



NEW ZEALAND
LAW SOCIETY

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LAND TRANSPORT (ADMISSIBILITY OF EVIDENTIAL BREATH TESTS) AMENDMENT BILL

19.12.12

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Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Land Transport (Admissibility of Evidential Breath Tests) Amendment Bill (Bill).
2. The Law Society recommends that the Bill not proceed (or proceed only if amended), for the reasons set out below.

Clause 4: Section 77 amended (Presumptions relating to alcohol testing)

3. The Bill would amend section 77 of the Land Transport Act 1998 (Act) to provide that when a person fails an evidential breath test, but elects to take a blood test, the evidential breath test result will be admissible against them in a prosecution if a blood specimen cannot be taken “for any reason”.
4. In the Law Society’s submission, this would be unwelcome, for two reasons:
 - Where a blood specimen is unable to be taken because of the actions of a motorist, the motorist can already be held criminally liable, and the evidential breath test is already admissible.
 - It is contrary to principle for motorists to be held criminally liable for what may in fact be the failings of an enforcement officer or a medical practitioner.

Where motorist at fault for failure to take a blood specimen, the motorist is already liable

5. Under the current law, a motorist who elects a blood test cannot revoke or withdraw that election: see *Police v Irwin*.¹ A motorist who elects a blood test, and who then refuses to co-operate with the taking of a blood specimen, commits an offence under section 60 of the Act. This carries the same consequences (conviction, same maximum penalties, loss of licence etc) as a conviction for driving with excess breath alcohol.
6. In addition, section 77(3)(b)(ii) of the Act already provides that the result of the evidential breath test remains admissible in a standard breath alcohol prosecution under section 56(1) if the motorist does not comply with the requirement to permit a blood sample to be taken.

¹ *Police v Irwin* (1990) 6 CRNZ 171 (HC).

7. So, if a blood specimen cannot be drawn *because of the actions of a motorist*, he or she can already be prosecuted under either section 56(1) or section 60. There is no need for the Bill to enact a provision allowing the prosecution to fall back on the evidential breath test *in respect of conduct by a motorist* after a blood test is elected.

Wrong for a motorist to be held criminally liable for failings of an enforcement officer or medical practitioner

8. The only change the Bill would make is to allow a prosecution against a motorist who has elected a blood test, but from whom a blood sample cannot be taken for reasons that have nothing to do with the motorist.
9. There is no principled basis to fall back on the evidential breath test if a blood specimen cannot be taken for some reason other than a motorist's non-compliance. The option of a blood test is an important safeguard, and the breath/blood alcohol legislation imposes a duty on enforcement authorities to have appropriate facilities and means of collecting a blood specimen. If for any reason an enforcement authority has not provided appropriate facilities then it is appropriate that the case should fail.
10. The result of an evidential breath test is deemed to be conclusive evidence. The result and accuracy of the device cannot be challenged: sections 64(4) and 75A of the Act. It is virtually unheard of for an element of an offence to carry a conclusive presumption. Machines are not infallible, and nor are the humans operating them. Despite this, the legislation provides that this ingredient of the standard breath alcohol offence cannot be challenged.
11. That is prima facie a breach of the right to be presumed innocent in section 25(c) of the New Zealand Bill of Rights Act 1990 (Bill of Rights). As things stand it is the existence of the right to elect a blood test that militates against sections 64(4) and 75A being an unreasonable limit on the presumption of innocence.
12. In *Aylwin v New Zealand Police*² the Supreme Court noted the importance of the right to a blood test. There are numerous benefits to a blood test:
- it is a far more reliable, accurate and accepted method of analysis;
 - it provides the ability to challenge material human errors in the method of taking the evidence;

² *Aylwin v New Zealand Police* [2009] 2 NZLR 1 (SC).

- it provides the ability to challenge the accuracy of the analysis of the evidence by cross-examining the ESR scientist; and
 - it provides the opportunity to have an independent scientist test the second part of the blood specimen.
13. The results of blood tests will almost always satisfy anyone, but because the presumptions in sections 75 and 76 are rebuttable, not conclusive, a blood test affords the rights under sections 25(a), 25(c) and 25(e) of the Bill of Rights, which protects the public confidence in the integrity of the system of justice.
14. In addition, the rule of law requires strict or reasonable compliance by enforcement officers with the breath/blood alcohol procedures. If a blood specimen cannot be taken because of the failings of enforcement authorities or medical practitioners then it would condone non-compliance with the law were the result of the evidential breath test able to be reverted to. It would result in the inappropriate acceptance of errors that may be unreasonable, being outside the reasonable compliance provision.
15. It should also be remembered that a motorist is detained while awaiting and undergoing a blood test. The delay can sometimes be lengthy. If the evidential breath test is reverted to because of the failings of enforcement authorities then such a delay will have been unnecessary and there will have been an arbitrary detention.
16. If the Bill becomes law then there will be no safeguard for those motorists from whom a blood test cannot be taken, not through their fault, but for unrelated reasons. Moreover, because the motorist who refuses a blood test can already be prosecuted under section 56(1) or section 60, only a compliant motorist electing a blood test will be confronted with the draconian effect of sections 64(4) and 75A. Those motorists will have the safeguard of a blood test taken away, through no fault of their own, and they will then have no ability to challenge the result or accuracy of the evidential breath test. The law change proposed could only be reasonable if the presumption that the results of evidential breath tests are accurate was a rebuttable presumption, rather than a conclusive one.
17. The Attorney-General issued a section 7 report under the Bill of Rights, concluding that the Bill is inconsistent with the right to be presumed innocent affirmed in section 25(c) and cannot be justified under section 5 of the Bill of Rights.³ The Law Society agrees with that conclusion.

³ 17 October 2012, http://www.parliament.nz/NR/rdonlyres/DAAEB228-0259-4F96-8BBA-5365DA5BE432/246873/DBHOH_PAP_23683_AttorneyGeneralReportoftheunderthe.pdf.

Amending “for any reason”

18. In his first reading speech, the Member sponsoring the Bill indicated that its genesis was a District Court decision, *Police v Childs*, in which a person avoided conviction because their previous drug use had created a situation where finding a vein from which to draw blood was near impossible. That decision is somewhat concerning, but the Bill, as drafted, goes significantly beyond what is necessary to remedy it. The Member indicated he was receptive to the suggestion by a submitter that the words “any reason” in clause 4 should be narrowed, to identify that the reason should be of a medical nature, and that making that amendment would prevent a situation where, for instance, no testing equipment or no testing officer was available to take a blood sample.⁴
19. The Law Society would welcome an amendment limiting the effect of the Bill to circumstances where a medical reason is the cause of the failure to obtain blood. However, while that would be a substantial improvement over the present form of the Bill, the Law Society considers the Bill as so amended would still be flawed.
20. The problem is the infallibility with which the law treats the assessment of breath alcohol by fallible machines. Intravenous drug users are not the only people from whom it may be medically difficult to obtain a blood sample. People with certain medical conditions or illnesses will also be affected, and anyone for whom the obtaining of blood is difficult for a medical reason will have the one mechanism the law allows to establish their innocence removed from them. However narrowly tailored this provision is, it cannot escape this result.

Conclusion

21. A motorist who elects a blood test and then abuses the process can already be prosecuted under section 56(1) or section 60 of the Act. In other circumstances the inability to take a blood specimen will almost always be because of the failings of enforcement authorities (albeit sometimes unavoidable). It is extremely rare for that to occur. Where it does happen, there are powerful reasons to justify a prosecution not proceeding or failing.
22. The Law Society believes the Bill is unnecessary, and recommends that it should not proceed.
23. If the Bill is to proceed, we recommend clause 4(2) be amended to read ... “for any reason of a medical nature”.

⁴ 7 November 2012, Hansard Vol 685 at 6426.

24. The Law Society wishes to be heard.

A handwritten signature in black ink, appearing to read 'Jonathan Temm'. The signature is written in a cursive style with a large, looping initial 'J'.

Jonathan Temm
President
19 December 2012