testing processes each sample can be tested for will be determined by the initial indication of which drug or drugs a driver may have used and the purpose for which the sample has been taken. For example, where a random process (OFT) is undertaken without good cause to suspect drug use only a limited testing process is applied, however, following the CIT process where good cause to suspect drug use has been established a more detailed testing process will be applied. While this process will not enable police to obtain the full results of every sample tested, it does mean one set fee is able to be applied to the testing process regardless of which process is undertaken. That fee (\$1,784.77) has been set at the minimum cost for the most limited

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testing process police are required to undertake to test for the most prevalent and high-risk drugs.

One element of the drug driving changes cannot be implemented at this time

13. The Amendment Act introduces a roadside oral fluid testing regime to detect and deter drug driving. In November 2022 Police advised the former Minister that we are unable to recommend an oral fluid testing device for this purpose as there is no currently available device that meets the legislative criteria for approval [BR22 017CH refers]. Joint advice on potential options to progress the oral fluid testing component of the Amendment Act is currently being prepared by Police and the Ministry of Transport for you and the Minister of Transport. You should anticipate receiving this advice in mid-February.

The increased cost may have a disproportionate impact on some groups

14. Some groups face additional burdens from the road safety penalties system, compared to the general population. Increasing the blood testing fee risks exacerbating these burdens.
15. The road safety penalties system particularly burdens the following people:
 - a. **People with few economic resources:** some people may forego rent or food or take out a loan to pay a financial penalty.¹ Others may disengage completely from the system which can result in these people receiving further penalties.
 - b. **Young males:** young males are more likely to engage in risky driving behaviours compared with young females, often influenced by peer pressure. This cohort is also potentially less likely to have a stable income (due to being in training or study), and therefore are less able to meet the financial cost of the penalty.
 - c. **People with addictions:** research indicates penalties are less effective at changing behaviour of people with addictions. This group may continue to offend unless the underlying cause of the addiction is addressed.²
 - d. **Māori:** Māori are over-represented in traffic charges, incurring 44 per cent of charges whilst comprising 16 percent of the population.³ Research indicates Māori are more likely to live in areas with less alternative transport options, increasing their reliance on motor vehicles to access employment, education, and training.⁴
16. If a person cannot pay their costs, they are escalated through the justice system which increases their penalty and may result in seizure of property or community service if summoned to Court.⁵ In some cases, mounting penalty debt burdens

¹ Auckland Transport and MRCagney (2022), *Equity of Road Safety Fines and Penalties*, Auckland.

² *The self-reported impact of legal and non-legal sanctions on a group of recidivist drink drivers*, Freeman et al (2006), Transportation Research Part F: Traffic Psychology and Behaviour, 9(1).

³ Auckland Transport and MRCagney (2022), *Equity of Road Safety Fines and Penalties*, Auckland.

⁴ Ibid.

⁵ If an infringement fee is not paid within 56 days of being issued, it is transferred from the Police to the Ministry of Justice for management which adds an additional \$30 to the amount the person must pay.

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can desensitise people to additional penalties, which can negatively impact road safety.

17. The introduction of an infringement regime goes some way to mitigating these impacts. In particular, the Police approach of not pursuing the recovery of costs for infringement level offences means the proposed fees increase will have no financial impact for an individual where an infringement level offence is proven.
18. Where a criminal offence is proven, the Judiciary have discretion about the level of costs awarded and is able to take individual circumstances (including ability to pay) into account.

The cost of blood testing for alcohol concentration has also increased

19. The contract for testing blood samples for alcohol concentration was renegotiated with ESR in 2022 and the cost to Police increased from \$111.99 to \$115.34 (incl GST). This increase was not updated by fee notice at the time and Police proposes that it now also be updated alongside the drug test fee. The updated fee has been included in the attached notice.

Your agreement is sought to increase the fee for blood tests for drugs and alcohol

20. The LTA empowers you to prescribe a fee for each type of blood test carried out under the LTA (s67(2)). As noted above in paragraph 10, Police recommends that you set the fees to reflect the minimum cost of the laboratory testing to Police. This approach maintains the current practice of the fees reflecting the partial cost to Police, without any allowance for overheads or administration, noting also that the fee is normally waived when an offence is not proved.
21. Police has budgeted for the anticipated increase in blood testing fees where fees are not recovered from drivers who have not committed an offence. We have also budgeted for the cost of testing in relation to infringement offences.
22. If you do not approve the increase, Police will absorb the total additional cost of the fee increase. Overall, testing costs will increase by approximately \$1.1m per annum as a result of the change to testing processes. Recovery of costs is sought in approximately 40 per cent of cases. While the specific amount of testing fees recovered is not known due to limitations in reporting, Police estimate some \$400,000 to \$600,000 of costs may not be recovered if the increase is not approved.

You are empowered to issue the fee notice – Cabinet or committee approval is not required

23. You are empowered to prescribe the fees in your position as Minister of Police. No Cabinet or committee approval is required. This provision means that no Regulatory Impact Assessment (RIA) is necessary unless the decision is considered by Cabinet or committee or communicated as an agenda item. As Minister of Police you previously approved the 2018 notice without reference to Cabinet.

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24. The increase has been an agenda item at interagency steering and governance groups including officials representing Waka Kotahi and the Ministry of Transport. Feedback from these discussions indicates that agencies consider the fees increase and notice to be an operational matter for Police in relation to the ESR contract negotiations.
25. Should you wish to raise this fee increase with Cabinet, Officials will need to undertake a RIA to accompany any paper or oral item or seek an exemption to this requirement. The process of developing a RIA or seeking an exemption from Treasury, combined with the 2023 Cabinet and committee schedule, may delay the introduction of any new fee until late March or April depending on how quickly the exemption request can be assessed by Treasury. If an exemption is declined, a full RIA process (including consultation) will be required before Cabinet can consider the issue.
26. Given the quantum of increase for drug testing of blood samples, you may wish to share this information for the awareness of your colleagues, the Ministers of Finance, Transport, and Justice by forwarding this briefing to them. Alternatively, you may wish to discuss the proposal with them before deciding whether to approve it. Officials can provide supporting material for any discussions you may wish to undertake. Reactive talking points will be provided for you should you approve the increases.

Timing and next steps

27. Taking the 28-day rule into account, your agreement to the fee increase and signed notice will be needed by 4pm Wednesday 8 February 2023, if the increased fees are to be in place when the new testing requirements come into force. This will allow Police to arrange Gazetting by Friday 10 February to enable implementation from 11 March 2023.
28. If approval is delayed, Police will absorb the increase in testing costs until such time as a decision is taken.
29. If you decide to advise Cabinet of this increase, your agreement to the signed notice would follow that and be in place in late March/early April 2023 (assuming an exemption from the RIA is approved).
30. Joint advice from Police and the Ministry of Transport on options that respond to matters around the approval of an oral fluid testing device will be provided to you and the Minister of Transport in the week commencing 13 February 2023.

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Consultation

31. The Ministry of Transport and Waka Kotahi have been consulted in the development of this paper and officials consider this to be an operational matter for Police in relation to the ESR contract renegotiation. The Treasury was consulted to clarify RIA requirements. PCO drafted the attached Blood Test Fee Notice in consultation with Police.

Gillian Ferguson

Director Policy

First contact	Gillian Ferguson - Director, Policy	s9(2)(a)
Second contact	Bronwyn Donaldson, Policy Manager	s9(2)(a)

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Annex A Blood sample analysis sequence and costs

s.9(2)(g) OIA



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Fee Notice for Approval and Signature

Land Transport (Blood Test Fee) Notice 2023

This notice is made by the Minister of Police under section 67(2) of the Land Transport Act 1998.

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Notice

1 Title

This notice is the Land Transport (Blood Test Fee) Notice 2023.

2 Commencement

This notice comes into force on 11 March 2023.

3 Interpretation

- (1) In this notice, unless the context otherwise requires, **Act** means the Land Transport Act 1998.
- (2) Terms or expressions used but not defined in this notice but defined in the Act have, unless the context otherwise requires, the same meaning as in the Act.

4 Blood test fee (alcohol)

For the purposes of section 67(1) of the Act, the fee for a blood test to determine whether alcohol is present in a blood specimen is \$115.34.

5 Blood test fee (1 or more qualifying drugs)

For the purposes of section 67(1) of the Act, the fee for a blood test to determine whether 1 or more qualifying drugs are present in a blood specimen is \$1,784.77.

6 GST included

The blood test fees prescribed by clauses 4 and 5 are inclusive of goods and services tax (if any).

7 Revocation

The Land Transport (Blood Test Fee) Notice 2018 (LI 2018/120) is revoked.

Dated at Wellington this *Seven* day of *February* 2023.



Minister of Police.

Explanatory note

This note is not part of the notice, but is intended to indicate its general effect.

This notice—

- prescribes fees for 2 types of blood test carried out under the Land Transport Act 1998;
- revokes and replaces the Land Transport (Blood Test Fee) Notice 2018;
- comes into force (at the same time as the Land Transport (Drug Driving) Amendment Act 2022) on 11 March 2023.

Issued under the authority of the Legislation Act 2019.

Date of notification in *Gazette*:

This notice is administered by the New Zealand Police.