

# Drink driving and the law

There are two main drink driving offences:

- driving with the **prescribed concentration of alcohol** in your blood (exceed PCA); and
- **driving under the influence** (DUI).

Exceed 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)

The law is strict as to the amount of alcohol that can be present in your blood when you drive. 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.

For full licence holders, the prescribed concentration of alcohol is **.05**. For learner, provisional or probationary drivers, any alcohol in their blood is a breach of licence conditions. If the level of alcohol recorded is **.05** or higher, they will also be charged with exceed PCA.

## Driving under the influence (DUI)

It is an offence to drive, or attempt to drive, a vehicle while so much under the influence of alcohol as to be incapable of exercising effective control of the vehicle.

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.

## What is a vehicle?

You can only commit the offence of exceed PCA when you drive or attempt to drive a **motor vehicle**. This includes cars, trucks, motor bikes and even includes e-scooters and other electric personal transporters.

Driving under the influence applies even more broadly to driving or attempting to drive a **vehicle**, which, in addition to motor vehicles, includes trams, bicycles, animals, animal-drawn vehicles and motorised wheelchairs that can travel over 10 kilometres per hour.

## 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 equipped to do breath testing. The police have broad powers to stop and breath test any driver, including a qualified supervising driver acting for the holder of a learner's permit or P1 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.

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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 three 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 far 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.

## Can I refuse to do an alcotest or breath test?

It is an offence to refuse an alcotest or breath test when required by a police officer. There are 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 that shows you were not over the limit. You will also need to provide to the court a medical report that says you were unable to blow because of your medical condition.

## 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 results of the breath test and the results of a 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.

## 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 be blood tested after an accident?

Anyone 10 years or older 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 8 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 may be fined, with more serious penalties, including disqualification, if you were the driver of the vehicle.

## Penalties

If you are convicted of a drink driving offence the court must disqualify you from holding a driver's licence. The court must impose the minimum disqualification period but can impose a longer period. Personal hardship or loss of employment are not grounds to keep your licence. You cannot get a restricted licence or a licence just for work purposes – the disqualification is total.

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A fine and licence demerit points will also 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               | Minimum disqualification | Fine  | Demerit points |
|-----------------------|--------------------------|---|----------------|
| PCA .05 - .079        | 3 months*                | \$824<br>expiation fee<br>(on-the-spot<br>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<br>breath test | 12 months                | \$1100- \$1600  | 6              |
| Refuse<br>blood test  | 12 months                | \$1100- \$1600  | 6              |

\* Police usually issue an on-the-spot fine for this offence. If the fine is paid on a first offence, no licence disqualification applies. If the case goes to court, the court must impose a disqualification of 3 months.

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.

## On-the-spot disqualifications

The police may give an 'on-the-spot' disqualification notice for the offences of exceed PCA (.08 or over), refuse breath 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. When you are sentenced, the court can backdate the disqualification period to commence from the day on which the on-the-spot disqualification notice was issued.

If your results show a blood alcohol reading of .05 - .079, the police will ask you to stop driving until you are no longer over the limit. The police can direct you to leave your vehicle and surrender your keys. Ask the police for help to arrange alternative transport if necessary. If you attempt to drive away, you may be arrested.

## Can I keep driving?

You can apply to the court to have an on-the-spot drink driving disqualification lifted or reduced but the grounds on which you can do so are strictly limited. You can apply to have the disqualification lifted if you can show, for example, that there is a reasonable prospect that you would be found not guilty of the offence. You should seek legal advice before making any court application to keep your licence.

## 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 before driving again. It is an offence to drive while your licence is disqualified or to drive after your disqualification period has ended if you have not renewed your licence. These offences are treated seriously by the courts and can result in imprisonment. Seek legal advice if you have been charged with either of these offences.

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. A breach of the conditions or 2 or more demerit points can result in further disqualification.

## Alcohol interlock scheme

An alcohol interlock device is a small breath-testing device fitted to the ignition of a vehicle. It measures the level of alcohol in your breath and prevents you from driving if alcohol is detected.



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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 exceed PCA (.08 – .149) (second offence), exceed PCA (.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 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.

If you are subject to the mandatory alcohol interlock scheme then you are exempt from a requirement to undertake an alcohol dependency assessment.

## Alcohol dependency assessment

If you are convicted of a drink driving offence where a child aged under 16 was present in the vehicle, or you have other previous convictions for prescribed drink driving offences committed within the past 5 years, you will be required to show you are not dependent on alcohol before your licence is renewed. This will involve undergoing an alcohol dependency assessment to determine whether you are dependant on alcohol. You are required to pay the cost of the assessment and any treatment program. For more information about your options, seek legal advice.

## Demerit point disqualification

If you are guilty of a drink driving offence, you will incur demerit points as part of the penalty. Depending on the number of demerit points you had prior to the drink driving offence, you may have to serve another disqualification period as a result of incurring too many points.



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.

## What if I had an accident?

If you have an accident while under the influence of alcohol or drugs you may also be charged with other traffic offences. These can range from driving without due care to causing death or harm by dangerous driving. 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.

## 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. 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, if you have been charged with driving while disqualified, 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.

**Call the Legal Helpline on 1300 366 424** for advice or to make an appointment for free legal advice at the Legal Services Commission.