

DRINK DRIVING AND THE LAW



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There are two different drink driving offences: driving over the limit, that is, exceeding the prescribed concentration of alcohol (PCA) in your blood and driving under the influence (DUI). PCA means that you were breath tested and recorded a blood alcohol level over the legal limit. DUI is more serious and means that you were so intoxicated that you could not control the vehicle. Exceed PCA is the more common offence.

DRIVING OVER THE LIMIT (EXCEED PCA)

If you drive, or attempt to drive, a motor vehicle while there is more than the 'prescribed concentration of alcohol' (PCA) in your blood, you will be guilty of an offence. It makes no difference that you did not feel drunk at the time, that you didn't drink very much or your driving was not affected in any way. The law is strict as to the amount of alcohol that can be present in a person's blood when driving. For full licence holders, the maximum allowable blood alcohol level is .05. For learner, provisional or probationary drivers, any alcohol in their blood is a breach of their licence conditions. In addition if the level of alcohol exceeds .05, they also face charges of exceeding the prescribed concentration of alcohol.

DRIVING UNDER THE INFLUENCE (DUI)

If you drive, or attempt to drive a vehicle while so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle, you will be guilty of an offence. For the purposes of this offence, you are deemed to be incapable of exercising effective control of a vehicle if your physical or mental capabilities are appreciably impaired. The police may use their observations to show that you could not exercise effective control, such as slurred speech, swaying when standing, and a strong smell of alcohol on your breath. A blood alcohol reading may form part of this evidence but is not essential. This offence is separate to exceed PCA and you may be charged with both offences, especially if you are involved in an accident. However, you cannot be convicted of both offences in relation to the same incident.

PENALTIES

If you are convicted of a drink or drug driving offence the court must impose the minimum disqualification period, but can impose a greater period. A fine will also be imposed and licence demerit points will apply. A magistrate has the power to impose a prison term in the case of serious or repeated DUI offences but this is not common. The following penalties are for first offences only.

Offence	Disqualification (minimum)	Fine	Demerit Points
PCA .05 - .079	3 months*	\$600 expiation fee (on-the-spot fine) or \$1100	4
PCA .08 - .149	6 months	\$900 - \$1300	5
PCA .15 or over	12 months	\$1100 - \$1600	6
DUI	12 months	\$1100 - \$1600	6
Refuse breath test	12 months	\$1100 - \$1600	6
Refuse blood test	12 months	\$1100 - \$1600	6
Drug driving	3 months*	\$600 expiation fee (on-the-spot fine) or \$900 - \$1300	4
Refuse drug test	6 months	\$900 - \$1300	6

*The police normally issue an on-the-spot fine for these offences. If the fine is paid on a first offence, no licence disqualification applies. If the case goes to court, a court must impose a disqualification of 3 months for driving with a blood alcohol concentration (BAC) of .05 - .079 or driving with prescribed drugs present in oral fluid or blood.

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Higher penalties apply if you have previous convictions for drink or drug driving. If you have a reading towards the higher end of the blood alcohol reading bracket then you can also expect a penalty higher than the minimum. Probationary, provisional and learner drivers face penalties for a breach of licence conditions in addition to the drink driving penalties. If you have been convicted of another drink or drug driving offence within the last three years to the date of the current offence the court will order that you be assessed to determine if you suffer from alcoholism or drug addiction. If you are found to be suffering from an addiction, then the court will disqualify you until further order. They will also say what the minimum amount of time you must serve is before you can apply to get your licence back. To get your licence back you will need to make an application to court and attend a further assessment, which shows that you no longer suffer from an addiction. For more information about your options and likely penalties, seek legal advice.

DRUGS AND DRIVING

Drug screening (saliva) tests can detect THC (cannabis), Methylamphetamine (speed) and MDMA (ecstasy). If you test positive, police have the power to conduct either a further saliva test or a blood test.

If the presence of drugs is confirmed by laboratory testing, you will be charged with driving with a 'prescribed drug in oral fluid or blood' or driving under the influence (DUI). The saliva tests are mandatory and there are penalties, more serious than those for a first offence of drug driving itself, if you refuse to cooperate.

ON-THE-SPOT DISQUALIFICATIONS

The police will give an 'on-the-spot' disqualification for the offences of exceed PCA (.08 or over), refuse breath test, refuse drug test or refuse blood test. This disqualification will usually be for the minimum period for the charge you are likely to face, which will be either 6 or 12 months. For example, if your blood alcohol reading was between .08 - .149, the usual disqualification period for a first offence is 6 months. A summons will be sent at a later date for you to appear in court to determine the actual penalty, including the length of disqualification and fine. The court will take the period since the on-the-spot disqualification into account when you are sentenced.

Warning – If you test positive to drugs or a blood alcohol reading of .05 - .079, the police will ask you to stop driving until you are no longer over the limit or the drugs are no longer detectable in your system. This is generally up to 4 hours for the drug THC and up to 24 hours for the drugs Methylamphetamine or MDMA. The police can direct you to leave your vehicle and surrender your keys. It is an offence to go against this direction. Ask the police for help to arrange alternative transport if necessary. If you attempt to drive away, you may be arrested.

CAN I APPEAL TO KEEP MY LICENCE?

You can apply to the court to have the drink driving disqualification lifted or reduced but the grounds on which you can do so are strictly limited. You can only apply to have your disqualification lifted if you can show that there is a reasonable prospect that you would be found not guilty of the offence. Personal hardship or loss of employment are not grounds for an appeal against this type of disqualification. You cannot get a restricted licence or a licence just for work purposes – the disqualification is total.

Reducing a period of drink driving disqualification is only available in the following circumstances:

- if you can convince the court that an exceed PCA (.08 or over) offence was 'trifling' (this means that the offence is not a typical offence – seek legal advice if the circumstances of your drink driving charge are unusual)
- if you can convince the court that you are guilty of a lower category offence than you have been charged with – that is, you are guilty of PCA between .08-.149 and not .15 or over.

Depending on the number of demerit points you had prior to the drink driving offence, you may have to serve another disqualification period. If you are on a full licence and incur 12 or more demerit points you will receive a notice from the Registrar of Motor Vehicles disqualifying you for at least 3 months. With this disqualification, you can elect to abide by a 'good behaviour' condition which enables you to retain your licence; however, if this is breached you will need to serve double the original disqualification.

DO I NEED A LAWYER?

If you are pleading guilty to a drink driving offence you can represent yourself if you choose. Even if you are representing yourself you should seek legal advice before going to court. Contact the Legal Help Line on 1300 366 424 or make an appointment for free legal advice at the Legal Services Commission. Legal aid will only be granted if there is a likelihood of imprisonment and this is not usually the case for drink driving charges. You may be eligible for legal aid if you have been charged with DUI and have prior convictions, or if your case is particularly serious.

If you are representing yourself, you will need to tell the court about what happened at the time of the offence, such as why you drove whilst you were intoxicated, what you will do to ensure that you do not drink and drive again, and some details about your personal circumstances, such as your work, family and financial situation.

If you intend to plead not guilty it is very important to get legal advice about your chances of success.

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CAN I REFUSE TO DO A BREATH TEST (ALCOTEST)?

If you refuse or fail to submit to an alcotest or breath test when required by a police officer you will be guilty of an offence. There are only very limited circumstances when you can claim that you were unable to provide a breath sample. If you intend to plead not guilty on the basis that you had a medical condition that prevented you from being able to provide a breath sample, you will need to have had a blood test done instead. You will also need to provide to the court a medical report that says you were unable to blow because of your medical condition.

WHEN CAN I BE BREATH TESTED?

You can be breath tested at any time you are on the road. Most testing takes place at random breath testing stations but all police vehicles are now equipped to do breath testing. The police have broad powers to effectively stop and breath test any driver, including a qualified supervising driver acting for the holder of a learners permit or provisional licence.

The test must be conducted within 8 hours of your driving or attempting to drive. When police exercise their random testing powers they must be in uniform and use a marked police vehicle, or a vehicle displaying a flashing light or sounding an alarm.

If an alcotest shows that the prescribed concentration of alcohol may be present, you will be required to blow into a breath analysis machine. The result indicated by the breath analysis is presumed to have been your blood alcohol level for the two hours immediately before the test. If the breath analysis shows that you are over the limit, you will be charged and may be issued with an on the spot fine or disqualification (depending on how much over the limit you are). Later (sometimes many months later), if you did not receive an on the spot fine, you will receive a summons to appear in court. A breath analysis result may only be challenged in limited circumstances, such as if the proper procedure was not followed or it is found to be inaccurate.

BLOOD TESTS

Where a breath analysis indicates you are over the limit, the police must advise you of your right to have a blood test.

If you choose to exercise this right the police will provide a blood testing kit. The kit contains a statement of your right to have a blood test together with instructions to both you and a doctor on the blood sampling procedures. You must make your own arrangements to have the blood sample taken.

However, if you are outside the metropolitan area and it appears to the police that you will be unable to travel to a place to have a blood

sample taken, the police must provide transport to a suitable place for the blood sample to be taken. If outside the metropolitan area, the blood test may be taken by a registered nurse.

The doctor (or nurse) must divide the sample into halves, giving one sample to you and forwarding a second sample to the police. The police sample will be analysed and the results will be sent to you. You can have the other sample tested independently. If this is intended, it is important that the sample be kept in a cool place and analysed as soon as reasonably practicable. Legal advice should be sought if the blood test result is significantly different to the breath analysis.

CAN I CHALLENGE THE RESULTS OF A BREATH TEST?

It is possible to challenge the results of a breath test but you should seek legal advice before doing so. You must be able to demonstrate a substantial difference between the breath test results the police obtained and those obtained as a result of the blood test. A blood test will show a lower reading than that provided by an earlier breath analysis because blood alcohol is naturally eliminated over time. If you wish to challenge the results in court you will require further testing to establish your alcohol elimination rate and a medical expert who can give evidence in support of your case.

CAN I BE BLOOD TESTED AFTER AN ACCIDENT?

Anyone over 10 years of age who is admitted to hospital for treatment following a road accident must be blood tested. The blood test must be done as soon as possible after you are admitted to hospital and within eight hours of the motor vehicle accident. The sample is sent to the police for analysis. If you were the driver and the result indicates that you have exceeded the blood alcohol limit, you will be charged. If you refuse a blood test without good medical reason you can be fined \$500, with more serious penalties, including disqualification, applying if you were the driver of the vehicle.

ALCOHOL INTERLOCK SCHEME

If you commit a serious drink driving offence you will be ordered to have an alcohol interlock device fitted to your vehicle for a time equal to your disqualification. The mandatory interlock scheme applies to second offence exceed PCA (.08 – 1.49), exceed PCA (0.15 or over), DUI, refuse breath test and refuse blood test offences. The mandatory alcohol interlock scheme applies after your disqualification period has been served.

You will be responsible for the cost of fitting of the alcohol interlock device but a concession scheme is available to eligible concession card holders. Under the mandatory interlock scheme you can only drive a nominated vehicle fitted with a functioning alcohol interlock device.

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WHAT HAPPENS IF I DRIVE WHILE DISQUALIFIED?

It is important that you do not for any reason drive while you are disqualified. This is a criminal offence taken very seriously by the courts and can attract a term of imprisonment. Seek legal advice if you have been charged with this offence.

AFTER DISQUALIFICATION

When you are disqualified from driving, your licence is cancelled. This means that when you have served your full disqualification period, **you must apply to renew your licence**. If you resume driving before renewing your licence you will be guilty of an offence. The penalty for this offence depends on the seriousness of the drink driving charge you were disqualified for in the first place. If your disqualification was for a second offence exceed PCA (.08 – 1.49) or exceed PCA (0.15 or over), DUI, refuse breath test or refuse blood test, the penalty can be as high as a fine of \$5000, imprisonment for 1 year and further licence disqualification for 3 years.

Following disqualification, you must hold a probationary licence for at least 12 months. As a probationary licence holder you must carry your licence at all times while driving and must not drive while there is any alcohol in your blood. Breach of the conditions or incursion of 2 or more demerit points can result in further disqualification.

WHAT IF I HAVE AN ACCIDENT?

If you have an accident while under the influence of alcohol or drugs you may also face other traffic offences. These can range from driving without due care to causing death or harm by dangerous driving. In addition, your insurance policy may be affected if it can be shown that you were under the influence at the time of the accident. If someone is injured due to your negligent driving when you are under the influence, your insurer may sue you to recover compensation paid to third parties. Even if you are injured and the accident was mostly the fault of another driver, your compensation may be reduced. As issues with insurance and liability can be complicated it is best to seek legal advice.