Office of the Minister of Transport

Chair
Cabinet Economic Growth and Infrastructure Committee

REPORT BACK ON THE DRUG-DRIVING REGIME

Purpose

1. This paper is a report back on the drug-driving regime and an analysis of the benefits and risks of adopting a random roadside testing regime for drug-driving.

Executive summary

2. A Ministry of Health survey of self-reported drug use suggests that one in six adults in New Zealand used recreational drugs in the previous year, the impacts of which flow through to adverse effects on driving. While it is difficult to state the extent of the effect on driving, drugs are found in the blood specimens of subgroups of drivers (for example deceased and hospitalised drivers).

3. New Zealand's drug-driving regime, which came into force on 1 November 2009, requires a Police Officer to first form 'good cause to suspect' the driver may have used a drug or drugs. If this criterion is met, the driver may be required to undergo the Compulsory Impairment Test[1] to determine whether he or she is impaired. Unsatisfactory performance on the Compulsory Impairment Test will generally lead to the driver being asked to provide a blood specimen for laboratory analysis. If the blood specimen is found to contain a qualifying drug, the driver can be charged with a drug-related driving offence. The penalties for this offence match those that apply to drink-drive offences.

4. Analysis of the Police data shows that the regime is working well. As at 31 December 2011, over 500 drivers had tested positive for at least one drug. Drivers are being processed through the drug testing and court prosecution procedures. A survey of frontline Police Officers has found that Police Officers generally find that the legislation is effective and workable.

5. There have been no major international developments in resolving a key issue of the relationships between drug dosages and crash risk or levels of impairment. Therefore it is not possible to set legal driving limits for drugs that reflect known crash risk or levels of impairment.

6. The paper considers if New Zealand should move to a random roadside testing regime for drugs. Under a random testing regime, a Police Officer could stop and drug test any driver without having first to form 'good cause to suspect' that the driver has used a drug or drugs. To operate a fair and efficient random testing regime, a quick and reliable roadside drug screening test is required to enable the Police Officer to determine who to detain for further evidential testing and who to let go.

[1] The Compulsory Impairment Test is a test of physical co-ordination and eye pupil size and movement.

7. Oral fluid (saliva) screening devices that have been developed for on-site (roadside) use are not considered to be reliable or fast enough to meet Police operational and other requirements. These devices can only test for a limited range of drugs and tend to perform poorly in relation to the detection of the active ingredient in cannabis. In a random testing regime, impaired drivers who have taken drugs that the device misses would be allowed to drive away without further testing. Another factor is cost, because a new device is used for each test.

8. The adoption of a random testing regime cannot be recommended until the performance-based issues with screening devices are resolved in a satisfactory manner.

9. Non-legislative enhancements to the current system will continue to be investigated and implemented by officials. These include investigating whether greater use could be made of the review process relating to medical fitness to drive for certain groups of drug-impaired drivers. One possible group is impaired drivers taking prescription medicines, including methadone.

Background

10. The policy and legislative framework for New Zealand's drug-driving regime is based on the principle that drug-driving should be treated as a road safety issue about impaired drivers, rather than a drug-control strategy relating to the use of illicit substances by drivers. A recently published OECD report[2] supported the emphasis on drug-driving as a road safety issue.

11. Other requirements are that drivers who undergo the drug testing process should be subject to a fair and robust process that complies with the New Zealand Bill of Rights Act 1990. Those who are convicted of a drug-driving offence would be subject to the same range of penalties as those that apply to drink-drivers to reflect community concerns about the seriousness of this behaviour. At the time of passing the legislation, roadside screening devices were not considered to be reliable enough to support a random roadside testing regime.

12. The government requested that the regime be reviewed after 2 years and a report submitted to Cabinet on whether the legislation should be amended to provide for a random roadside drug testing regime [CAB Min (10) 26/10 refers].

Issues

The size and nature of the drug-driving problem in New Zealand

13. There have been several surveys of drug users in New Zealand. These surveys are based on self-reported drug use behaviour.

14. A survey carried out by the Ministry of Heath[3] measured alcohol and drug use among New Zealanders aged between 16 and 64 years from August 2007 to April 2008. One in six adults (16.6 percent) had used 'any drugs'[4] for recreational purposes in the previous year. In the population, this equates to 438,200 people.

[2] *Drugs and Driving: Detection and Deterrence* OECD/ITF 2010
[3] *Drug Use in New Zealand: Key Results of the 2007/2008 New Zealand Alcohol and Drug Use Survey*
[4] 'Any drugs' excludes the use of alcohol, tobacco and also BZP (party pills) which were legal at the time.

15. One in three people (34.5 percent) who had used 'any drugs' in the previous year reported that they had driven a car or another motor vehicle (such as a motor cycle) or boat while feeling under the influence of drugs. This report does not contain information on how often, during this time, people reported driving while feeling under the influence of drugs.

16. In August 2009, a study entitled *Drug-Driving in New Zealand: A Survey of Community Attitudes, Experience and Understanding* was published. This study included an internet based survey of respondents who had admitted to having used drugs and those who had not. The survey revealed a lack of knowledge among drug users about the effects of drugs on driving, and a relaxed attitude to the risks.

17. The size of the impact on the driving population is difficult to quantify. Many people report being regular drug users, but it cannot be assumed that the majority of them drive when they are under the influence of these drugs. The percentages who do report using drugs and then driving would suggest that this issue will require on-going monitoring and attention for the foreseeable future.

How the drug-driving regime is operating in New Zealand

18. The following information, provided by the New Zealand Police, gives a snap-shot of testing and prosecutions as at 31 December 2011.

19. The Institute of Environmental Science and Research Ltd has completed the laboratory testing of 567 blood specimens for drug analysis.

20. Of the specimens analysed, 519 had tested positive for at least one qualifying drug. The most commonly detected drug was the active ingredient in cannabis[5] which was found in 335 specimens. Stimulants (including amphetamines, methamphetamine and BZP) were found in 110 specimens. A variety of other drugs (opioids such as methadone and morphine) and sedatives were detected in these and other blood specimens. As at 31 December 2011, 414 drivers had been charged with one of the new offences. Three hundred and twenty-two drivers had been convicted with a number of other cases still pending in the court system.

21. There were 26 drivers whose performance on the Compulsory Impairment Test was unsatisfactory but whose blood specimens did not contain any of the drugs the Police asked the Institute of Environmental Science and Research Ltd to test for. The 26 blood specimens are just over five percent of the 476 blood specimens that had been taken following unsatisfactory performance on the Compulsory Impairment Test. This indicates that Police Officers' judgements of behavioural impairment are very sound in that they are not significantly over-referring drivers for invasive and unnecessary blood tests. It is expected that over time Police Officers will continue to become more proficient at assessing behavioural impairment in drivers.

22. As there is only one year of complete crash data available since the regime came into force, it is not possible to assess the impact of the drug-driving regime on crashes.

[5] The active ingredient in cannabis is commonly referred to as THC (tetrahydrocannabinol also known as delta-9-tetrahydrocannabinol).

Survey of Police Officers

23. A small survey has been completed of frontline Police Officers who have been enforcing the new drug-driving provisions in the Land Transport Act 1998. The primary aim of the survey was to determine the degree of difficulty Officers experienced in enforcing the provisions.

24. Most respondents (69 percent) considered that the legislation was easy and workable, or easy enough to enforce once they had completed the Compulsory Impairment Test a few times. However, some of those who completed the Compulsory Impairment Test considered the process and or forms to be drawn-out or too subjective. Some Officers commented that the mandatory nature of both the Compulsory Impairment Test and the blood specimen was good. The majority of respondents expressed the view that the drug-driving provisions are an effective tool for the Police to remove drug-impaired drivers from the roads.

International developments

25. Over the last 2 years there have been no major international developments in resolving the lack of information about the complex relationships between drug dosages and crash risk and levels of impairment.

26. Detectable levels of some drugs in blood may persist after impairment has worn off. There may also be measurable impairment effects when the drug is undetectable in the blood.

27. This makes it very difficult to determine where to set legal driving limits for a number of drugs that are related to known crash risk or levels of impairment as is the case for alcohol. Setting legal drug-driving limits relating to crash risk or impairment is problematic for those drugs that are always illegal, under the Misuse of Drugs Act 1975, to possess, use, supply or cultivate. If the limit for illicit drugs is set at zero for consistency with the Misuse of Drugs Act, this is unlikely to be consistent with criteria that are based on crash risk or levels of impairment.

Random roadside drug testing of drivers

28. Random roadside drug testing is often mistakenly equated with roadside oral fluid (saliva) screening. The correct legal definition of a random drug testing regime is one in which a Police Officer can stop and test any driver who is driving a motor vehicle on a public road. The Officer does not have to form ‘good cause to suspect’ that a driver had used a drug or drugs before they can test them.

29. The primary advantage of a random roadside testing regime is that it is believed to be a more effective deterrent. Random roadside testing currently applies to the alcohol testing regime which in New Zealand is known as ‘Compulsory Breath Testing’. Its deterrent effect relies on the ability of Police to reliably screen a large number of drivers very quickly and in a highly visible manner at the roadside. The aim is to increase public perceptions of the risk of being caught if they drive while over the legal limit.

30. In a random testing regime, a roadside screening test is often used to replace the Police Officer's 'good cause to suspect' judgement. A 'fail' on a screening test provides a legal mandate for the Police Officer to detain the driver for further evidential testing. Drivers who pass the screening test are sent on their way without further delay.

Oral fluid screening devices for drugs

31. Unlike alcohol, there are no equivalent breath testing devices for drugs. Most of the international research effort has centred on oral fluid (saliva) screening devices for the roadside drug screening of drivers. When considering these devices, the most important factor is accuracy, following by the speed to produce a result and the range of drugs these devices are able to detect. A further consideration is cost as a new device is used for each test.

International views on the accuracy of oral fluid (saliva) screening

32. Australia is the only comparable jurisdiction that currently uses oral fluid screening devices in a random roadside testing regime. Significant issues have been identified with the range and accuracy of the devices. The screening devices used in Australian States can only detect three drugs - cannabis, methamphetamine and MDMA (Ecstasy)[6]. An evaluation in one Australian State showed that one of screening devices detected the active ingredient in cannabis in only 34 percent of the specimens where it was subsequently detected by the forensic laboratory. In a random roadside testing regime, drivers who are missed by the screening device would be allowed to drive away without further testing.

33. The above results are comparable to a number of other international studies which have also found that oral fluid screening devices are very unreliable for detecting the active ingredient of cannabis. These devices are likely to miss a significant percentage (at least 50 percent) of cannabis users.

34. False positive results have also been reported with oral fluid screening devices. This is where the device incorrectly identifies the presence of a drug when it is absent. In a random testing regime, this would lead to a driver being incorrectly detained for further unnecessary evidential testing.

35. Two large-scale European studies have also raised issues about the accuracy of oral fluid screening devices. The ROSITA-2 Project[7] found that no oral fluid screening device was considered reliable enough to be used for the roadside screening of drivers. A presentation given at the DRUID[8] 2011 Final Conference in Cologne, Germany outlined an evaluation of the performance of 13 oral fluid screening devices. Eight of these devices were identified as 'promising' from a police operational perspective. None of these devices was able to meet the desired performance targets for all of the drugs of interest (cannabis, amphetamines, cocaine, opiates, and benzodiazepines).

[6] MDMA (Ecstasy) is chemically similar to methamphetamine.

[7] The ROSITA-2 Project was carried out between 2003 and 2005 in a number of European jurisdictions to evaluate the usability and analytical reliability of on-site oral fluid (saliva) drug testing devices.

[8] The Integrated Project DRUID (Driving under the Influence of Drugs, Alcohol and Medicines) is an international project involving organisations and researchers in more than 20 European countries. It aims to fill the gaps in knowledge and provide a solid base to generate harmonised EU-wide regulations for driving under the influence of alcohol, drugs and medicines.

36. It has been reported that the USA's Food and Drug Administration which is a leading accreditation authority for medical devices, has not yet cleared or approved any oral fluid screening devices for on-site testing. In Australia, the National Association of Testing Laboratories[9] has not so far approved any oral fluid based drug testing provider for on-site testing. No provider has been able to produce an on-site testing device that meets the verification criteria.

37. Similar concerns about the performance of oral fluid screening devices have been raised by New Zealand's Institute of Environmental Science and Research Ltd.

Speed and cost implications

38. Oral fluid screening devices produce results much slower than the initial passive breath alcohol screening device that is used by the New Zealand Police. In Australia, the initial saliva screening test takes on average 5 to 6 minutes[10]. In terms of the New Zealand Bill of Rights Act, questions are likely to be raised about whether it is reasonable to detain drivers who are not yet suspected of having committed an offence for at least 5 minutes at the roadside.

39. Due to the poor performance of roadside oral fluid screening devices, they cannot be used effectively, at the front-end of the testing process, to replace Police Officers' 'good cause to suspect' judgements. Also, roadside screening devices can only indicate the presence of a drug in oral fluids, not the dosage that is present. The presence of a drug in oral fluids cannot be related to the degree of impairment. Therefore it could not be used in place of the Compulsory Impairment Test as a proxy measure for impairment.

40. If an oral fluid testing process replaced the Compulsory Impairment Test, this would represent a fundamental change from an impairment-based regime to one in which the presence of a drug in a driver's oral fluid is sufficient evidence for an offence. This regime could capture a number of drivers who were not impaired when they were driving as some drugs remain detectable in bodily fluids after their effects have worn off. Under such a regime, a secondary oral fluid screening test and a confirmatory laboratory analysis of the specimen for evidential purposes would probably be required.

41. Unlike the electronic devices that are currently used by the Police for breath alcohol screening, the oral fluid screening devices used in Australia for the initial screening of drivers are disposable. This means that a new device has to be used for every test. These devices are quite costly. The initial screening device that is used in Australia[11] was costed at $A37.80 per test in 2008 ($NZ50 per test at today's prices).

42. The adoption of a random roadside testing regime for drug drivers is not recommended unless the short-comings with roadside screening devices are satisfactorily addressed. The requirements of the New Zealand Bill of Rights Act would also need to be met. Officials will continue to monitor international research

[9] This body is responsible for accrediting laboratories and other testing facilities to the Australian Standards 4808 (for urine) and 4760 (oral fluid).

[10] By comparison, the passive breath alcohol test (commonly called the 'sniffer' test) used by the New Zealand Police only takes a few seconds to produce a 'pass' or 'fail' result once breath is sampled by the device.

[11] Securatec Drug Wipe II Device.

and developments in drug testing technologies and will report back to the Minister of Transport on any such developments in 2 years time (in April 2014).

Non-legislative enhancements

43. There are a number of possible non-legislative enhancements to the current regime.

44. The medical review process may be an appropriate response for some impaired drivers who are on opioid substitution (methadone) treatment or taking prescription medicines. The Ministry of Transport, the New Zealand Transport Agency and the New Zealand Police will work collaboratively with the Ministry of Health and other relevant agencies to further investigate greater use of medical reviews when appropriate, in lieu of a prosecution.

45. The Ministry of Transport commissioned the Institute of Environmental Science and Research Ltd to undertake further research in accordance with the research provisions of section 209A of the Land Transport Act. The findings of this research will help inform future policy and Police operational practices regarding the range of drugs that should be tested for in blood specimens.

46. The New Zealand Transport Agency is closely monitoring its current drug-driving awareness campaign "Drug-Driving. Do you think it's a Problem?" The feedback received from the campaign will be used to develop its next stages.

Consultation

47. The following departments and agencies were consulted in the preparation of this paper: the New Zealand Police, New Zealand Transport Agency, Institute of Environmental Science and Research Ltd, Ministry of Justice, Ministry of Health, Te Puni Kōkiri, the Treasury and the Officials' Economic Growth and Infrastructure Committee. The Department of Prime Minister and Cabinet was informed of this paper.

Financial implications

48. There are no financial implications in this paper.

Legislative implications

49. There are no legislative implications in this paper.

Human rights and disability implications

50. There are no human rights or disability implications.

Regulatory Impact Analysis

51. A regulatory impact analysis is not required.

Publicity

52. I propose that this Cabinet paper be published on the Ministry of Transport website, following consideration by Cabinet.

Recommendations

53. It is recommended that the Committee:

1. **note** that there is self-reported use of recreational drugs in New Zealand, the impacts of which flow through to adverse effects on driving

2. **note** that under the current drug-driving enforcement regime, drivers are being detected, tested and processed through the court system

3. **note** that since the last report-back there have been no major international developments in resolving the gaps in knowledge about the impacts of drugs dosages on crash risk and levels of impairment

4. **note** that are still significant performance-based issues with oral fluid (saliva) screening devices in terms of the limited range of drugs that they are able to detect, their lack of accuracy, and the slow time to produce a result

5. **agree** that New Zealand should not consider moving to a random roadside testing regime until the current performance-based issues with oral fluid screening devices have been satisfactorily resolved

6. **note** that the Ministry of Transport will report back to the Minister of Transport on developments in drug testing technologies in April 2014

7. **note** that officials from the Ministry of Transport and other relevant agencies will continue to work on non-legislative enhancements to the current drug-driving regime

Hon Gerry Brownlee
Minister of Transport

Dated_____