



**LEGISLATION ADVISORY COMMITTEE**

PO Box 180  
Wellington 6401

Phone 04 495 5911

Fax 04 494 9859

[www.justice.govt.nz/lac](http://www.justice.govt.nz/lac)

Email [LAC@justice.govt.nz](mailto:LAC@justice.govt.nz)

14 February 2014

Chair  
Transport and Industrial Relations Committee  
Parliament Buildings  
P O Box 18 041  
**WELLINGTON 6160**

Dear Mr Bennett

**LAND TRANSPORT AMENDMENT BILL**

**Introduction**

1. The Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
2. The terms of reference of the LAC include:
  - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
  - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
3. The LAC wishes to submit on three aspects of the Land Transport Amendment Bill.

**Lack of right to request a blood test**

4. Section 77(1) of the Land Transport Act 1998 (LTA) contains a conclusive presumption to the effect that the results of an evidential breath test (EBT), once admitted as evidence, cannot be challenged. This means that drivers have no defence against errors that may arise from breath tests. To compensate for this lack of “defence of error”, a driver whose EBT exceeds 400 mcg has a right to elect a blood test within 10 minutes of being advised of the result.
5. The right to request a blood test will not be extended to drivers who are liable for an infringement offence under the Bill – that is, those with a breath test of between 251 mcg and 400 mcg.
6. The LAC notes that it is on this basis that the Attorney-General has made his section 7 report on the Bill. The LAC wishes to comment on two practical issues that arise with the proposal.
7. First, although a driver with a breath test of between 251 mcg and 400 mcg cannot request a blood test, an enforcement officer can require him/her to have one in certain circumstances. Notably, under s 72(1)(a) LTA an enforcement officer can require a blood test if the driver refuses an EBT. A positive blood test in these circumstances will result in a higher infringement fee (\$500 rather than \$200), but the same number of demerit points (50).
8. There is a question whether this may provide an incentive to refuse an EBT after a person has delivered an initial breath screening test of between 251 mcg and 400 mcg. Such a refusal will likely result in a requirement to undergo a blood test. It is possible that a well-informed driver might consider taking the risk of the higher infringement fee for the possibility of a negative blood test.
9. The LAC raises this point in case the Select Committee considers it relevant to its position on the wider question of whether it is acceptable to deny the right to request a blood test under the infringement regime.
10. Furthermore, given the complexity of the options open to a driver in these circumstances, the Committee might consider asking the Police to provide the standard text that will be used to explain the options and consequences at the roadside. The Committee could then assess for itself whether it is recommending easily understandable legislation. Citizens deal with the Police, and make on the spot decisions based on what Police say; not what the statute book says.
11. For the sake of completeness, we raise a second point. Although the Bill reduces the allowable blood alcohol limit for the “driving or attempting to drive a motor vehicle” it leaves the offence of causing injury or death while driving over the limit untouched. Section 61(1) of the LTA provides:

*“A person commits an ... offence if the person is in charge of a motor vehicle ... and causes bodily injury to or the death of a person while—*

*(a) The proportion of alcohol in the breath of the person in charge, as ascertained by an evidential breath test subsequently undergone by that*

*person under section 69, exceeds 400 micrograms of alcohol per litre of breath; or*

*(b) The proportion of alcohol in the blood of the person in charge, as ascertained from an analysis of a blood specimen subsequently taken from that person under section 72 or section 73, exceeds 80 milligrams of alcohol per 100 millilitres of blood.”*

12. The maximum penalty is 5 years imprisonment (in the case of injury) and 10 years (in the case of death) or a \$20,000 fine in either case. The Bill does not amend this provision or provide for any offence of causing death or injury while driving at the reduced, infringement offence blood alcohol levels. It may be that the lack of safeguard of a right to request a blood alcohol test was influential in the decision not to provide for such an offence, given the substantially higher penalties.
13. However, it seems anomalous that if a blood test is taken and the result is in the 251 mcg and 400 mcg range, there is only the infringement offence (plus any other driving offence) but no specific alcohol related offence. If the Committee concludes that the regime ought to be amended, the LAC suggests that it should consider such an offence. Presumably the penalties for the offence should be somewhat less than those in s 61(1), but higher than the infringement offence levels.

#### **Rebuttable presumption – clause 6**

14. Under s 77(3)(b), an evidential breath test (EBT) is not admissible against a person who, within 10 minutes of being advised of the result of the EBT, requests a blood test and, without delay, permits a practitioner or medical officer to take a blood specimen from them.
15. The explanatory note indicates that circumstances have arisen where a person who has previously been unable, for medical or physical reasons, to provide an adequate blood specimen, has on a subsequent occasion avoided prosecution by again opting for a blood test in the knowledge that they may be unable to provide one.
16. Clause 6 of the Bill seeks to rectify this problem. It amends section 60 of the LTA to introduce a “rebuttable presumption” that such a driver has in effect refused the blood test on the second occasion.
17. The Bill provides no direction on how the presumption is to be rebutted.
18. Section 64(1) of the Act provides:
 

*“It is a defence to proceedings for an offence against section 60 (which relates to failing or refusing to supply a blood specimen) if the court is satisfied, on the evidence of a ... medical practitioner, that the taking of a blood specimen from the defendant would have been prejudicial to the defendant’s health.”*
19. Although this provides a defence to the offence of refusal to take a blood test, it is not related specifically to the proposed presumption. In any event, it is not

clear how new subsections 60(3B) and (3C) are expected to interplay with the defence. The LAC submits that clarification is needed.

20. The LAC also submits that clause 6 may be too wide in any event. It would be preferable if the person who cannot provide the first blood test should only be presumed to have refused a future blood test if the medical reason for their failure to provide a specimen is the same. Again, it may be desirable that the Select Committee seeks clarification from the Police about how this will be explained to a possible offender on the roadside.

**Conclusion**

21. Thank you for taking the time to consider the Committee's submission. The Committee does not wish to be heard on this submission.

Yours sincerely

A handwritten signature in cursive script that reads "Grant Hammond".

Hon Sir Grant Hammond  
Chair