

Subject: Summary of the Australian Blood and Breath Sample Legislation

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INTRODUCTION

In Australia, all state and territorial legislatures have made highway traffic safety a priority. This is evidenced by the authority given to police to demand preliminary breath tests at random. Moreover, the police can demand evidentiary breath and blood tests in a broad range of circumstances. Failure to submit to such tests constitutes an offence in all jurisdictions.

In the event of a crash, most jurisdictions authorize the police to demand evidentiary breath or blood tests from the driver. The police merely require reasonable grounds to believe or suspect that the person was the driver at the time of the crash. Police do not have to believe that the driver had any alcohol or drugs in his or her body.

AUSTRALIAN CAPITAL TERRITORY

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

The *Road Transport (Alcohol and Drugs) Act 1977* authorizes police to conduct a screening test in several circumstances. First, section 8(a) and (b) gives police the power to conduct a screening test if the person is driving in public or is reasonably suspected of driving shortly before the demand was made. An officer does not need to suspect or believe that the driver has any alcohol in his or her body.

Second, section 10 authorizes the police to conduct a screening test if they have reasonable cause to suspect that a person has committed the offence of culpable driving. Culpable driving is defined as driving while under the influence of alcohol or a drug, to such an extent as to be incapable of having proper control of the vehicle.

If a person fails a screening test (blood-alcohol concentration (BAC) of 0.05% or more) or refuses to take it, an officer may take the person into custody and conduct a “breath

analysis” (“breathalyzer” test). A person who refuses to take a breathalyzer test is guilty of an offence (s. 22(c)).

The police cannot lawfully demand a screening or breathalyzer test if more than two hours elapsed since driving (s. 14(1)(c)). Furthermore, an officer cannot require a screening or breathalyzer test if: it appears dangerous or impracticable for the person to undergo such tests; the person is in hospital and the doctor certifies that taking these tests would be detrimental to the person’s medical condition; or the person is at the place where he or she usually lives (s. 14 (2)). However, an officer may demand such tests when the person is at home if: the person was, or the officer reasonably suspects that the person was, driving at the time of an “accident”; the officer reasonably suspects that the person has committed the offence of culpable driving; or the screening test or breathalyzer demand is made immediately after the vehicle stopped at or near the person’s principal residence.

Police and medical practitioners are also authorized to take blood samples in certain circumstances. The police demand for the blood sample must be made within two hours of driving (s. 15(3)). Under section 15(1), an officer “may require the person to permit a sample of his or her blood to be taken by a doctor” if: it appears that it may be dangerous or impracticable for the person to take a screening or breathalyzer test; the attending doctor certifies that a screening or breathalyzer test would be detrimental to the person’s medical condition; or it is impracticable to conduct a breathalyzer test because the breath analysis instrument is not working or is unavailable. If a doctor or nurse believes that the person is incapable of giving or refusing consent due to his or her medical condition and an officer demands a blood sample, the doctor or nurse is legally required to take a sample (s. 15(4)(b)).

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES FOLLOWING

A CRASH

Section 9 authorizes the police to demand a screening test where a motor vehicle is involved in an “accident” if the officer reasonably suspects that the person was driving, or the officer has doubts about who was driving and reasonably suspects that the person was in the vehicle. The police need not believe that the person has any alcohol in his or her body.

If a person fails a screening test (BAC of 0.05% or more) or refuses to take it, an officer may take the person into custody and conduct a breathalyzer test. If the person refuses to take it, he or she is guilty of an offence under section 22(c).

However, the police cannot lawfully demand a screening or breathalyzer test if the person is taken to hospital and more than two hours elapsed since his or her arrival at the hospital or since the crash (s. 14(1)(a)(i)).

Under section 15AA(1), a doctor or nurse treating a person in a hospital, whom he or she reasonably believes was the driver involved in an “accident”, must take a sample of that person’s blood within two hours of his or her arrival at the hospital. The police can then collect the sample and have it analyzed to determine the person’s BAC.

QUEENSLAND

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

The *Traffic Act 1949* authorizes the police to demand a “breath test” (“screening” test) from any person the officer finds driving, attempting to drive or in charge of a vehicle (s. 16A (2)). Similarly, a screening test may be demanded from any person the officer reasonably suspects engaged in such conduct during the last two hours. An officer does not need a reasonable suspicion or belief that the driver has any alcohol in his or her body. A person who refuses to take a screening test commits an offence under section 16A(5A).

The police may require a person who fails a screening test (BAC of 0.05% or more) or refuses to take it to provide a breath sample “for analysis by a breath analysing instrument” (“breathalyzer”) or provide a blood sample. If a driver is at a hospital for treatment, the police may demand that he or she take a breathalyzer test or provide a blood sample, subject to a medical practitioner’s approval. A driver’s refusal to take a breathalyzer test or provide a blood sample constitutes an offence (s. 16A(11)).

The police are also authorized to take blood and urine samples from a person arrested for impaired or careless driving, or a person required to take a breathalyzer test if the screening test results (i.e. 0.00% or low BAC) do not reasonably explain the signs of impairment that the officer observed.

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES FOLLOWING

A CRASH

Following a crash, the police have the same authority to demand screening or breathalyzer tests, and blood and urine samples as above. Thus, an officer can demand a screening test from any person who the officer reasonably suspects was driving, attempting to drive, or in charge of the motor vehicle at the time of the “incident”. An officer does not require a reasonable suspicion that the driver has any alcohol in his or her body.

If the person fails the screening test or refuses to take it, the police can demand a

breathalyzer test or a blood sample (s. 16A(8)). The police may also demand a breathalyzer test or a blood sample from a person in hospital for treatment if they reasonably suspect that the person was the driver at the time of the crash.

TASMANIA

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

The *Road Safety (Alcohol and Drugs) Act 1970* gives the police broad authority to demand a “breath test” (“screening” test) and “breath analysis” (“breathalyzer” test). First, the police may stop a vehicle and demand a screening test at random from any driver, even if they have no grounds to suspect that the driver has consumed alcohol. If, after administering the screening test, the officer reasonably believes that there may be any alcohol in the driver’s blood, the officer can demand a breathalyzer test (s. 7A(4)).

Second, the police can demand a breathalyzer test from a person who they have cause to suspect has alcohol in his or her blood and reasonably believe drove in that condition (s. 8(1)). Third, the police can demand a breathalyzer test from a suspect they reasonably believe has committed certain offences, including causing death by dangerous driving, reckless driving and driving while disqualified.

The police can demand a blood sample from a person, who is legally required to take a breathalyzer test, if: a medical practitioner objects to a breathalyzer test because it would be prejudicial to the person’s care; it appears to the officer that it may be dangerous for the person to take a breathalyzer test; or it appears to the officer that the person’s condition makes it impracticable to take a breathalyzer test.

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES FOLLOWING

A CRASH

Section 8(3) gives the police broad power to demand a breathalyzer test from any driver involved in an “incident” resulting in injury or death, if they reasonably believe that the vehicle was in motion at the time of the crash. The police do not have to believe that the driver has any alcohol in his or her blood. However, the police cannot legally demand a breathalyzer test from a driver who is at a hospital for treatment unless a medical practitioner agrees (s. 10(5)).

The police can demand a blood sample from a person who they reasonably believe may have had alcohol or a drug in his or her blood and was the driver at the time of a crash involving

personal injury (s. 10A(1)). While a blood sample cannot be taken without the driver's consent, his or her failure to consent constitutes an offence under section 14(1). If a medical practitioner states that the driver is incapable of consenting, the officer can request the medical practitioner to take a blood sample. The medical practitioner must comply with this request, unless he or she believes that taking a blood sample would be prejudicial to the person's care (s. 12(2)). However, an officer cannot lawfully request a blood sample if three hours or more have elapsed since the crash (s. 12(4)).

VICTORIA

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

Under section 53(1) of the *Road Safety Act 1986*, the police may demand a "preliminary breath test by a prescribed device" ("screening" test) from any person they find driving or in charge of a vehicle, or from a driver required to stop at a preliminary breath-testing station. If the screening test reveals that the person's blood contains any alcohol, the officer can demand a breath sample "for analysis by a breath-analysing instrument" ("breathalyzer" test).

The police can also demand a breathalyzer test if they reasonably believe that the driver committed the offence of impaired driving (s. 55(2)). The police do not have to demand a screening test first.

An officer can demand a blood sample if the driver cannot take a breathalyzer test for medical reasons, because of a physical disability, or because the breathalyzer is unavailable or not working (s. 55(9A)). Although the driver must consent to the taking of a blood sample, the failure to do so constitutes an offence under section 49(1)(e).

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

FOLLOWING

A CRASH

The police can demand a screening test from any person who they reasonably believe drove, was in charge of a vehicle or was a passenger at the time of an "accident". If the screening test reveals that the person's blood contains any alcohol, the officer can require the person to take a breathalyzer test (s. 55(1)). As indicated above, if the driver cannot take a breathalyzer test for medical reasons, because of a physical disability, or because the breathalyzer is unavailable or not working, an officer can demand a blood sample (s. 55(9A)).

Under section 56(2), a person over the age of 15 who is involved in an "accident" and

brought to a treatment facility must allow a doctor to take a blood sample. If a person refuses to consent, he or she commits an offence (s. 56(2)). However, no offence is committed if the doctor believes that taking a blood sample would be prejudicial to the person's proper care (s. 56(4)). Nor is an offence committed if an officer notifies the doctor that the alcohol concentration was not exceeded, the person was not the driver or a blood sample was taken by another medical practitioner (s. 56(4)). If a person is unconscious or unable to communicate, a doctor is authorized to take a blood sample (s. 56(5)).

A blood sample taken under sections 55 and 56 can be introduced into evidence in a criminal proceeding to prove the driver's BAC at the time of the crash or to prove that the driver was under the influence of alcohol when the demand was made (s. 57(2)).

SOUTH AUSTRALIA

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

The *Road Traffic Act 1961* authorizes the police to demand an alcotest ("screening" test) or a "breath analysis" ("breathalyzer" test), or both in several circumstances. First, the police can demand a screening or breathalyzer test, or both from any person they reasonably believe behaved in a manner, while driving or attempting to drive, indicating that he or she was impaired. Second, the police can require a driver approaching a breath-testing station to take a screening test (s. 47E(2a)). If the screening test results indicate that the driver's BAC may be 0.05% or more, the officer can demand a breathalyzer test.

If the driver is unable to take a screening or breathalyzer test because of a medical or physical condition, and he or she requests that a blood sample be taken, the officer must facilitate such a request (s. 47F(2)).

However, the police cannot demand a blood sample from a driver who is incapable of providing a breath sample, unless the person is involved in a crash or admitted to hospital. Consequently, drivers with physical conditions such as emphysema may escape liability.

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES FOLLOWING

A CRASH

The police can demand a screening or breathalyzer test, or both from any driver who they reasonably believe was involved in an "accident" (s. 47E(1)(d)). The officer does not have to believe that the driver has any alcohol in his or her body.

If the driver is brought to hospital for treatment, a medical practitioner must take a blood sample as soon as practicable and, in any event, within eight hours of the crash (s. 47I(1)). This duty applies notwithstanding the fact that the driver may be unconscious. Medical practitioners are not under a duty to take a blood sample if they believe that taking a sample would be injurious to the patient's medical condition or the patient persistently objects. However, the patient's refusal to provide a blood sample constitutes an offence under section 47I(14).

If a crash results in death, the medical practitioner who certifies the cause of death has a duty to take a blood sample from the deceased, or notify the coroner that a blood sample should be taken (s. 47I(4)). This duty applies to any patient who dies within eight hours of his or her admission to hospital. A blood sample taken by a medical practitioner under the *Road Traffic Act 1961* must be made available to the police for analysis (s. 47I(7)(d)).

WESTERN AUSTRALIA

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

Under section 66(1) of the *Road Traffic Act 1974*, the police may demand that the driver or any person they reasonably believe was the driver take a "preliminary breath test" ("screening" test). The police are authorized to stop any vehicle for the purpose of administering this test. If the screening test indicates that the person's BAC is 0.05% or more, the person refuses to take the test or the person is incapable of taking the test, the police can demand a "breath analysis" ("breathalyzer" test) or a blood sample. Failure to comply with a breathalyzer or blood sample demand constitutes an offence under section 67(2). However, a person does not have to take the breathalyzer test if more than four hours have passed since he or she drove or attempted to drive, or the person cannot take the test due to a physical condition (s. 66(4)).

The police may demand a blood sample in two additional circumstances. First, if a person cannot take a required breathalyzer test due to his or her physical condition, the police may demand a blood sample. Second, the police may demand a blood and/or urine sample if the breathalyzer results (i.e. 0.00% or low BAC) do not reasonably explain the person's conduct, condition or appearance (s. 66(11)). Although the statute suggests that the person's consent is necessary, failure to consent constitutes an offence under section 67(2). A person is not required to submit to a blood and/or urine analysis if more than four hours have elapsed since driving or attempted driving (s. 66(12)).

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

FOLLOWING A CRASH

If the police have reasonable grounds to believe that a vehicle was a cause of personal injury or damage, they may demand a screening, breathalyzer or blood test from any person they reasonably believe may have been the driver. Although the statute explicitly authorizes police officers to demand breath or blood samples from suspected drivers, known drivers are required to submit to a screening test under section 66(1). If the driver fails the test (BAC of 0.05% or more), the police can demand that he or she take a breathalyzer test or provide a blood sample (s. 66(2)(d)).

NEW SOUTH WALES

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

Under section 13(1)(a) and (b) of the *Road Transport (Safety and Traffic Management) Act 1999*, the police have broad power to conduct “breath tests” (“screening” tests). The police may demand a screening test if they reasonably believe that the person is or was driving, or is or was occupying the driving seat and attempting to put the vehicle in motion. An officer does not have to suspect or believe that the driver has any alcohol in his or her body.

If the driver fails the screening test (BAC of 0.05% or more) or refuses to take it, the police may detain or arrest the driver without a warrant (s. 14(2)). At the police station, the officer may require the driver to submit to a “breath analysis” (“breathalyzer” test).

The police cannot lawfully demand screening or breathalyzer tests if: the driver was admitted to hospital for medical treatment, unless the medical practitioner allows the officer to take a breath sample; it appears to the officer that it would be dangerous for the driver to take the tests; or two or more hours have elapsed since the person drove or attempted to drive (s. 17(a),(b) and (c)). Moreover, the police cannot require the driver to take screening or breathalyzer tests at his or her residence (s. 17(d)). Rather, the police must direct the driver to a police station to conduct such tests.

The police may demand a sobriety assessment if a driver registers a BAC below 0.05% on a screening test and they reasonably believe that the driver may be under the influence of a drug, given the way in which the vehicle was driven (s. 25(1)). If a driver refuses to submit to a sobriety assessment, an officer may arrest the driver without a warrant and demand blood and urine samples (s. 27(1)). The police cannot lawfully require a sobriety assessment, or demand blood and urine samples if the driver was admitted to hospital for medical treatment unless: the

medical practitioner allows the samples to be taken; it appears to the officer that it would be dangerous for the driver to submit to a sobriety assessment or provide samples; or more than two hours have elapsed since the person drove or attempted to drive (s. 28).

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES FOLLOWING

A CRASH

The *Road Transport (Safety and Traffic Management) Act 1999* does not specifically authorize the police to demand breath or blood samples in the event of a crash. However, they have broad authority to demand a screening test under section 13(1), which includes a crash situation. As mentioned above, if the person fails the screening test, he or she may be required to take a breathalyzer test (s. 15(1)).

Under section 20(2), a medical practitioner attending to an “accident patient” has the duty to take a blood sample, whether or not the patient consents. This duty only applies if, at the time of the crash, the “accident patient” was driving or occupying the driving seat and attempting drive. The medical practitioner is then required to have a portion of the sample analyzed to determine the driver’s BAC. A police officer may also arrange for a portion of the sample to be analyzed to determine the driver’s BAC or drug concentration in the blood. A blood sample taken under section 20(2) can be introduced into evidence to prove the driver's BAC at the time of the crash.

The police may have a drug analysis done on the driver’s blood sample if: they reasonably believe that the driver was under the influence of a drug at the time of a crash; no officer took a sample; and there was no reasonable opportunity to conduct a sobriety assessment (s. 23(6)).

NORTHERN TERRITORY

(i) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES

The *Traffic Act 1987* gives the police broad authority to demand a “breath test” (“screening” test), “breath analysis” (“breathalyzer” test), or both in several circumstances. First, under section 23(2), the police may stop vehicles and require drivers to take a screening or breathalyzer test, or both. The statute states that this power may be exercised whether or not the police suspect that the driver has consumed any alcohol (s. 23(4)).

Second, under section 23(1)(a), the police may demand a screening or breathalyzer test, or both, if they reasonably suspect that the driver committed the offence of driving under the

influence of alcohol or a drug, or driving with a “high” BAC.

Third, under section 23(6), the police can demand a breathalyzer test from a driver who has taken a screening test if they reasonably believe that there is any alcohol in the driver’s blood. Fourth, if a driver registers a fail on a screening test (BAC of 0.05% or more) or refuses to take it, the police can detain or arrest the driver without a warrant and demand a breathalyzer test.

The police cannot lawfully demand a screening or breathalyzer test if: it appears that the person is injured and they are satisfied that taking such tests may be detrimental to the driver’s medical condition; or the driver has a physical disability that prevents him or her from providing a breath sample (s. 23(11)). In the first of these situations, the police can demand a blood sample (s. 25(2)). In the case of a driver with a physical disability, the police can only demand a blood sample if they reasonably believe that the driver committed the offence of driving with an excessive BAC (s. 25(6)). Under section 19(2), it is an offence to drive with a BAC of 0.08% or above. It is also an offence to drive with a BAC of 0.05% or above (section 19(6)).

(ii) SCREENING TESTS, BREATHALYZERS AND BLOOD SAMPLES FOLLOWING

A CRASH

The police can demand a screening or breathalyzer test, or both from any person they reasonably suspect was driving at the time of an “accident” (s. 23(1)(b)). Moreover, the police can demand these tests from any person they reasonably suspect was in a motor vehicle “accident” and has, or had at the time of the “accident”, alcohol in his or her blood (s. 23(1)(c)).

Under section 25(1), the Minister of the *Public Health Act* must ensure that a blood sample is taken as soon as practicable from each person who “has apparently attained the age of 15 years who enters a hospital for examination or treatment of injuries, which may have resulted from a motor vehicle ‘accident’.” Thus, medical practitioners have the right to take blood from anyone involved in a crash, even if the person is unconscious or apparently incapable of consenting (s. 26(1)). This sample may be entered into evidence in any court proceeding to prove the person’s BAC at the time of the crash.

A medical practitioner is not required to take a blood sample if: the person’s BAC is already known; taking a sample would be detrimental to the person’s medical condition; the person’s injuries were not received in a crash; 12 hours or more elapsed since the crash; or four hours or more have elapsed since the person entered the hospital (s. 26(2)).

CONCLUSION

Australia's drinking and driving laws give police far broader authority to demand screening, breathalyzer and blood tests than Canadian law. Random breath screening is authorized in all jurisdictions. Moreover, in most circumstances, the police can demand breath or blood samples from any suspected driver involved in a crash. Finally, medical practitioners have broad authority to take blood samples from "crash victims" entering hospital.

All Australian states authorize the police to test drivers at random for alcohol. Although the wording of the statutes differs, the police generally have broad power to stop and demand a screening test from any driver or anyone suspected of driving. In the Northern Territory, the police may also demand a breathalyzer test at random from any driver.

In most jurisdictions, the police can demand that a driver take a breathalyzer test if he or she fails a screening test (BAC of 0.05% or more) or refuses to take it. However, in Tasmania and Victoria the police can demand a breathalyzer test if they reasonably believe that the driver has any alcohol in his or her body. The driver does not have to fail the screening test. These legislative powers are particularly significant since the breathalyzer evidence is admissible in legal proceedings to prove a driver's BAC.

The right to demand blood samples is less uniform. Generally, the police may demand a blood sample if the driver is unable to provide a breath sample because of a medical condition or physical disability. Queensland and Western Australia also permit officers to demand a blood sample if a driver fails a screening or breathalyzer test, or refuses to take them.

The general screening-test provisions authorize the police across Australia to demand that any driver involved in a crash submit to a test. Furthermore, the police are usually authorized to demand a screening test from anyone they suspect was driving at the time of the crash. Tasmania, South Australia, Western Australia and the Northern Territory permit the police to demand a breathalyzer test from anyone who was driving or suspected of driving at the time of the crash. Western Australia also authorizes the police to demand a blood sample from suspected drivers involved in a crash.

All jurisdictions, except Tasmania, authorize the police or medical practitioners to demand a blood sample from any driver or person suspected of driving, who was involved in a crash. Tasmania requires an additional element, namely that the police reasonably believe that the driver may have had alcohol or drugs in his or blood at the time of the crash. Moreover, most jurisdictions impose a positive duty on medical practitioners to take a blood sample from any patient entering hospital who is suspected of being the driver at the time of a crash.

ENDNOTES