

25 February 2021

Committee Secretariat  
Transport and Infrastructure Committee  
Parliament Buildings  
Wellington

Submitted online

## **Land Transport (Drug Driving) Amendment Bill**

Dear Committee Members

The New Zealand Medical Association (NZMA) wishes to submit on the above Bill. The NZMA is New Zealand's largest medical organisation, with about 5,000 members from all areas of medicine. The NZMA aims to provide leadership of the medical profession, and to promote professional unity and values, and the health of all New Zealanders. We recognise the principles of te Tiriti o Waitangi and the special obligations to Māori, particularly to ensure equity and active protection. Current disparities in health outcomes between Māori and non-Māori are unacceptable. The NZMA is committed to advocating for policies in health and the social and wider determinants of health that urgently address these disparities and contribute to equity of health outcomes. Our submission has been informed by feedback from our Board, Advisory Councils and members.

### **General Comments**

1. We note that this Bill would establish a new random roadside oral fluid drug testing regime that would sit alongside the compulsory impairment test (CIT) approach to drug driving. Under the new regime, a police officer would be able to stop any driver of a motor vehicle and administer an oral fluid test without cause to suspect a driver has consumed drugs. We note that the Bill proposes that drivers who fail two consecutive oral fluid tests would incur an infringement penalty. Drivers who fail two consecutive oral fluid tests can elect to undertake an evidential blood test and would be subject to both infringement and criminal penalties, depending on the levels of drugs in their blood. Criminal limits equivalent to a blood alcohol concentration (BAC) of 80mg/100mg will be established for the most prevalent drugs used by New Zealand drivers, subject to the available evidence and advice of an Expert Panel. These substances will include THC, methamphetamine, benzodiazepines, MDMA, opiates and cocaine.
2. Although robust epidemiological data on the extent to which drug driving contributes to road traffic accidents are lacking, it is reasonable to infer from available data that drug driving is a significant issue in New Zealand. Accordingly, we welcome evidence-informed measures to deter drug driving and make our roads safer. We note, however, that the regulatory impact

statement acknowledges the low evidence certainty for roadside drug testing to act as a deterrent to drug driving.<sup>1</sup> While we support the Bill's objectives and consider that it may go some way towards making our roads safer despite the limited evidence of a deterrent effect, we share concerns with others in the sector that the Bill, as it stands, has some flaws and weaknesses. These stem in part from our view that the science to support roadside oral fluid testing is not quite sufficiently advanced although it is rapidly evolving. Key concerns include the inability of oral fluid testing to detect impairment, the absence of well-defined threshold levels and impairment limits for many drugs, and the potential for the Bill to exacerbate inequities for Māori in the criminal justice system. We elaborate on these concerns in the following paragraphs and provide some suggestions for a modified approach to drug driving for the Committee's consideration.

### **Key concerns**

3. A major concern with roadside oral fluid drug testing is that while such tests detect the presence or absence of a small panel of common drugs, they do not detect impairment and correlate poorly with actual blood concentration. Further complicating matters is that unlike with alcohol, there is often not a clear linear relationship between dosages of many drugs, time from when they are taken, and impairment. Under the Bill, people could receive infringements for drug driving despite not being impaired. The Attorney-General has concluded that provisions of the Bill are inconsistent with the rights to be secure against unreasonable search and seizure, the right not to be arbitrarily detained, and the right to be presumed innocent until guilty as affirmed in ss21, 22 and 25(c) of the Bill of Rights Act.<sup>2</sup> While a person that fails 2 consecutive oral fluid tests may elect to have a blood test, the Attorney-General notes this is not an effective procedural safeguard as there are significant disincentives to requesting it. Given that many drugs are detectable in blood long after they have been taken and any impairing effects have worn off, a blood test that detects any level of a qualifying substance would still lead to an infringement offence under the Bill as proposed.

4. We have concerns that the Bill could exacerbate inequities for Māori in the criminal justice system. While infringement level offences are the first tier of sanctions, several pathways under the Bill could lead to criminal offences. Given the considerable length of time needed to conduct roadside oral fluid testing (up to 15-20 minutes for two tests), it is difficult to envisage random drug testing checkpoints at roadblocks where all drivers are stopped and tested (as occurs with alcohol breath testing) given the disruption to the traffic this would cause. It is more likely that police will stop and drug test individually selected drivers, making it probable that Māori will be disproportionately targeted under this Bill. We note that the regulatory impact statement states: *"Without the operational controls inherent in checkpoint type operations, there is a risk that unconscious bias could lead to disproportionately more Māori men and women being detained for drug testing."* It is also possible that positive oral fluid testing could be used by police to undertake further actions under the Misuse of Drugs Act such as vehicle searches for drugs. Other considerations relevant to our concerns include that Māori were 2.2 times more likely to report using cannabis in the last 12 months than non-Māori.<sup>3</sup>

5. While a large number of psychoactive substances can impair driving, oral fluid testing devices will only test for the most prevalent drugs or drug classes in New Zealand. A possible unintended consequence of the proposed Bill could be to encourage people who use cannabis to switch to more harmful substances such as synthetic cannabinoids to evade detection by roadside oral drug testing, a risk that has been identified in the regulatory impact statement.

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<sup>1</sup> <https://www.treasury.govt.nz/sites/default/files/2020-04/ria-transport-edd-apr20.pdf>

<sup>2</sup> [https://www.parliament.nz/en/pb/sc/business-before-committees/document/BORA\\_101339/report-of-the-attorney-general-under-the-new-zealand-bill](https://www.parliament.nz/en/pb/sc/business-before-committees/document/BORA_101339/report-of-the-attorney-general-under-the-new-zealand-bill)

<sup>3</sup> <https://www.health.govt.nz/system/files/documents/publications/cannabis-use-2012-13-nzhs-may15-v2.pdf>

6. Numerous prescription medicines can impair driving. We note that the Bill extends the existing medical defence to be available to drivers who have taken prescription drugs “in accordance with their prescription and any instructions from a health practitioner” and have provided a blood sample through an evidential blood test. We have some concerns about the resource implications of this, particularly for GPs that may be required to give evidence. While we support campaigns to help health practitioners better inform patients about how medications and other drugs can affect driving, we seek clarification on whether there may be liability implications for health practitioners that prescribe such medicines where a patient is found to have failed an evidential blood test for drug-impaired driving.

7. Although the Bill purports to take a harm minimisation approach to drug driving, we are concerned that the health-based interventions it contains are limited and take effect too late. For example, compulsory referrals for assessment to drug education or rehabilitation programmes are proposed for second criminal offences in some situations and all third and subsequent criminal offences. Our view is that health-based interventions should occur much earlier on.

### **Conclusion and recommendations**

8. The NZMA welcomes effective evidence-informed measures to deter drug driving in New Zealand. We consider the current Bill may go some way towards this objective. Ideally, roadside drug testing should be able to detect impairment from all drugs. As the science to support oral roadside drug testing continues to advance, it is important to ensure that measures such as those proposed in the Bill do not unduly infringe on individual rights, exacerbate inequities in the criminal justice system or drive more dangerous patterns of drug use. To mitigate some of the concerns we have identified above, we provide the following recommendations for the Committee’s consideration.

9. The Government needs to commit funding for drug driving research that explicitly focuses on effective methods of detecting impairment rather than simply the presence of a drug or its metabolites. The legislation before the Committee should allow for the introduction of new reliable methods of detecting impairment as they emerge.

10. The Bill needs to be reoriented towards a more proactive health-based approach. Health-based interventions for drug driving should occur far earlier on, perhaps even starting at a person’s very first infraction under the legislation. A stepwise tiered approach could be used whereby alternatives to fines such as the option to attend an education and/or counselling session or to undertake community service could be offered for a first-time infraction.

11. If the Bill is implemented, it is essential to ensure robust and comprehensive monitoring of all impacts including on deterrence of drug driving, patterns of drug use and driving, and to evaluate data on offences by ethnicity and age group. High quality baseline data need to be collected before the measures in the Bill take effect. It is also important to evaluate the extent to which roadside oral drug testing leads to offences under the Misuse of Drugs Act, and to identify whether certain populations are disproportionately being targeted

12. It is essential to ensure that police will have adequate resourcing to conduct roadside oral drug testing. The implementation of roadside oral testing for drug driving must not occur at the expense of a reduction in testing for alcohol impaired driving which remains a larger problem and for which existing levels of roadside testing are inadequate.

We hope our feedback is helpful and would like to request the opportunity for an oral presentation to speak to this submission.

Yours sincerely

A handwritten signature in blue ink that reads "K. Baddock". The signature is written in a cursive style with a large initial "K" and a decorative flourish at the end.

Dr Kate Baddock  
NZMA Chair