

Land Transport (Drug Driving) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

29 August 2024

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Land Transport (Drug Driving) Amendment Bill (**Bill**).
- 1.2 The Bill seeks to address an important issue. The Bill is intended to enable the rollout of a roadside oral fluid drug testing regime. It is in the interests of public safety to ensure that drivers on New Zealand roads are not impaired by drug consumption.
- 1.3 However, the Law Society recommends the Bill does not proceed, because:
 - (a) The Bill is inconsistent with sections 21, 22 and 25(c) of the New Zealand Bill of Rights Act 1990 (**Bill of Rights**). Uncertainty about the reliability and accuracy of Oral Fluid Testing devices (**OFT devices**) is one factor underlying these Bill of Rights concerns, and the Bill reduces the stringency of approval criteria for OFT devices.
 - (b) The Law Society considers that the use of OFT devices may not achieve the objective of the Bill (detecting drug driver impairment). The devices are designed for the purpose of determining 'recent use' of a qualifying drug, which may not necessarily correlate with impairment.
 - (c) Immediate sanctions would flow from positive results in roadside oral fluid screening tests (**OFT**), in the form of a 12-hour ban on driving, enforced by confiscation of the driver's keys. There is no ability to challenge a positive roadside test.
 - (d) There has been a lack of public consultation on the issue of setting positive OFT thresholds. Where a positive test results in immediate significant sanction, consultation on determining those settings is key to the principles of democracy.
 - (e) The Bill contains strict liability offences, which are concerning in the light of other issues identified with the uncertainty and limitations of OFT.
 - (f) The Law Society is concerned about the potential for the OFT regime to disproportionately affect Māori.
 - (g) The OFT regime may capture persons with medical conditions requiring regular therapeutic drug use. The medical defence available to those individuals is restrictive and raises access to justice issues such that many may be sanctioned without the opportunity to challenge the sanction or present the relevant defence.
- 1.4 This submission has been prepared with assistance from the Law Society's Criminal Law and Human Rights and Privacy Committees.¹
- 1.5 The Law Society **wishes to be heard** on this submission.

¹ More information on the Law Society's law reform committees and sections can be found here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>

2 General comments

- 2.1 The Bill proposes to amend the random roadside OFT regime in the Land Transport Act 1998 (**LTA**) to resolve practical issues that have prevented the implementation of the regime. Law changes introduced by the Land Transport (Drug Driving) Amendment Act 2022 (**LTDDA**) have not been implemented, as no current devices on the market meet the required statutory approval criteria.
- 2.2 Proposed changes in the Bill include introducing new OFT device approval criteria. This will allow procurement of commercially available devices, to permit police officers to test drivers' oral fluid for the presence of illicit and prescription drugs that impair driving.
- 2.3 The Bill is the latest proposed measure to address drug-impaired driving in a series of reforms. A Government Bill was introduced in 2020, which became the LTDDA and first introduced the oral fluids testing regime. When first introduced, the LTDDA intended the OFT regime to be a comprehensive testing regime that produced a result at the required evidential standard for enforcement. The Law Society made a submission to the Select Committee on the Government Bill at that time.² Much of what was said in that submission remains relevant to the current Bill.

3 Key proposed changes

- 3.1 The Bill retains much of the existing regime, but proposes six key changes:
- (a) Introducing less stringent OFT device approval criteria. The Minister of Police will need to be satisfied of the accuracy of the device but will no longer need to be satisfied that an approved device will only return a positive result if it detects the presence of a qualifying drug.³ The new criteria account for devices producing a low proportion of false positive results. The Bill also enables the approval of devices that, while they can detect a specified family of qualifying drugs, are insufficiently sensitive to identify individual drugs.⁴
 - (b) Providing for a roadside screening regime, in contrast to the full and final roadside testing regime (subject to the option to request a blood test) envisaged by the current legislation. The new screening regime will enable approved OFT devices to be used to conduct screening tests at the roadside, followed by further requirements for positive laboratory evidential testing of oral fluid.
 - (c) Requiring evidential testing of an oral fluid sample 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 are issued.

² The Law Society's previous submission on the 2020 Bill can be found here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/Land-Transport-Drug-Driving-Amendment-Bill.pdf>

³ Clause 22, new section 71G.

⁴ Clause 22, new section 71G. The qualifying drugs must be drugs listed in Schedule 5 of the Land Transport Act 1998, included in the schedule on the advice of an independent expert panel, based on New Zealand data linking road crashes with the presence of the drugs in the drivers' blood samples: General Policy Statement at 2–3.

- (d) Removing the right to request a blood test after two positive OFTs.
- (e) Providing for a prohibition on driving for 12 hours and the potential seizure of an individual's car and keys to be immediately enforced following two positive OFTs at the roadside.
- (f) Creating new infringement offences which will impose strict liability, including offences for drivers who fail or refuse to remain in place, fail or refuse to accompany an enforcement officer, or fail or refuse to undergo an OFT.

4 Issues

Creation of double standards

- 4.1 The Law Society is pleased to see the inclusion of specified thresholds of blood drug concentrations for the imposition of infringement notices or criminal offences in Schedule 5 of the LTA. The lack of a threshold and the recommendation that one should be set was raised in our prior submission.⁵ An expert panel considered relevant drug blood concentrations with an established link to impairment, and these are the thresholds set out in Schedule 5.
- 4.2 However, if changes now proposed by the Bill proceed, this Schedule of drug blood concentration and the set levels for criminal sanction in practice will only apply to a limited number of cases where an individual has been unable to produce an oral fluid sample.⁶ In most cases, laboratory analysis to establish a positive evidential threshold for the issue of an infringement notice will be carried out on oral fluid samples, not blood samples.
- 4.3 Further, the Bill does not appear to contemplate the provision of a notice and procedure for collecting oral fluid samples such as the Land Transport (Blood Specimen Collecting Instrument and Procedure) Notice 2014.⁷ The Law Society recommends adding a clause requiring the Minister to give a Notice with corresponding provisions regarding oral fluid samples. This would ensure that current procedures for blood tests are maintained for oral fluids. Like the Land Transport (Blood Specimen Collecting Instrument and Procedure) Notice, this could provide for the division of the specimen into two parts – one part for analysis, and one part for custody by an approved laboratory with the possibility of later sending to a private analyst if required by defence counsel.
- 4.4 In this way, the Bill risks creating an arbitrary double standard. Some people, who become eligible for a blood test through inability to produce an oral fluid sample or as a result of failing a compulsory impairment test (or CIT) will be subject to a different threshold than those whose impairment is assessed on the basis of oral fluid. Sampling

⁵ At para 4.

⁶ Proposed section 71E.

⁷ Land Transport (Blood Specimen Collecting Instrument and Procedure) Notice 2014.

blood compared to oral fluid will generally show drugs present at higher concentrations in the oral fluid than in the blood, when drug use is recent.⁸

Recent use, oral fluid, and impairment

- 4.5 The use of oral fluid as a determining feature for immediate sanction raises some significant issues. The Independent Expert Panel on Drug Driving (**IEPDD**) has documented a number of the issues including the unreliability of drug concentration found in the oral mucosa as related to the blood drug concentration, the pharmacodynamics which significantly alter the amount of drug concentration in oral mucosa, and the link between impairment and blood drug concentration being more widely known and studied than the oral drug concentration.⁹ Further, the IEPDD report considers only the situation where confirmatory analysis will be carried out on blood samples, not oral fluids.¹⁰
- 4.6 Approved devices will need to have a concentration threshold for a specified qualifying drug (or specified family of qualifying drugs) set at a level that indicates recent drug use as set out in any relevant standard. In determining the concentration level at which a screening device will produce a positive result, the Minister must have regard to relevant New Zealand standards or joint Australian/New Zealand standards. The applicable Standard in New Zealand is the AS/NZS 4760:2019 (**the Standard**).¹¹ However, the Minister does not have to set a threshold that aligns with those standards if satisfied based on other information that the screening threshold of the device indicates recent use of the drug.¹²
- 4.7 The Standard is consistent with the views of the IEPDD. It sets out that there is no relationship between oral fluid concentration and urine or blood concentration and it is “not appropriate to relate the presence of drugs in oral fluid to impairment, but rather to relatively recent exposure”.¹³ This raises the question of how the objective of the Bill can be tied to the use of OFT devices. It follows from the Standard’s description that the devices do not provide a reliable measure of impairment and that relying on ‘recent use’ as a proxy for driving impairment is problematic.
- 4.8 There is also uncertainty about the extent to which people’s driving is impaired after consuming listed qualifying drugs. In its Regulatory Impact Statement, the Ministry of Transport (**Ministry**) acknowledges that:¹⁴

[w]hile research shows drugs have the potential to negatively affect driving ability, it is not possible to say with certainty that the presence of a particular drug or substance

⁸ Independent Expert Panel on Drug Driving “Recommending Statutory Limits for drug concentrations relating to impaired driving” (April 2021) at 27 (**IEPDD report**), available at <www.transport.govt.nz>.

⁹ IEPDD report at 15, 32, 39–40.

¹⁰ IEPDD report at 5.

¹¹ Australian/New Zealand Standard “Procedure for specimen collection and the detection and quantification of drugs in oral fluid” 4760:2019.

¹² Proposed section 71G(5).

¹³ Australian/New Zealand Standard “Procedure for specimen collection and the detection and quantification of drugs in oral fluid” 4760:2019 at Foreword; IEPDD report at 39–40.

¹⁴ Regulatory Impact Statement: Legislative amendments to enable roadside oral fluid, 19 April 2023 (**2023 RIS**) at 6. See also IEPDD Report at 10–16.

in a driver's oral fluid or blood means they are always impaired. People respond to individual drugs, combinations of drugs and different dosages of drugs in different ways. In contrast to alcohol, there is not a clear linear relationship between dosages of drugs, when they are taken, and impairment.

- 4.9 On the same topic, the IEPDD, tasked with recommending statutory limits for drug concentrations related to impaired driving, has stated:¹⁵

[t]here is a paucity of studies that have directly addressed the issue of driving impairment after a given dose of a drug, let alone the complex relationship between the dose and the concentration in biological fluids that can be sampled routinely and used as forensic evidence (oral fluid and blood).

- 4.10 The IEPDD has further highlighted the difficulties of determining *per se* limits for drugs (whereby it is an offence to drive a vehicle with a concentration of identified drugs in the blood or oral fluid above a specified threshold) in a scientifically robust manner.¹⁶

- 4.11 A passage from the Law Society's 2021 submission bears repeating, relating to the difficulty for drivers in understanding their responsibilities and obligations:¹⁷

The lack of guidance about relevant criminal levels of qualifying drugs will confuse drivers as they will likely be unsure whether they can or should drive. There is also a risk that drivers may commit infringement offences even after taking careful steps to avoid becoming an impaired driver. In addition, uncertainty in the proposed regime may have perverse effects where a person decides not to take important prescription medication because of a fear that this may cause them to commit a driving offence.

- 4.12 To enable a punitive sanction such as a prohibition on driving for 12 hours or an infringement offence based on the mere presence of a specified drug in oral fluid, regardless of whether it actually affected the individual's ability to drive, is arbitrary. The Law Society considers this is unsatisfactory.

- 4.13 The Law Society recommends that a definition of an "impairment threshold" be added to the Bill, which sets the threshold at a level that is rationally and empirically connected with the degree of driver impairment.

Lack of consultation on relevant levels of a qualifying drug for an infringement offence

- 4.14 The Bill provides for the Minister of Police, not the legislature, to specify the thresholds at which a laboratory test will appear positive for the purpose of the drug driving infringement offences (the "positive evidential threshold").¹⁸ The Minister must be satisfied that any positive evidential threshold in respect of a particular listed qualifying drug is set at a level that indicates recent use of that drug.¹⁹ It is deemed sufficient for this purpose if the threshold aligns with the applicable threshold specified in the relevant New Zealand standard or joint Australian/New Zealand standard.²⁰

¹⁵ IEPDD report at 7.

¹⁶ IEPDD report at 14.

¹⁷ Law Society "Submission on the Land Transport (Drug Driving) Amendment Bill" (April 2021) at 2.2.

¹⁸ Bill, cl 22, proposing a new s 71GA(1)(b). The infringement offences are detailed at clauses 7-9.

¹⁹ New s 71GA(3).

²⁰ New s 71GA(4).

- 4.15 The Minister’s notice specifying positive evidential thresholds is secondary legislation, and there is no requirement in the Bill for public consultation on relevant levels of qualifying drugs for infringement offences.²¹ This lack of public consultation is a concern. In these circumstances, and in light of the uncertainties outlined above, it is particularly important that the threshold levels for offences under the Bill are subject to public consultation.
- 4.16 The Law Society also recommends that, at a minimum, public consultation is undertaken when setting the relevant thresholds for oral fluid testing.

Infringement offences imposing strict liability

- 4.17 The Bill includes infringement offences that shift the onus of proof onto the defendant. 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.²² The Bill thus creates strict liability offences. For the following reasons, the Law Society has concerns in relation to a strict liability regime based on OFTs alone.
- 4.18 A positive screening test at the roadside will require a sample of oral fluid to be sent to an approved laboratory for testing, with infringement notices only issued if the laboratory test detects the presence of any specified qualifying drug at a level indicative of recent use.²³ However, given the poor correlation between oral fluid and blood drug concentrations, the IEPDD has recommended that laboratory confirmation of blood concentrations follow a positive oral fluid screen.²⁴ This confirmation, provided for in the current legislation by affording an individual the right to elect a blood test after two positive OFTs, will be removed by the Bill.²⁵ The removal of this safeguard is concerning. The Law Society recommends the select committee reconsider this.
- 4.19 As currently drafted, the Bill accordingly risks both issuing infringements without a robust scientific basis, and limiting people’s ability to raise a defence. Some unimpaired drivers will fail drug tests and face penalties.²⁶ The Ministry notes that in the jurisdictions that provide for OFT, this is considered a justifiable response to addressing the harm of drug driving and deterring drug driving behaviour.²⁷ However, in the light of the issues outlined above, the Law Society does not consider the proposed approach in the Bill justifiable. The Bill of Rights implications, which relate to the right to be presumed innocent until guilt is proven, are discussed further below (para 5.10–5.11).

Defences

Medical defence

²¹ Under new section 71GA(2), the Minister of Police must consult the Minister of Transport and the Science Minister before making a notice.

²² Bill, cl 25, amending section 77A(2).

²³ Bill, cl 19, new section 71D.

²⁴ IEPDD report at 5 and 15–16.

²⁵ Bill, cl 19.

²⁶ Regulatory Impact Statement, Enhanced Drug Driving Testing, 28 July 2020 (**2020 RIS**) at 21.

²⁷ 2020 RIS at 21.

- 4.20 Section 64(1A) of the LTA provides a medical defence. However, it is not clear whether or how (as presently drafted) the defence can be applied in the context of an infringement offence, without raising the infringement to the level of court proceedings.²⁸ The Law Society considers this an inefficient method of dealing with a simple infringement notice and we understand that this will likely occur with relative frequency if the regime is implemented as proposed.
- 4.21 The Law Society recommends the select committee consider how to address this issue so that such an escalation for an infringement notice is not required.
- 4.22 We also note that, while not an offence, new section 11A(3) provides that a person may not drive or attempt to drive a motor vehicle if the concentration level of a listed qualifying drug in the person's oral fluid equals or exceeds the concentration level specified for that listed qualifying drug. Clause 26 then amends section 94A(1) to provide that an enforcement officer must forbid a person to drive a motor vehicle for a 12-hour period if the person has had two positive OFTs (or refuses to take an OFT).
- 4.23 The Law Society recommends amending clause 26 to insert a provision that section 94A(1) will *not* apply if the enforcement officer is satisfied that the person consumed the relevant qualifying drug in accordance with a prescription/administered by a health practitioner, and in accordance with instructions.
- 4.24 This would ensure better protection of human rights to allow a medical exception that is able to be presented roadside, perhaps by way of a valid medical prescription or current medical certificate, although we recognise that there will be practical difficulties associated with such a proposition.

Risks of disproportionate impact on Māori

- 4.25 The proposals risk inequitable consequences for Māori. Policy papers considering the Bill's likely impact on Māori identify the risk that the proposed OFT regime could have disproportionate negative outcomes for specific communities, including young people, Māori, lower socio-economic communities and rural communities.²⁹ Māori are already overrepresented in the justice system and, according to Ministry of Health survey data, more likely to use cannabis compared to non-Māori.³⁰ While it does not follow that Māori are any more likely than non-Māori to choose to drive while drug-impaired, the RIS acknowledges there is some risk in the OFT regime that certain groups, including Māori, could be unfairly targeted, and that risks of unconscious or systemic bias arise.³¹
- 4.26 The Ministry considered one advantage of creating infringement rather than criminal offences in this context to be that it mitigates the risk of Māori receiving criminal penalties for drug-impaired driving. However, there remains the potential for unpaid

²⁸ Land Transport Act 1998, s 64(1A).

²⁹ 2023 RIS at [37]–[38] and [55]–[59].

³⁰ 2023 RIS at [37]–[38] and [55], citing Ministry of Health “Cannabis Use 2012/2013: New Zealand Health Survey” (Ministry of Health, Wellington, 2015).

³¹ 2023 RIS at [57] and [62]; and see UPD | Ihi Research “Understanding Policing Delivery: Phase One Report” (August 2024) [upd-ihl-phase-one-report.pdf \(police.govt.nz\)](https://www.police.govt.nz/assets/Uploads/UPD-Ihi-Phase-One-Report.pdf); RNZ “[Māori men more likely to be stopped, tasered, prosecuted by police due to 'bias' and 'structural racism' | RNZ News](https://www.rnz.co.nz/news/maori/478484)” (21 August 2024).

fees and, additionally, the accumulation of driving demerit points to escalate drivers into the criminal justice system.³² Notwithstanding the commitment by agencies to developing an operational response to address concerns about potential bias, risks of the perpetuation of bias against Māori and of prejudicial outcomes for Māori remain concerning to the Law Society and are a further reason the changes should not proceed.

5 Inconsistency with the Bill of Rights

- 5.1 Several of the issues set out above in section 4 feed into concerns held by the Law Society about inconsistency of the proposals with the Bill of Rights. Altogether, three reports issued under section 7 of the Bill of Rights since the first OFT Bill was introduced in 2018³³ have identified issues with the proposed OFT regime.³⁴
- 5.2 In the Law Society's view, for the following reasons, aspects of the Bill are likely to be inconsistent with the rights to be:
- (a) secure against unreasonable search or seizure (section 21);
 - (b) not arbitrarily detained (section 22); and
 - (c) presumed innocent until proven guilty (section 25(c)).

Section 21 – freedom from unreasonable search and seizure

- 5.3 The Attorney-General has issued a section 7 report on the Bill.³⁵ This considers that OFT proposals engage the right to be secure against unreasonable search and seizure. Under the proposed regime, an enforcement officer can collect an oral fluid sample from a driver's mouth or, in certain situations, a blood sample. The collection of oral fluid constitutes a physical search of the person.³⁶ The regime allows officers to test all drivers without requiring any reason to suspect that the person is drug-impaired. In the Attorney-General's view, both sampling methods are a significant intrusion on bodily privacy, not outweighed by the public interest objective of the Bill. However, the OFT procedure would be less likely to be an unreasonable search and seizure if an officer was required to have reason to believe that a driver was impaired before carrying out the first OFT. A further seizure is involved in providing for a driver's keys to be taken to prevent them from driving, which may occur for failure to provide an oral screening test or blood test. This could likewise be unreasonable if it occurs without any reason to suspect the person has consumed a drug.³⁷

³² 2023 RIS at [55]–[59]. The Bill proposes an infringement penalty of \$200 and 50 demerit points. Land Transport (Random Oral Fluid Testing) Amendment Bill 2018 (59-1).

³³ 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); 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 Judith Collins "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Drug Driving) Amendment Bill" (29 July 2024).

³⁵ Hon Judith Collins "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Drug Driving) Amendment Bill" (29 July 2024) (**Attorney-General s 7 Report**).

³⁶ Attorney-General s 7 Report at [35] to [39].

³⁷ Attorney-General s 7 Report at [45].

5.4 The Law Society agrees with the Attorney-General that:

- (a) Undergoing one or more oral fluid screening tests will constitute a physical search of the person and the taking of an oral fluid sample (or, where applicable, a blood sample) is a seizure for the purposes of section 21.³⁸
- (b) The Bill's aim of acting as a deterrent and restraint on drug-impaired driving is a sufficiently compelling public policy objective to justify the use of some search and seizure powers.³⁹
- (c) However, the intrusion on an individual's privacy that arises from the taking of a bodily sample for the first oral fluid screening test is disproportionate where there is no basis to suspect the individual driving is under the influence of an impairing drug.⁴⁰
- (d) The subsequent laboratory-based evidentiary test does not mitigate the intrusion on an individual's privacy at the time of the roadside screening tests, in the absence of good cause to suspect a driver is impaired.⁴¹
- (e) As currently designed, the requirement to undergo one or more random compulsory OFTs and provide an oral fluid sample or blood sample is inconsistent with section 21.⁴²
- (f) The removal of a person's keys for failure to provide an oral screening test would, in the absence of any reason to suspect the person has consumed a drug, amount to an unreasonable seizure.⁴³

5.5 These conclusions are reinforced by several factors not addressed in the Attorney-General's report, namely the uncertainty as to the reliability of OFTs, the uncertainty as to the extent to which people are impaired in their driving after consuming listed qualifying drugs, and the uncertainty as to the overall effectiveness of random roadside testing in deterring drug driving.

- (a) *Uncertainty about the reliability of oral fluid testing.* Concerns relating to reasonableness of the procedure are heightened by uncertainty about its reliability. The Law Society shares the Privacy Commissioner's concerns about the OFT regime and the risk of inaccurate roadside screening tests.⁴⁴ The Ministry has assumed a 95 per cent accuracy of OFT devices.⁴⁵ The Law Society acknowledges that the Bill's requirement to carry out two positive screening tests before individuals are prohibited from driving for 12 hours is intended to provide a degree of safeguard against enforcement action being taken on the basis of false positive OFT results.⁴⁶ However, there remains a 1 in 20 chance of

³⁸ Attorney-General s 7 Report at [29]–[30].

³⁹ Attorney-General s 7 Report at [34].

⁴⁰ Attorney-General s 7 Report at [39].

⁴¹ Attorney-General s 7 Report at [40]–[41].

⁴² Attorney-General s 7 Report at [42].

⁴³ Attorney-General s 7 Report at [45].

⁴⁴ Departmental Disclosure Statement, Land Transport (Drug Driving) Amendment Bill, 16 July 2024 (**Departmental Disclosure Statement**) at [3.5.1].

⁴⁵ 2020 RIS at 5.

⁴⁶ Bill, cl 27.

false positives at the roadside.⁴⁷ According to the device manufacturers, a significant proportion of false-positives are due to operator error rather than device error.⁴⁸ This increases the likelihood that a second screening test will be a false positive (assuming the same enforcement officer conducts both screening tests).

- (b) *Uncertainty about the level at which drugs impair driving.* As discussed at paras 4.4 and 4.17, the IEPDD, the expert panel on drug driving tasked with recommending statutory limits for drug concentrations related to impaired driving, has identified the poor correlation between oral fluid and blood drug concentrations, and documented uncertainty arising from a “paucity of evidence” about the extent to which people’s driving is impaired after consuming listed qualifying drugs. Given this, the intrusive nature of OFT procedures is more likely to be disproportionate to the intended objective and less likely to be justified.
- (c) *Uncertainty about deterrent effect.* The Law Society agrees with the Privacy Commissioner that “there is a lack of evidence that the anticipated benefits from compulsory oral fluid testing for drugs are proportionate to justify the very serious privacy intrusion involved”.⁴⁹ Specifically, the evidence that the Bill will achieve its aim of deterring drug driving is not robust. The Ministry identifies limited empirical evidence on drug-driving deterrence and indicates relatively low confidence in the certainty of the evidence. The policy is based on an estimated deterrent impact of 25 per cent (i.e. drivers that use drugs and drive reduce their drug driving by 1 out of 4 trips).⁵⁰

5.6 These concerns undermine the rational connection between the search and seizure provisions of the OFT regime and the desired purpose of the regime. The resulting rights inconsistency is more likely to be considered unreasonable.

Section 22 – right not to be arbitrarily detained

5.7 The compulsory roadside testing regime provided for by the Bill involves detention, in the form of statutory restraints of a person’s movements accompanied by penalties for non-compliance. Roadside detention could last up to 30 to 40 minutes (although may be less), and longer could be required for those required to take a blood test.⁵¹ The Attorney-General concludes that similar issues arise to those discussed in relation to section 21. The reasonableness of prolonged detention is impacted by concerns relating to the accuracy of the technology currently available in OFT devices.⁵² On balance, a real risk arises of arbitrary detention.⁵³ Again, however, concerns would be mitigated 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 testing procedures.

⁴⁷ 2023 RIS at 3.

⁴⁸ 2020 RIS at 5.

⁴⁹ Departmental Disclosure Statement at [3.5.1].

⁵⁰ 2020 RIS at 8.

⁵¹ Attorney-General s 7 report at [55]–[57].

⁵² At [61].

⁵³ Attorney-General s 7 report at [62].

- 5.8 The Law Society agrees with the Attorney-General that:
- (a) The oral fluid screening test amounts to a detention for the purposes of section 22 of the Bill of Rights 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.⁵⁴ It does so in the absence of good reason to suspect a person has taken drugs.
 - (b) The Bill as drafted is inconsistent with the right not to be arbitrarily detained as affirmed in section 22 of the Bill of Rights.⁵⁵
 - (c) The error rate of OFT devices could lead to prolonged detention of individuals on the basis of inaccurate screening.⁵⁶
- 5.9 In the Law Society's view, the conclusion that detention for the purpose of conducting an oral screening test risks being arbitrary in these circumstances is further reinforced by the matters outlined above at para 5.5.

Section 25(c) – the right to be presumed innocent unless proven guilty

- 5.10 In the Attorney-General's view, while aspects of the Bill may engage the right to be presumed innocent until proven guilty, proposals are consistent with section 25(c) of the Bill of Rights because:⁵⁷
- (a) Infringement notices for drug driving will only be issued where the laboratory test detects the presence of any specified listed qualifying drug at a threshold specified by notice by the Minister of Police. This will be "at a level indicative of recent use, which is a reasonable proxy for impairment".⁵⁸
 - (b) A medical defence is 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.
- 5.11 For the following reasons, discussed above, the Law Society differs from this view and does not consider the reversal of burden of proof in the Bill as currently drafted to be justifiable.⁵⁹
- (a) Infringement offences contained in the Bill that shift the onus of proof onto the defendant constitute a prima facie limit on s 25(c). In the Law Society's view, the extent to which the positive evidential threshold for the purposes of an OFT can be considered a proxy for impairment is doubtful, and the Society's further concerns in relation to a strict liability regime based on OFTs alone (given the

⁵⁴ Attorney-General s 7 report at [52].

⁵⁵ Attorney-General s 7 report at [64].

⁵⁶ Attorney-General s 7 report at [62].

⁵⁷ Attorney-General s 7 report at [65]–[68].

⁵⁸ Attorney-General s 7 report at [67].

⁵⁹ See further 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) at [61]–[62]: "In my view, the limit placed on the right in s 25(c) by the introduction of these offences based on a testing regime that involves unreasonable powers of search, seizure, and detention, and is likely to be without sufficient checks to ensure the reliability of evidence, cannot be justified under s 5 of the Bill of Rights Act."

significant limitations and uncertainties of OFT devices) are set out above (paras 4.4–4.11).

- (b) The OFT regime as drafted also limits the defences which are available to people issued with an infringement notice. As earlier discussed, the Bill proposes to remove the right for a person who has returned two positive oral fluid tests to elect to provide blood instead of oral fluid for the purposes of an evidential test.⁶⁰ While, as noted by the Attorney-General, a medical defence is available, the defence as it currently stands does not appear to be worded in a way that would make it available at the roadside prior to the necessary evidential testing leading to commencement of “proceedings for an offence” (para 4.19).⁶¹ The imposition on drivers seeking to raise the defence is therefore significant, raising significant doubt about the reasonableness of the prima facie limit on section 25(c).

6 Recommendations

6.1 The Law Society recommends that the Bill does not proceed. However, if it does proceed, the Law Society invites the select committee to consider amending the Bill to incorporate the following additional safeguards:

- (a) Adding a clause requiring the Minister to give a Notice like the Land Transport (Blood Specimen Collecting Instrument and Procedure) Notice 2014 with corresponding provisions regarding oral fluid samples.
- (b) Inserting a definition of an appropriate ‘impairment threshold’, at a level rationally and empirically connected with the degree of driver impairment.
- (c) Relevant thresholds should, at a minimum, be the subject of public consultation.
- (d) Considering an alternative method of resolving an infringement offence when a medical defence is proposed.
- (e) Amending clause 26 to insert a provision that section 94A(1) will *not* apply if the enforcement officer is satisfied that the person consumed the relevant qualifying drug in accordance with a prescription/administered by a health practitioner, and in accordance with instructions.
- (f) Reconsidering the decision to remove right to elect a blood test.

Nāku noa, nā



Taryn Gudmanz
Vice President

⁶⁰ Cl 19, new section 71D and explanatory note.

⁶¹ Land Transport Act 1998, s 64(1A).