

MEMO

TO: Oral Fluid Testing (OFT) Governance Board

FROM: Health and Transport Policy, Policy and Partnerships

DATE: 13 April 2022

SUBJECT: Land Transport (Drug Driving) Amendment Bill – effect of final legislative design on scope of OFT Programme

1. This paper provides the OFT Governance Board with advice on the:
 - a. new statutory review requirement added to the Land Transport (Drug Driving) Amendment Bill (the Drug Driving Bill)
 - b. drug driving requirements that Police will need to implement or enforce that are currently out-of-scope of the OFT Programme
 - c. need for Police to establish a broader impaired driving work programme that covers all drug driving requirements not just OFT requirements.

A new statutory review requirement was added to the Drug Driving Bill at the Committee of whole House stage

2. At the Committee of the whole House stage, the Green Party Aotearoa put forward a proposed change to the Drug Driving Bill to include the requirement for an independent review of the drug driving regime three to four years after the regime comes into effect.
3. The Government (along with all opposition parties) supported the Green Party Aotearoa proposal at the Committee of the whole House stage, and the statutory review requirement was added to the Drug Driving Bill.

The statutory review requirement will likely have implications for the implementation programme

4. The new statutory review requirement sets out a comprehensive and prescriptive list of matters that an independent reviewer appointed by the Minister of Transport must consider when reviewing the drug driving regime. This includes:
 - a. the impact of the changes made by the Drug Driving Amendment Act
 - b. reliability of OFTs and blood tests in assessing a person's impairment
 - c. whether appropriate thresholds and impairment levels have been set for different drugs
 - d. whether the changes made by the Drug Driving Amendment Act have been appropriately implemented by Police and other relevant entities

- e. whether the changes made by the Drug Driving Amendment Act have had a disproportionate effect on Māori and Pasifika people
 - f. the extent to which, if it can be assessed, the number of people driving while impaired by drugs has changed since the new drug testing regime has come into force
 - g. whether any further changes should be considered including repealing any changes made by the Drug Driving Amendment Act
 - h. any other matters that the Minister of Transport has requested the reviewer examine or that the reviewer considers relevant.
5. There will be the ability for the Minister of Transport to exclude some of these matters from the scope of the review. However, overall, the new requirement for an independent review is likely to have implications for how Police (and the Ministry of Transport and Waka Kotahi) implements and monitors the drug driving regime.
6. With the requirement for the review to consider the reliability of OFTs in assessing a person's impairment (b), we note this will be difficult to determine since current technology is not able to detect impairment. Instead, the focus for Police is to procure an available OFT device that meets the statutory approval criteria. The additional scrutiny of the review requirement means it will be important to clearly document how we have undertaken this process. Having a robust and transparent process will also assist in the event of any future legal challenges to the validity and reliability of OFT devices (similar to what happened when alcohol breath testing devices were introduced).
7. The requirement for the review to consider whether the changes made by the Drug Driving Amendment Act have been appropriately implemented by Police (d) will have implications for how we monitor the effect of the new regime. It is recommended that the implementation programme includes a Police-led evaluation workstream. This workstream should cover monitoring and evaluation of:
- developments in OFT technology (especially if there is a new device in future that can detect impairment)
 - the Police deployment model and charging practices to determine if it achieves intent of the regime and mitigates risks of disproportionate outcomes, especially for Māori
 - other drug driving requirements that Police is responsible for implementing and enforcing.
8. There are some aspects of the new review requirement that Police cannot progress at this stage as either insufficient information is available or other agencies are responsible. For example, the Ministry of Transport will need to lead aspects of the review relating to blood infringement thresholds and criminal limits (c) and matters the Minister of Transport may request the reviewer examine (h).

The current scope of the OFT Programme does not cover all legislative requirements of the new drug driving regime

9. Currently, as per the programme initiating brief, the scope of the OFT Programme is limited to the Police-led implementation of OFT in accordance with legislative provisions created and amended by the Drug Driving Amendment Act.
10. Policy has recently undertaken an impact assessment of the Drug Driving Amendment Act to determine whether Police has identified and correctly interpreted all relevant legislative requirements that we will need to implement and to determine if these have been adequately considered as part of the implementation programme. This assessment has been reviewed by the Ministry of Transport and an overview is attached.
11. Following this impact assessment, Policy and the OFT Programme Manager have identified a number of key areas of the new drug driving regime that Police will need to implement that are currently out of scope of the OFT Programme. In addition to creating a specific Police-led evaluation workstream, as noted above, we have also identified other workstreams within the current OFT Programme will need to be expanded to progress specific requirements.
12. The currently out of scope requirements include:
 - a. the new review requirement discussed above in paragraph 4
 - b. existing compulsory impairment test (CIT) process that interfaces with new OFT and drug driving requirements (which was previously highlighted in the programme initiating brief as out of scope)
 - c. existing alcohol testing processes that interface with new OFT and drug driving requirements (e.g. new combination alcohol and drug infringement and criminal offences and penalties, effect on zero alcohol licences and alcohol interlock sentences)
 - d. changes to blood testing processes (i.e. blood test fee changes, application of new blood infringement thresholds and criminal limits, and new blood infringement and criminal offences and penalties)
 - e. new medical defence pathways.

There needs to be a broader Impaired Driving work programme that covers all drug driving requirements

13. For Police to effectively implement the new drug driving regime by March 2023, it is critical that the implementation programme considers all legislative requirements that Police will be responsible for implementing and enforcing.
14. There is the risk that the limited scope of the OFT Programme means a lack of oversight of and responsibility for the implementation of the changes introduced by the Drug Driving Amendment Act that are out-of-scope.

15. Progressing OFT requirements separately from other drug driving requirements could potentially lead to inconsistencies, duplication, or omissions in the development of new operational processes and system changes. To manage resources more effectively, it is practical for all requirements to be progressed under the same work programme.
16. On this basis, it is strongly recommended to establish a broader Impaired Driving work programme that covers all drug driving requirements. Subject to your agreement, the OFT Programme manager will engage with the Strategic Tasking and Coordination Governance Group on the establishment of the broader Impaired Driving work programme.

Recommendations

17. It is recommended that the OFT Governance Board:

- a. **Note** a statutory requirement for an independent review of the regime, proposed by the Green Party Aotearoa, was added to the Drug Driving Bill at the Committee of the whole House stage.
- b. **Note** the Policy Group and OFT Programme have identified that the current scope of the OFT Programme does not cover all legislative requirements of the new drug driving regime, specifically those matters outlined in paragraph 12, which presents governance and implementation risks for Police.
- c. **Direct** that the OFT Programme Manager engage now to clarify business owner and seek agreement on scope for the broader Impaired Driving work programme to implement a minimum viable product and foundation policy instructions delivered in the first 12 months. *[Amends recommendation c. in version dated 13 April 2022 following discussion at OFT Governance Board meeting on 19 April 2022]*
- d. **Direct** that once the scope and structure of the Impaired Driving work programme is agreed, updated papers be brought back to the OFT Governance Board to agree. *[Amends recommendation d. in version dated 13 April 2022 following discussion at OFT Governance Board meeting on 19 April 2022]*

Appendix – Overview of changes introduced by the Land Transport (Drug Driving) Amendment Act

#	Requirement	Legislative reference	OFT Programme scope	Programme workstream
Oral fluid testing				
1	Allow for compulsory random oral fluid tests (OFT) to be conducted by enforcement officers without cause	Section 71A Land Transport Act 1998 (LTA)	In-scope	Operational Policy, Deployment, Training
2	OFT regime operates alongside/complements existing compulsory impairment test (CIT) and alcohol testing processes	Section 71A(2)(a), 71F LTA	Out-of-scope	Operational Policy, Deployment, Training
3	Provide for drugs/drug classes to be tested by OFT (THC, methamphetamine, benzodiazepines, MDMA, opiates, cocaine)	Section 71G LTA	In-scope	Procurement
4	Presumptions relating to OFTs	Section 77A LTA	In-scope	Operational Policy, Deployment, Training, Prosecutions
5	Undergo 1 st OFT	Section 71A LTA	In-scope	Operational Policy, Deployment, Training
6	Undergo 2 nd OFT following positive 1 st OFT	Section 71B LTA	In-scope	Operational Policy, Deployment, Training
7	Undergo further OFT if 1 st or 2 nd invalid	Section 71C LTA	In-scope	Operational Policy, Deployment, Training
8	Remain at a specified place for the result of OFT/evidential blood test or accompany enforcement officer	Section 71A-E LTA	In-scope (OFT only)	Operational Policy, Deployment, Training

#	Requirement	Legislative reference	OFT Programme scope	Programme workstream
9	Elect blood test if two positive OFTs	Section 71D LTA	Out-of-scope	Operational Policy, Deployment, Training
10	Cannot switch to OFT process following CIT	Section 71A(2)(b), 71F LTA	Out-of-scope	Operational Policy, Deployment, Training
11	Can switch to CIT (where good cause to suspect) after: <ul style="list-style-type: none"> 1st OFT negative 1st OFT positive for multiple drugs 2nd OFT negative. 	Section 71F(5)(c) and (d) LTA	Out-of-scope	Operational Policy, Deployment, Training
12	OFT approval – Minister to consult with Minister of Transport and Minister of Science	Section 71G LTA	In-scope	Procurement
13	OFT approval – Minister will notify OFT device in Gazette	Section 71G LTA	In-scope	Procurement
14	OFT approval – refer to AU/NZ Standards	Section 71G LTA	In-scope	Procurement
15	Drivers who refuse OFT required to undertake an evidential blood test	Section 72(1)(h) LTA	Out-of-scope	Operational Policy, Deployment, Training
16	Power of entry to conduct OFT	Section 119 LTA	Out-of-scope	Operational Policy, Deployment, Training
17	Taking or analysing oral fluid specimens for research or statistical purposes	Section 209, 209A	Out-of-scope	Operational Policy, Evaluation

#	Requirement	Legislative reference	OFT Programme scope	Programme workstream
Offences				
18	Offence if blood drug concentration exceeds prescribed blood infringement thresholds or criminal limits	Sections 57A(1), 57B(1), 57C(1), Schedule 5	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
19	Infringement offence for 2 positive OFTs	Section 44 Drug Driving Amendment Act	In-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
20	Additional penalties for third or subsequent convictions	Section 56, 57D LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
21	Combination criminal and infringement offences for multiple substances with higher penalties	Section 57B-D LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
22	Criminal offence for qualifying drugs where no criminal limit set	Section 57A-C LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
23	Alcohol interlock, zero alcohol licences, youth levels	Section 57C, 65AB LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
24	Offence for fail/refuse to remain at specified place for result of OFT/evidential blood test	Section 59 LTA	In-scope (OFT only)	Operational Policy, Training, ICT, Mobility, Prosecutions
25	Offence to fail/refuse to accompany enforcement officer to place to undergo OFT/evidential blood test	Section 59 LTA	In-scope (OFT only)	Operational Policy, Training, ICT, Mobility, Prosecutions
26	Offence to refuse to permit blood specimen	Section 60 LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
27	Additional penalties for causing injury or death	Section 61 and 62 LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions

#	Requirement	Legislative reference	OFT Programme scope	Programme workstream
28	Repeat drug driving convictions (mandatory alcohol interlocks and vehicle confiscation)	Section 65AB LTA, 129 Sentencing Act	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
29	Suspension from driving for 12 hours for 2 positive OFTs	Section 94A LTA	In-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
30	Mandatory 28-day suspension	Section 95 LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
31	Vehicle seizure	Section 96 LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
32	Arrest for drug-related offences	Section 120 LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
Defences				
33	Medical defence	Section 64 LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
34	OFT error – no defence	Section 64 LTA	Out-of-scope	Operational Policy, Training, ICT, Mobility, Prosecutions
Blood				
35	Blood test fee waived	Section 67, 72(1F)	Out-of-scope	Operational Policy
36	Explain risk of higher penalties if electing blood test	Section 71A(5)(b), 71D(2), 72(1F)	Out-of-scope	Operational Policy, Training, Prosecutions
37	Procedure for dealing with blood specimens	Section 79 LTA	Out-of-scope	Operational Policy
38	Power to add and amend blood thresholds and limits through Order in Council	Section 167A LTA	Out-of-scope	Evaluation
39	Independent Expert Panel to advise on blood thresholds and limits	Section 167B LTA	Out-of-scope	Evaluation

#	Requirement	Legislative reference	OFT Programme scope	Programme workstream
<i>Harm-prevention</i>				
40	Court must order compulsory health referral for repeat criminal offences	Section 65 LTA	Out-of-scope	Prosecutions
41	Evidence of controlled drug cannot be used for prosecutions under Misuse of Drugs Act	Section 73A LTA	Out-of-scope	Operational Policy, Training, Prosecutions
42	Police to issue information about availability of drug/health related services with infringement notices	Operational	Out-of-scope	Operational Policy, Training, Mobility
<i>Review</i>				
43	Statutory independent review	Schedule 1, Part 4 LTA	Out-of-scope	Evaluation