

**Subject:** Summary of the New Zealand Breath and Blood Sample Legislation

**Authors:** J. Kraatz, Legal Research Associate, LL.B Candidate 2003; and Professor R. Solomon, National Director of Legal Policy for MADD Canada

**Date:** June 14, 2001

## **INTRODUCTION**

The *Transport Amendment Act (No. 2) 1988* was created with the purpose of amending the *Transport Act 1962*. One result of the *Amendment* was the elaboration of New Zealand's drinking and driving offences. Some of these offences require only that the suspect be under the influence of alcohol or drugs to such an extent as to be incapable of having proper control of the vehicle; while others require proof that the suspect was driving or attempting to drive with a blood or breath-alcohol concentration above the prescribed limits. To prove the elements of the latter offences, the proportion of alcohol in the driver's breath or blood must be analyzed.

### **(i) Screening tests, Breathalyzers and Blood Samples**

The screening breath test is not intended to give a precise measure of a suspect's breath or blood-alcohol concentration (BAC), but rather indicate whether these levels likely exceed the prescribed limits. The prescribed limits in New Zealand are 400 micrograms of alcohol per litre of breath and 80 milligrams of alcohol per 100 millilitres of blood. For persons who are under the age of 20, the prescribed limits are 150 micrograms of alcohol per litre of breath and 30 milligrams of alcohol per 100 millilitres of blood.

In 1992 police powers were broadened, allowing an officer to demand a screening test from any person driving or attempting to drive a motor vehicle. Furthermore, the police may require any driver to undergo a test using a passive breath-testing device. A suspect is required to remain where the breath screening and/or passive screening test was conducted until the results are determined. Failure to remain is an offence (s. 58A(4)).

If the suspect fails the breath-screening test (above 400 micrograms of alcohol per litre of breath) the police may demand that he or she accompany them to a place where an evidential

breath test can be taken (s. 58B(1)(a)). If the suspect is under 20, the police may demand an evidential breath test if a screening test indicates that there is “some” alcohol in the person’s breath. Furthermore, the police may demand an evidential breath sample from any suspect who refuses to take a breath screening or passive alcohol test (s. 58B(1)(c)), or if a screening test cannot be carried out for any reason (s. 58B(1)(d)). It is an offence to fail to accompany an officer and to remain until the evidential breath test is conducted and the results are ascertained (s. 58B(5)).

The results of an evidential breath test may be used in proceedings against the suspect. Such results can not be rendered inadmissible if the test was carried out by a conclusive evidential breath-testing device and indicate that the proportion of alcohol in the accused’s breath exceeded 600 micrograms per litre of breath (s. 58(5)). In any proceedings, it is presumed that the proportion of alcohol in the accused’s breath at the time of the alleged offence was the same as the proportion of alcohol indicated by the test (s. 58(2)).

The police may demand a blood sample from a suspect if an evidential breath test cannot be conducted for any reason, including situations where the suspect refuses to take the test or an evidential breath-testing device is not readily available. Furthermore, under section 58C(1)(d), the police may demand a blood test from any person who is arrested for:

- (a) causing bodily injury or death while driving under the influence of drink or drug;
- (b) driving or attempting to drive while under the influence of drink or drug, or both, to such an extent as to be incapable of having proper control of the vehicle; and
- (c) being in charge of a motor vehicle while under the influence of drink or drugs, and either:
  - (i) a medical practitioner has examined the person and believes that he may be under the influence of a drug, or drink and a drug; or
  - (ii) the person has refused to be examined by a registered medical practitioner.

Moreover, suspects may advise the police that they wish to undergo a blood test where they have taken an evidential breath test and the result appears to be positive and under 600

micrograms of alcohol per litre of breath (s. 58C(1)(b)).

A blood test requires the taking of a specimen of venous blood in accordance with normal medical procedures (s. 57A). Such a sample must be taken by a registered medical practitioner or an authorized person (s. 58C(1)), and can be taken whether or not the suspect has consented (s. 58D(1)).

Once required to provide a specimen, it is an offence for any person to fail or refuse to accompany an officer to undergo a blood test (s. 58C(5)(a)). Furthermore, it is an offence to fail or refuse to remain until a blood sample has been drawn (s. 58C(5)(b)). The results of the blood test may be used in any proceedings against the suspect. It is presumed that the proportion of alcohol in the accused's blood at the time of the alleged offence was the same as the proportion of alcohol in the blood specimen taken from the accused (s. 58(3)).

#### **(ii) Screening Tests, Breathalyzers and Blood Samples Following a Crash**

If a crash occurs, the police may demand a screening test from the driver of the vehicle regardless of whether they believe that the person has alcohol in his or her body (s. 58A(2)(a)). If the police are unable to determine who was driving, they may demand a screening test from any person whom they have "good cause" to suspect was in the motor vehicle at the time of the crash (s. 58A(2)(b)).

If the suspect fails the screening test (above 400 micrograms of alcohol per litre of breath), the police may demand that he or she accompany them to a place where an evidential breath test may be taken (s. 58B(1)(a)). If the suspect under 20, the police may demand that the person undergo an evidential breath test if the screening test indicates that there is "some" alcohol in the person's breath. The police may also demand an evidential breath test when a suspect has refused to take a screening test (s. 58B(1)(c)) or the screening test could not be carried out for whatever reason (s. 58B(1)(d)). It is an offence to fail or refuse to accompany an officer, or to remain until the evidential breath test is taken and the result is ascertained (s. 58B(5)).

If the person refuses to take an evidential breath test or the test cannot be carried out for whatever reason, the police may demand that the suspect provide a blood sample for

analysis (s. 58C(1)). Failure to permit the taking of a sample is an offence (s. 58C(5)). The blood sample must be drawn by a medical practitioner or other authorized person (s. 58C(1)).

If the suspect is in a hospital as a result of a motor vehicle crash, the police cannot demand that he or she provide a specimen of breath for an evidential breath test (s. 58B(6)). However, a blood specimen may be taken by a medical practitioner or other authorized person (s. 58D(2)(a)), if he or she believes that the taking of the specimen would not be prejudicial to the suspect's proper care or treatment (s. 58D(2)(b)).

Results from an evidential breath and/or blood test may be used in proceedings against the accused. The proportion of alcohol in the accused's breath or blood at the time of the offence is presumed to be the same as the proportion of alcohol in the specimen (ss. 58(2) and (3)).

## **CONCLUSION**

In New Zealand, the police need not believe that a person has alcohol in his or her body in order to demand a screen test. Rather, the police may demand a screen test from any driver on a public road. Furthermore, the police may demand a screen test from anyone who was driving or attempting to drive a motor vehicle involved in a crash. If the police are unable to ascertain who the driver was, they may demand a screen test from any person whom they have "good cause" to suspect was in the vehicle at the time of the crash. The police need not have any suspicion of alcohol consumption prior to the demand for a screen test.

If the suspect fails the screening test or refuses to take it, the police may demand a breath or blood sample for analysis. Results from an evidentiary test may be used in proceedings against the suspect. The proportion of alcohol in the person's breath or blood at the time of the alleged offence is presumed to be the same as the proportion indicated by the test.

## ENDNOTES