



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Land Transport (Drug Driving)
Amendment Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 269 of the Standing Orders of the House of
Representatives

1. I have considered whether the Land Transport (Drug Driving) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. I have concluded that the Bill appears to be inconsistent with s 21 (right to be secure against unreasonable search and seizure) and s 22 (right not to be arbitrarily detained) and cannot be justified under s 5 of the Bill of Rights Act. I also considered the consistency of the Bill with s 25(c) (right to be presumed innocent until proven guilty) and concluded that the Bill is consistent with that right.
3. As required by s 7 of the Bill of Rights Act and Standing Order 269, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill amends the Land Transport Act 1998 (the principal Act) to resolve issues with the current oral fluid testing regime and enable New Zealand Police to better detect and deter drug-impaired driving.
5. A random roadside oral fluid testing regime was introduced in March 2023 by the Land Transport (Drug Driving) Amendment Act 2022. It was intended to enable enforcement officers to test for the presence of the highest-risk illicit and prescription drugs that impair driving. However, the approval criteria for oral fluid screening devices have prevented implementation, as there are no commercially available devices that meet the statutory requirements.
6. The Bill retains much of the existing regime, but makes the following changes:
 - 6.1 introducing new oral fluid testing device approval criteria;
 - 6.2 enabling approved oral fluid testing devices to be used to conduct screening tests at the roadside;
 - 6.3 requiring evidential testing of oral fluid in a laboratory to confirm the presence of one or more listed qualifying drugs at or above the specified concentration level before an infringement notice and demerit points can be issued;
 - 6.4 amending the existing offences and penalties for drivers that fail or refuse to remain in place or fail or refuse to accompany an enforcement officer.
7. I note that some of my analysis on this Bill is similar to the advice of the former Attorney-General, Hon David Parker, on previous amendments to the Land Transport Act. Both the Land Transport (Drug Driving) Amendment Bill and the

Land Transport (Random Oral Fluid Testing) Amendment Bill were found to be inconsistent with s 21, s 22, and s 25(c) of the Bill of Rights Act.¹

New oral fluid screening device criteria

8. The Bill introduces new device approval criteria that better reflect the limitations of oral fluid testing devices (new section 71G).
9. The Minister of Police must have regard to the accuracy of the device but will no longer need to be satisfied that the device will only return a positive result if the device detects the presence of a qualifying drug.
10. The approval criteria account for devices producing a low proportion of false positive or false negative results and provide for detection of families of drugs that include specified qualifying drugs.
11. When determining the concentration level at which a screening device will produce a positive result for each qualifying drug² or family of drugs, the Minister must have regard to any relevant New Zealand Standard or joint Australian/New Zealand Standard. The Minister does not have to set thresholds that align with those standards if they are satisfied based on other information that the screening threshold of the device indicates recent use (with recent use taken as a proxy for impairment).
12. The notice by which the Minister approves a device must specify any qualifying drug or family of drugs that the device will screen for, as well as the concentration level at which the device will appear positive for each qualifying drug or family of drugs (section 71G(2)).

Oral fluid screening tests

13. The Bill proposes to use approved oral fluid devices to conduct screening tests at the roadside. An enforcement officer would be able to stop anyone and require them to take a first oral fluid screening test. If the first oral screening test returns a positive result,³ the driver would need to undergo a second screening test. A person would be required to undergo a further test if either the first or second oral fluid test fails to produce a result.

¹ Hon David Parker, *Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Drug Driving) Amendment Bill* (30 July 2020); Hon David Parker, *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).

² Qualifying drugs are those specified in Schedule 1 or 2 of the Misuse of Drugs Act 1975, or any of Parts 1 to 5 and Part 7 of Schedule 3 of the Misuse of Drugs Act 1975. However, the drug driving offences relate to the listed qualifying drugs in Schedule 5 of the Land Transport Act only.

³ A positive result in relation to an oral fluid screening test means the test indicates the concentration level of a specified qualifying drug, or a specified family of qualifying drugs, in the oral fluid of the person meets or exceeds the screening threshold specified in a notice made under section 71G.

14. Drivers who return two positive screening tests at the roadside would be prohibited from driving for 12 hours to address any immediate road safety risk. This is not an offence.

Evidential testing of oral fluid

15. The Minister must specify by notice the listed qualifying drug or drugs that will be tested in the laboratory, as well as the positive evidential threshold for each listed qualifying drug.⁴
16. The Bill requires a sample of the driver's oral fluid to be sent to a laboratory for testing if the first screening test is positive. It defines 'oral fluid sample' as a sample taken from a person as part of an oral fluid screening test or a further oral fluid sample (section 2(1) as amended).
17. The laboratory test will be used to confirm (or not) the presence of a specified listed qualifying drug or drugs and whether the presence is at a level that indicates recent use. If the screening test identified a family of drugs, the laboratory test will confirm (or not) the presence of one or more specified listed qualifying drug that is a member of that family.

Offences and penalties

18. Drivers who fail or refuse to take a screening test or provide an oral fluid sample will be issued with an infringement offence and demerit points at the roadside and will be prohibited from driving for 12 hours.⁵
19. Infringement notices for drug driving will only be issued where the laboratory test detects the presence of any specified listed qualifying drug at a positive evidential threshold specified by notice by the Minister of Police.
20. A medical defence is still available to drivers who can establish that they have taken any prescription medication in accordance with a current prescription and any instructions from a health practitioner or manufacturer.

Other provisions

21. The Bill also requires an individual to provide a blood specimen if they are unable to provide an oral fluid sample that is sufficient to carry out an oral fluid screening

⁴ Listed qualifying drug means a qualifying drug listed in Schedule 5 of the Land Transport Act. The schedule includes 25 drugs and for each it notes a tolerance level and a high-risk level. The schedule can be amended by Order in Council and notice in the Gazette, but the Minister of Transport first must seek and consider independent advice and provide reasonable time for public submissions (s167AAA refers).

⁵ New section 60A clarifies that a person does not fail or refuse to undergo an oral fluid screening test or provide an oral fluid sample only because they are unable to provide a sufficient sample. In practice, a person who is unable to provide a sufficient sample would be required to undergo a blood test.

test or a fluid sample sufficient for laboratory analysis where required (new section 72(1)(f)).

22. If a person fails or refuses to permit an enforcement officer to take a blood specimen from them under new section 72(1)(f), the Bill enables the officer to exercise all or any of the powers under section 121(2) of the principal Act, which include forbidding that person from driving for a period, taking possession of all ignition or other keys of the vehicle, and rendering the vehicle immobile.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Freedom from unreasonable search and seizure

23. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, or otherwise. The right protects a number of values including personal freedom, privacy, dignity, and property.⁶ The touchstone of this section is a reasonable expectation of privacy.⁷
24. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that, logically, an unreasonable search cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁸ Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable.
25. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy, and the rationale of the search.⁹ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.

Oral fluid screening tests and taking of a sample constitutes a search and seizure

26. Clauses 16 to 18 of the Bill provide that an enforcement officer may require a person to undergo one or more oral fluid screening tests. As noted in paragraph 13, a second test is only required if the first test is positive, and each test can be repeated once if it fails to produce a result. Clause 19 provides that a person may be required to provide a further oral fluid sample, which I understand is for the purpose of laboratory analysis.
27. ‘Oral fluid screening test’ is defined in the Bill as a test that is carried out by means of an oral fluid screening device. The screening devices are not specified in the Bill

⁶ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁷ At [161].

⁸ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

⁹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

(this is to be notified in the Gazette). New Zealand Police will procure suitable oral fluid screening devices after the passage of the Bill through the House.

28. It is uncertain, therefore, how the testing device will work and how the sample will be collected. I have been advised that the nature of the screening test will depend on the type of device used. For example, it may involve a tongue swab, or it may require a spit sample and the volume of any saliva collected could vary. Clause 29 provides that the procedure for taking an oral fluid sample will be prescribed in regulations.
29. Based on the information available, I consider that undergoing one or more oral fluid screening test will constitute a physical search of the person and the taking of an oral fluid sample a seizure for the purposes of s 21.
30. In addition, clause 23 of the Bill provides that a person must permit a health practitioner or medical officer to take a blood sample if they are unable to provide an oral fluid sample sufficient to carry out an oral fluid screening test or laboratory analysis where required. The taking of a blood sample is also a seizure for the purposes of s 21.

There is a sufficiently compelling rationale

31. The stated objective of the Bill is to better detect and deter drug-impaired driving and improve road safety. Currently, enforcement officers can conduct compulsory impairment tests (CIT) to detect drivers who are impaired by drugs. An officer must have 'good cause to suspect' that a driver had used a drug, or drugs, before undertaking the test. CIT tests are time-intensive and can only be performed by trained staff.
32. The Ministry of Transport and Police consider that there is likely to be a high number of drug-impaired drivers who are not captured under the CIT testing regime because there may be no observable signs of impairment at the time of driving.
33. The Land Transport (Drug Driving) Amendment Act 2022 intended to enable New Zealand Police to undertake random, compulsory roadside drug testing at a scale that would act as a deterrence and remove impaired drivers from the road.
34. The Bill likewise aims to act as a deterrent to and restraint on drug-impaired driving. I consider that this is a sufficiently compelling public policy objective to justify the use of some search and seizure powers.

The intrusion on privacy is not proportionate to the public interest objective

35. Driving is a heavily regulated activity because of the importance of road safety and the risk to other road users caused by unsafe practices. Drivers must have a lowered expectation of privacy as a result.¹⁰
36. Any search of the body, rather than a search of a car or house, creates a higher expectation of privacy, and the more invasive the procedure the greater the expectation of privacy.¹¹
37. Under the proposed regime, an enforcement officer is enabled to physically collect an oral fluid sample from a driver's mouth, or in specified situations a blood sample, which represents a significant intrusion on bodily privacy.
38. The Bill provides that refusing to undergo a screening test or provide an oral fluid sample will itself be an infringement offence, and this carries the same maximum penalty or infringement fee, and number of demerit points, as driving while impaired by two or more listed qualifying drugs as evidenced by laboratory testing of the oral fluid sample (clauses 35 and 36 refer).
39. As noted above, the intrusiveness of the search may vary depending on the devices available for oral fluid testing. While the taking of oral fluid can be expected to be less intrusive than a blood test, it will be significantly more invasive than capturing aspirated material as a breath test would do. The intrusion on an individual's privacy that arises from the taking of a bodily sample for the first oral fluid screening test appears disproportionate where there is no basis to suspect the individual driving is under the influence of an impairing drug.

The scheme has introduced some safeguards, but I do not consider these to be sufficient

40. The Bill has introduced the requirement for a laboratory analysis of a person's oral fluid sample to confirm the presence of a specified listed qualifying drug at a level that is equal to or exceeds the positive evidential threshold before an individual can be charged with an infringement offence. However, while an evidentiary test is important for the purposes of establishing whether an offence has occurred, it does not mitigate the intrusion on an individual's privacy at the time of the roadside screening tests.
41. In contrast to a CIT, the Bill does not require an enforcement officer to have good (or any) cause to suspect a driver has consumed a drug before an oral fluid test can be required. If an officer was required to have reason to believe that a driver was impaired prior to carrying out a first oral fluid test, that test would be less likely to constitute an unreasonable search and seizure. An officer's belief that the individual

¹⁰ *R v Jeffries* [1994] 1 NZLR 290.

¹¹ *R v Williams* [2007] NZCA 52.

may be impaired, followed by a positive first oral screening test, would provide a reasonable basis for undertaking a second oral fluid test.

42. Therefore, while I recognise that the objective of the Bill is within the public interest, the regime is not adequate to justify such an intrusion on bodily privacy. As currently designed, the requirement to undergo one or more random compulsory oral fluid tests and provide an oral fluid sample or blood sample is inconsistent with s 21 of the Bill of Rights Act.

Prohibition of driving through the taking of a driver's keys would also constitute a seizure

43. Drivers who produce two positive oral fluid screening tests will be prohibited from driving for 12 hours. A driver who refuses to undergo an oral fluid screening test will also be prohibited from driving.
44. Likewise, a person who is unable to provide an oral fluid screening test, and then fails or refuses to allow a blood sample to be taken may be prohibited from driving for such period as specified by the enforcement officer.
45. In both circumstances, prohibition from driving may require the seizure of a driver's keys. I consider that removal of a person's keys for failure to provide an oral screening test or blood test, could, in the absence of any reason to suspect the person has consumed a drug, amount to an unreasonable seizure.

Section 22 – Right not to be arbitrarily detained

46. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. The purpose of the right not to be arbitrarily detained is the protection of human dignity, autonomy, and liberty.¹²
47. A person is regarded as detained within the meaning of s 22 if, amongst other things, there are statutory restraints of a person's movements (accompanied by penalties for non-compliance).¹³ The existing breath-screening test (in relation to alcohol) is considered by the courts to amount to a detention.¹⁴
48. Where an enactment is inconsistent with s 22, there can be no role for justification under section 5 of the Bill of Rights Act. Rather, the term "arbitrarily" is intended to provide a measure of the reasonableness of statutory powers, as well as the exercise of those powers.¹⁵

¹² *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

¹³ *R v Blake* HC Auckland T1737/99, 28 September 2000.

¹⁴ *Temese v Police* (1992) 9 CRNZ 425 (CA).

¹⁵ Andrew Butler and Petra Butler, *New Zealand Bill of Rights Act: a Commentary* (2nd ed, LexisNexis, Wellington 2015), at [19.8.1].

49. At issue is whether there is sufficient justification for detention and whether the Bill carefully circumscribes who may detain a person, for how long, and under what conditions.

Compulsory roadside testing constitutes being detained

50. Under the Bill, an enforcement officer may require a person to:
- 50.1 remain in place where stopped to undergo the oral fluid screening test or tests, or if it is not practicable to undergo the test where stopped, to accompany the officer to any other place where they can undergo the test;
 - 50.2 remain at the place where the test was taken until after the result of the test is ascertained;
 - 50.3 remain in place where stopped to provide a further oral fluid sample for the purposes of laboratory analysis, or if it is not practicable to provide the oral fluid sample where stopped, to accompany the officer to any other place where they can provide an oral fluid sample.
51. The Bill amends section 59 of the principal Act to make it an infringement offence if a person fails or refuses to comply with any of the above requirements. This also carries the same maximum penalty, infringement fee, and demerit points as driving while impaired by two or more listed qualifying drugs.
52. In my view, the oral fluid screening test regime can be considered to amount to a detention as it places a statutory restraint on a person's movement in order to undergo the test and is accompanied by penalties for non-compliance.

Is there a sufficient justification for detention?

53. As noted above, an enforcement officer may require a person to remain in place to undergo the first compulsory oral fluid screening test without any cause to suspect that the person has consumed a specified drug or is impaired. The length of the detention is open-ended but limited because of the maximum number of times the test can be administered.
54. The cost-benefit analysis prepared by the Ministry of Transport in 2020 suggested that based on the experience of Queensland, the assumption is that it would take 10 to 15 minutes to conduct the first oral fluid test with the possibility that this is extended for a second test or longer if either test fails to produce a result. I was advised that there has been no updated information that would change that assumption.
55. Each test can only be repeated once, so the maximum number of screening tests is four. This suggests roadside detention could last 30 to 40 minutes but in most cases would be half that time for someone who returns two positive tests.

56. Although the Bill provides that a person may need to give a further oral fluid sample following the screening tests, this is not expected to significantly add to the length of detention, as it would only require collection and not the wait time for a result.
57. A person who is unable to provide a sufficient oral fluid sample for roadside screening would be required to undertake a blood test, which would take significantly longer. There is no requirement for an enforcement officer to suspect drug use prior to requiring a blood test. In contrast, a person who fails to undertake a CIT may be required to undertake a blood test only if the officer has good cause to suspect the person has consumed a drug or drugs.
58. Compared to roadside detention for breath alcohol procedures, the time difference is significant. The combination of a passive breath test and breath-screening test, if both are needed, will only take a few minutes with reasonable driver cooperation. All evidential testing is undertaken at a police station or booze bus.
59. Compared to a CIT, oral fluid screening tests at the roadside are a much shorter detention. A CIT involves eye, walk and turn, and 1-leg-stand assessments and may take up to an hour and a half. However, as discussed above, a person may be stopped and required to undertake a CIT only where an enforcement officer has 'good cause to suspect' that a driver had used a drug, or drugs.
60. The length of detention can be extended for a second test, if the first test is positive. There is also the possibility of further tests if either test fails to produce a result.
61. The accuracy of the technology currently available in oral fluid testing devices impacts the reasonableness of prolonged detention. The Ministry of Transport advises that the second oral fluid test reduces the probability of a false positive from between 10% and 1% of the time to between 5.5% and 0.01% of the time. Individuals with a positive first oral fluid screening test will be required to undertake a second oral fluid screening test. At the higher end of the known error rate, approximately 1 in 10 results from a first oral fluid test would be in error.
62. On balance, I consider that there is a real risk of arbitrary detention where an initial oral fluid screening test takes in excess of 15 minutes or where an individual is unable to provide a sufficient oral fluid sample and instead must provide a blood specimen. I also consider the error rate of oral testing devices could lead to prolonged detention of individuals on the basis of inaccurate screening. The Bill provides inadequate safeguards in these situations.
63. I therefore consider the Bill appears to be inconsistent with the right not to be arbitrarily detained as affirmed in s 22 of the Bill of Rights Act.
64. As noted in my consideration of s 21 of the Bill of Rights Act, if the Bill required an enforcement officer to have reason to suspect that a person had consumed drugs or was impaired prior to carrying out an oral fluid screening test or a blood test, then the temporary detention imposed while the test is carried out may be less likely to give rise to an inconsistency with the right to be free from arbitrary detention.

Section 25(c) – Right to be presumed innocent until proven guilty

65. For completeness, I have considered whether the Bill is consistent with s 25(c) of the Bill of Rights Act (the right to be presumed innocent until proven guilty). As noted above, the Land Transport (Drug Driving) Amendment Bill and the Land Transport (Random Oral Fluid Testing) Amendment Bill were both found to be inconsistent with the Bill of Rights Act on that ground.
66. The Bill includes infringement offences that shift the onus of proof onto the defendant and constitute a prima facie limit on s 25(c). I note that it is ‘conclusively presumed in the absence of proof to the contrary’ that a person’s oral fluid contains a qualifying drug if laboratory analysis yields a positive result for the drug.
67. In this case, however, I consider the limit on s 25(c) justified. An infringement notice for the presence of a qualifying drug can be issued only where laboratory analysis detects the drug’s presence at a level indicative of recent use, which is a reasonable proxy for impairment.¹⁶ This supplies a rational connection between the limit on s 25(c) and the policy objective of road safety that was not sufficiently demonstrated in the Land Transport (Drug Driving) Amendment Bill.
68. Where there are good reasons for laboratory analysis showing a positive result, I consider that the defendant is best placed to provide those reasons. I note that a medical defence is available. Moreover, the proposed offences are infringement offences that do not carry a criminal conviction.

Conclusion

69. For the above reasons, I have concluded the Bill appears to be inconsistent with sections 21 (right to be secure against unreasonable search and seizure) and 22 (right not to be arbitrarily detained) of the Bill of Rights Act.



[Hon Judith Collins]

Attorney-General

29 July 2024

¹⁶ I note that the threshold for a positive result is yet to be specified.