



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

LAND TRANSPORT AMENDMENT BILL

17/02/2014

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Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Land Transport Amendment Bill (Bill).
2. The Law Society has read the Attorney-General's section 7 report and shares the concerns expressed in it that proposed new section 70A(2) is inconsistent with the right to be presumed innocent affirmed in section 25(c) of the New Zealand Bill of Rights Act 1990. The Law Society recommends that new section 70A(2) be amended to enable those with a breath alcohol reading of 251-400mcg/L to elect a blood test.

New infringement regime – adult legal alcohol limits

3. The Bill creates new infringement offences, punishable by fines and demerit points, relating to adults driving while having a breath alcohol level of 251-400mcg/L of breath, or a blood alcohol level of 51-80 mg/100mL.¹

The current law

4. Under the current law, which creates a criminal offence for driving with a breath alcohol level exceeding 400mcg/L, an individual who blows over that level in an evidential Breathalyser can request a blood test: section 70A, Land Transport Act 1998 (Act). If that blood test shows that they are over the allowed blood alcohol level, they must bear the additional cost involved in that testing.
5. The availability of a blood test is an important safeguard in prosecutions relating to alcohol-affected driving. The result of an evidential breath test is deemed to be conclusive evidence. The result and accuracy of the device cannot be challenged.² It is rare for an element of an offence to carry a conclusive presumption. Machines are not infallible, nor are the humans operating them. Despite this, the legislation provides that this ingredient of the standard breath alcohol offence cannot be challenged.
6. 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). The reason sections 64(4) and 75A are not an unreasonable limit

¹ An exception is provided for a driver who is apparently younger than 20 or who holds an alcohol interlock licence or a zero alcohol licence: cl 9.

² See sections 64(4) and 75A of the Land Transport Act.

on the right to be presumed innocent is that sections 70A and 77(3) of the Act provide a right to elect a blood test.

7. In *Aylwin v New Zealand Police*³ the Supreme Court noted the importance of the right to a blood test. A blood test:
- is a far more reliable, accurate and accepted method of analysis;
 - provides the ability to challenge material human errors in the method of taking the evidence;
 - provides the ability to challenge the accuracy of the analysis of the evidence by cross-examining the ESR scientist; and
 - provides the opportunity to have an independent scientist test the second part of the blood specimen.
8. The results of blood tests will almost always satisfy any concerns. Because the presumptions in sections 75 and 76 (presumptions relating to certificates in blood-alcohol proceedings and to blood specimens) 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 public confidence in the integrity of the system of justice.

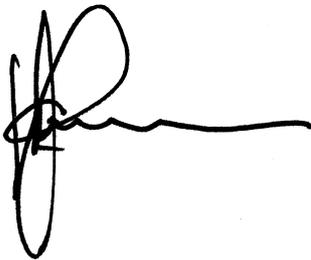
Clause 9: section 70A replaced (Right to elect blood test)

9. The Bill retains this safeguard for those who initially blow over 400mcg/L on an evidential Breathalyser. But clause 9 removes the safeguard of electing a blood test for those who receive a breath alcohol reading of 251-400mcg/L. The Law Society considers that this safeguard should also be available for those who receive a breath alcohol reading of 251-400mcg/L.
10. The reliability of evidential Breathalysers is good, but they are not infallible. For someone who already has demerits, the consequences of an infringement notice and a further 50 demerits may be serious. If someone blows just over 250mcg/L and believes they are below that level, they should be permitted to elect a blood test.
11. The Law Society endorses the Attorney-General's conclusion that unless the right to elect a blood test is available, the proposed infringement regime for drivers with breath alcohol levels of 251-400mcg/L would represent an unreasonable limitation on the right to be presumed innocent.

³ *Aylwin v New Zealand Police* [2009] 2 NZLR 1 (SC).

Conclusion

12. The Law Society recommends that the Committee give close attention is to the Attorney-General's section 7 report, with a view to adopting amendments to the Bill that fully recognise the right to be presumed innocent. Allowing for those with a breath alcohol reading of 251-400mcg/L to elect a blood test appears to be the simplest option.
13. The Law Society wishes to be heard.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a horizontal line that tapers to the right.

Chris Moore
President
17 February 2014