

## **Regulatory Impact Statement**

### **ALCOHOL AND DRUG TESTING OF OFFENDERS AND BAILEES IN THE COMMUNITY**

#### **Agency disclosure statement**

This Regulatory Impact Statement was prepared by the Department of Corrections and Police. It provides an analysis of options for introducing an alcohol and/or other drug testing regime for offenders managed in the community and bailees.

In its pre-election policy statement on law and order, the National Party signalled its intention to introduce “random drug and alcohol testing, where being drug free is a condition of bail, home detention, or other community sentences”. It would not be appropriate to rely on existing provisions in the Sentencing Act 2002, the Parole Act 2002 and the Bail Act 2000 to introduce an alcohol and/or other drug testing regime.

The analysis of options for fulfilling this commitment is subject to certain constraints.

- Limited data is available to inform predictions about the impact of different options on justice sector costs.
- Limited data is available on the future cost of technology.

Suzanne Kennedy  
Chief Policy Adviser  
Department of Corrections

## Status Quo

- 1 Drug and alcohol misuse is a major driver of crime. Forty-eight per cent of offenders report that they have been using at least one drug at the time of their arrest<sup>1</sup> and approximately two thirds<sup>2</sup> of offenders on home detention, intensive supervision, and supervision orders have identified alcohol or other drug abuse or addiction issues.
- 2 The courts and the Parole Board may impose a condition requiring abstinence from consuming or possessing alcohol and/or other drugs ('abstinence conditions') on:
  - offenders serving sentences or orders in the community;
  - bailees; and
  - offenders released from prison or subject to an extended supervision order.
- 3 Every year, around 5,000 offenders on community sentences and orders<sup>3</sup> and around 15,000 bailees have an abstinence condition imposed. In very rare cases, abstinence conditions include a requirement to undergo testing for the purpose of monitoring the individual's abstinence.
- 4 Police currently test a few high risk bailees. Offenders serving sentences or orders in the community may sometimes be tested for alcohol and other drugs through participation in treatment programmes. However, monitoring of compliance with abstinence conditions is limited in practice because there is no legal authority to require offenders and individuals on bail to submit to testing.
- 5 Testing for the presence of alcohol and other drugs to improve compliance with abstinence conditions is widely used in other jurisdictions, such as the United Kingdom, United States and Australia.

## Problem definition

- 6 There are a group of offenders and bailees in the community whose offending is directly related to their use of alcohol and/or drugs. Many of these offenders and bailees are subject to abstinence conditions as part of their sentence or order. Some of these offenders and bailees present a higher risk than others in terms of the harm caused by their offending, for example violent offending within the family or wider community.

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<sup>1</sup> New Zealand Arrestee Drug Abuse Monitoring (NZ-ADAM) 2007 Annual Report. New Zealand Police.

<sup>2</sup> Analysis by the Department of a random selection of pre-sentence reports and offender plans for 200 offenders on home detention, intensive supervision and supervision sentences between July 2010 and June 2011, showed that 68% of these offenders had identified alcohol and drug abuse.

<sup>3</sup> Includes offenders released from prison on parole or on release conditions, sentenced to home detention, subject to extended supervision orders, or sentenced to supervision or intensive supervision.

- 7 The imposition of an abstinence condition plays an important role in the prevention of re-offending. Significant effort is currently made by front line staff to ensure that offenders and bailees comply with abstinence conditions. However, the ability to test offenders or bailees for the presence of alcohol and/or drugs in this context<sup>4</sup> is currently limited by legislation.
- 8 Testing for alcohol or drugs encroaches on the right to be secure against unreasonable search and seizure (as affirmed by section 21 of the Bill of Rights Act 1990). Without legislative clarification there is the possibility of successful legal challenge whenever testing is carried out.

### **Objective**

- 9 This policy will contribute to the Government's commitment to public safety and reducing crime and re-offending by increasing compliance with abstinence conditions by high risk offenders and bailees in the community. This will be done by enhancing current practice through the introduction of an alcohol and drug testing regime.
- 10 This work will support other Government initiatives with a similar purpose, such as expanded alcohol and drug treatment programmes and the Alcohol and Other Drug Treatment Court.

### **Regulatory Impact Analysis**

- 11 The status quo and two options for introducing an alcohol and other drug testing regime are assessed against the following three criteria:
  - a) Effectiveness – to what extent would the testing regime be effective at reducing harm to the community caused by use of alcohol and/or other drugs?
  - b) Cost – what would be the cost of the testing regime to the Department of Corrections and Police, as well as the wider Justice Sector?
  - c) Ease of implementation – what are the implementation risks and implications of the option?
- 12 Effectiveness has been given the greatest weight in the analysis because the primary objective is to improve public safety and reduce crime.
- 13 The cost indications are based on methods for alcohol and drug testing currently in use in New Zealand such as the electronic alcohol detection bracelets used by the Alcohol and Other Drug Treatment Court pilot in Auckland and drug testing costs through private laboratories. More accurate costs will be available once the current procurement process for electronic monitoring is in its final stages.

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<sup>4</sup> Legislation specifically allows the Department of Corrections to alcohol and drug test offenders in prison, and NZ Police to alcohol and drug test drivers of motor vehicles.

## **Status quo**

- 14 Currently there are a small number of tests conducted on individuals that are ordered by the courts and parole board. These tests are not targeted in any systematic way. There is also no explicit legislative authority to require offenders or bailees subject to an abstinence condition to submit to testing. Any implied authority to conduct testing could be in conflict with the right to be secure against unreasonable search and seizure (as affirmed by section 21 of the Bill of Rights Act 1990).
- 15 The status quo runs the risk of not being able to identify when someone has failed to comply with their abstinence condition as well as not providing a sound legal basis for testing.
- 16 There would be negligible costs associated with this option.
- 17 The status quo has been ruled out as a viable option given how little can be achieved by agencies without a clear legal basis for requiring individuals to submit to testing.

## ***Non-regulatory option: greater use of community support to prevent alcohol and drug use***

- 18 A non-regulatory option to increase compliance with abstinence conditions was considered. This would be to use community support in the form of interventions such as motivation and relapse prevention from community providers and Department of Corrections' staff to support individuals with an abstinence condition to comply with their condition.
- 19 The cost of this option would range from around \$2 million per year to deliver an intensive intervention to 450 high risk individuals per year to over \$40 million per year to deliver a short intervention to all 20,000 individuals with an abstinence condition. These costs do not include the set up costs necessary to provide the capability and capacity to deliver the increased volume of interventions.
- 20 The non-regulatory option of increasing community support is likely to reduce crime through increasing effective interventions that support abstinence. However this non-regulatory option would not detect when an individual poses a risk to public safety by not complying with their abstinence condition. This option would also require significant effort to develop the capability and capacity to provide interventions to up to 20,000 individuals per year.

## ***Regulatory option (preferred option): explicit legislative authority to require offenders and bailees with abstinence conditions to submit to testing***

- 21 This option would involve legislative change explicitly authorising the Department of Corrections, and the Police, to require offenders serving sentences and orders in the community, and bailees, to submit to testing for compliance with that condition.

- 22 This option would significantly improve public safety and reduces crime through being able to target the highest risk offenders, and bailees with intensive testing, thereby increasing the likelihood of detection. Research from the United States indicates that where high risk drink drivers are aware that the chances of detection are very high, recidivism can reduce from as high as 36 per cent to nil.<sup>5</sup> Australian jurisdictions that have been testing offenders for some time have concluded, as a result of their experience, that targeted testing of those at highest risk of re-offending is the most effective way to improve public safety.<sup>6</sup> On this basis, allowing the Department of Corrections and Police to focus resources according to risk would ensure the testing regime maximises the reduction in harm to the community in a sustainable way.
- 23 Limits on eligibility for testing and other operational matters would be set out in rules made by the Chief Executive of the Department of Corrections (in respect of offenders serving sentences and orders in the community) and the Commissioner of Police (in respect of bailees).
- 24 First year costs, including set up and operating costs, are estimated to be just over \$3 million. Second and subsequent years are estimated to cost just over \$2 million per year. These cost indications are based on methods for alcohol and drug testing currently in use in New Zealand, such as the electronic alcohol detection bracelets used by the Alcohol and Other Drug Treatment Court pilot in Auckland and drug testing costs through private laboratories. More accurate assumptions and costs will be available once the current joint Police and Department of Corrections procurement process for electronic monitoring is in its final stages.
- 25 At any time around 255 high risk<sup>7</sup> people would be tested (105 electronically monitored bailees and 150 offenders). As many of those tested would be on bail or sentences and orders of less than one year, it is expected that the average number of individuals tested during a full year would be 475.
- 26 At this stage it is assumed that the testing for alcohol will be carried out primarily through the use of an alcohol monitoring technology to be determined through the current justice sector electronic monitoring procurement process. It is proposed that those subject to testing not be given the option of an evidential breath or blood test (as is the case for drivers who fail an alcohol breath test). This is because there is no requirement for the level of alcohol usage to be ascertained, just an indication that the abstinence order has been breached, that is, that some alcohol has been consumed.
- 27 The number of positive tests that result in arrest, prosecution for breach and resulting custodial sentences are estimated to result in an additional ten prison beds being used per year. Electronically monitored bailees are not likely to significantly impact on prison beds (less than one prison bed per year). This is

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<sup>5</sup> *Effectiveness of the SCRAM Alcohol Monitoring Device: a Preliminary Test*. Drug Court Review, Vol. VI, 2.

<sup>6</sup> November 2012 meeting of the Corrections Services Administrators Council Working Group.

<sup>7</sup> High risk is considered a person who poses a high risk of causing harm to the community. This would also include persons identified under the Prevention First strategy.

a result of time served on remand coming off any sentence imposed and therefore not increasing the number of prison beds required.

*Comparative analysis of options*

Option	Effectiveness	Cost	Ease of implementation
<b>Status quo</b>	<ul style="list-style-type: none"> <li>• Some testing occurs and there are some incentives to abstain</li> <li style="text-align: center;"><b>but</b></li> <li>• Increase in scale of testing is risky without legislative authority</li> <li>• Minimal improvement to public safety as testing does not target the highest risk to the community</li> </ul>	<ul style="list-style-type: none"> <li>• Small cost to Police of occasional testing and to the Department of Corrections through funding of treatment providers</li> </ul>	<ul style="list-style-type: none"> <li>• No change in operations</li> <li>• Avoids the need for legislative change</li> </ul>
<b>Non-regulatory option – use of community support</b>	<ul style="list-style-type: none"> <li>• Effective at reducing crime through using effective interventions</li> <li style="text-align: center;"><b>but</b></li> <li>• Minimal improvement to public safety as it would not be able to detect when an offender poses an increased risk to the public by breaching their abstinence condition</li> <li>• Interventions only successful for some participants</li> </ul>	<ul style="list-style-type: none"> <li>• Range from around \$2 million per year for a programme targeted to 450 high risk individuals to over \$40 million per year for a short programme for all 20,000 individuals with abstinence conditions<sup>8</sup></li> </ul>	<ul style="list-style-type: none"> <li>• It would require developing capability and capacity to deliver between 450 and 20,000 extra interventions per year</li> </ul>
<b>Regulatory option (preferred option)</b>	<ul style="list-style-type: none"> <li>• Effective at reducing crime through on-going monitoring of individuals</li> <li>• Improves public safety by detecting when an offender poses an increased risk to the public by breaching their abstinence condition</li> </ul>	<ul style="list-style-type: none"> <li>• Estimated first year cost of \$3 million with subsequent annual cost of around \$2 million per year for testing those at the highest risk of causing harm and those deemed high priority<sup>9</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Would require legislative change</li> </ul>

**Conclusion and recommendation**

28 The option that would best and most sustainably enable agencies to protect the public from harm is a testing regime that targets around 225 offenders and 250 defendants on electronically monitored bail per year who are subject to abstinence conditions and who pose a high risk to public safety if they use these substances.

29 Intensive targeted testing is most effective at improving public safety because it focuses testing on those who pose the highest risk of breaching an abstinence condition and causing the greatest harm if they do so. Research in the United States has shown that the high likelihood of detection is a key factor in changing offender behaviour. This is consistent with information obtained from

<sup>8</sup> Illustrative costs based on the cost of providing an intensive programme and a short motivational programme.

<sup>9</sup> Based on indicative costs of electronic monitoring in use by the Pilot Alcohol and Other Drug Court

Australian officials, who suggest frequent testing of the highest risk individuals is most effective in detecting and deterring use of alcohol and other drugs.

## **Consultation**

- 30 The following agencies have been consulted and their comments taken into account in the preparation of this Regulatory Impact Statement: the Ministry of Justice, the Treasury, the Ministry of Health, the Health Promotion Agency, the Ministry of Social Development, the Ministry of Women's Affairs, the Ministry of Transport, Te Puni Kōkiri, and the Office of the Privacy Commissioner. The Department of Prime Minister and Cabinet has been informed.
- 31 The Treasury, Ministry of Justice and Te Puni Kōkiri asked for increased clarification on the level of certainty in the costs and if they had accounted for costs to the whole Justice Sector. The financial implications have been updated to clarify that the costs are indicative, based on current information and they include all costs to the Justice Sector. The section was also updated to reflect that more accurate costs would be available towards the end of the current Police and Department of Corrections' procurement process for electronic monitoring. Feedback from other agencies was incorporated in minor changes.

## **Implementation**

- 32 Amendments would need to be made to the Sentencing Act 2002, the Parole Act 2002 and the Bail Act 2000. If legislation is introduced by the end of 2013, it could be passed and the policy implemented in 2014.
- 33 It is proposed that the Sentencing Act 2002, the Parole Act 2002 and the Bail Act 2000 be amended in order to:
- require all offenders and bailees serving a sentence or order in the community, and who are subject to an abstinence condition imposed by the Court or Parole Board, to submit to alcohol and/or drug testing if directed by New Zealand Police or the Department of Corrections;
  - establish principles under which alcohol and drug testing should operate, such as:
    - the method of testing and the testing procedure should involve the minimum intrusion on the person being tested that is practicable and consistent with the purpose of conducting the testing (which may include continuous testing through electronic means);
    - testing should be conducted in a manner that affords the person being tested as much privacy and dignity as is practicable;
    - testing will not occur more frequently than is reasonable to deter the use of the prohibited substances;

- require the Chief Executive of the Department of Corrections and the Commissioner of Police to make and publish rules relating to alcohol and drug testing methods, procedures and eligibility criteria for the target group;
- make the Rules Deemed Regulations for the purposes of the Regulations (Disallowance) Act 1989, but not the purposes of the Acts and Regulations Publication Act 1989;
- make an offender's or bailee's non-compliance with an alcohol and/or drug test a breach of their abstinence condition.

#### *Holding Offenders and Bailees to Account*

- 34 The response to positive tests for use of alcohol or drugs would be based on the sentence or order, an assessment of risk and the professional judgement of Corrections and Police staff.
- 35 Where an offender returns a positive test and there is significant risk to the public of serious and imminent harm, along with a breach of the conditions or order, Corrections would request Police arrest the person without warrant under section 80V of the Sentencing Act 2002 or section 75 of the Parole Act 2002. If the offender is on parole and eligible for recall, the probation officer may seek to have the offender recalled to prison. Any bailee who returns a positive test would be arrested and taken before the next available court for a reconsideration of bail hearing.
- 36 In exceptional circumstances a rehabilitative response maybe provided to suitable offenders. This could range from relapse prevention to additional treatment and would be focused on maximising the benefits from treatment. As all of those tested would be high risk and likely already prioritised for intervention to address they alcohol or drug use, this proposal would not impact on existing treatment services.

#### *Proposed Testing Regime*

- 37 This proposal for alcohol and drug testing of offenders and bailees in the community is based on deploying the most effective technology and regime to manage an offender's or bailee's risk. In circumstances where technology is not viable (for example where network coverage is unreliable and in remote rural locations), Police will conduct breath tests for the targeted offenders or bailees as per the agencies joint management plan for that offender. Testing may be limited in terms of times and duration of testing, but would enhance current practice with a focus on preventing harm to the community.
- 38 Limited drug testing would be carried out using a range of methods, such as urine and blood analysis. It is likely that this would be undertaken by private laboratories and those offenders and bailees subject to drug testing would be directed to attend the laboratory and provide a sample for analysis. To be effective, this (limited) testing would occur at regular and random intervals.



## **Monitoring, evaluation and review**

- 39 Both the Department of Corrections and Police intend to monitor the results of testing. The overall performance of the testing programme and its outcomes over the course of its implementation will also be assessed. Monitoring will include the rate of conviction/reconviction for tested individuals relative to those for comparable individuals not subject to testing.