DAVID MICHAEL SMITH

# BLOOD-ALCOHOL AND BREATH-ALCOHOL PROVISIONS OF THE TRANSPORT AMENDMENT ACTS 1968 AND 1973.

RESEARCH PAPER FOR MASTER OF PUBLIC POLICY DEGREE - SPECIAL TOPIC (LAWS 537)

FACULTY OF COMMERCE AND ADMINISTRATION
VICTORIA UNIVERSITY OF WELLINGTON

WELLINGTON 1979

TABLE OF CONTENTS



THE TRANSPORT AMENDMENT ACT 1968





THE TRANSPORT AMENDMENT ACT 1978

"The Bill as a whole marks the increasing readiness of people in this country to take road safety seriously" (comment of Mrs Barbara Castle, British Minister of Transport during second reading of the British Road Safety Bill which introduced blood alcohol testing to the United Kingdom).[1]

If indeed the United Kingdom had not been taking road safety seriously then she was not alone in that. Prior to 1966 there was very little to suggest that New Zealanders in general, and their politicians in particular were at all prepared to treat the question of road safety with any great concern. The country is long and narrow and with public transport practically non-existent in many areas the right to drive has always been taken more seriously than the duty to do it carefully. As a matter of law a glance at the Transport Act 1962 would reveal that deficient driving was measured in terms of -

(a) careless

(b) dangerous

(c) driving under the influence of alcohol or drug[2]

Category (c) represented an extreme measure. In fact it was not uncommon for drivers, particularly those involved in serious accidents, who had been clearly drunk at the time to be dealt with under Crimes Act provisions such as manslaughter. If they were to be dealt with under the Transport Act provisions the chances of their acquittal were extremely high largely because of the hit and miss nature of clinical tests as a basis for determining fitness to drive. Courts generally were extremely loath to convict at all on the evidence of a general practitioner who may have examined a driver at the relevant time although it could be said that on the rare occasion that a conviction was entered the penalties were extremely severe. Three months imprisonment and 10 years disqualification from driving were not uncommon for the hapless convicted offender.

Thus the concept of the drunken driver reigned supreme for upwards of 30 years. Such a driver was acknowledged to be a sizeable if indeterminate factor in the road toll but traffic research was not sufficiently sophisticated to measure the full impact of the drunken driver let alone the drinking driver. The latter was acknowledged both in Europe and the United States as being an alcohol impaired driver whose impairment may not be visible but in medical terms is significant in that the likelihood of such a driver having an accident is considerably greater than the totally sober driver.

[1] Hansard (UK) 1966-7 (753) Page 993.

[2] Motor Vehicles Act 1924 and Transport Act 19 Sections 27 and 39ff respectively.

The British however have taken no steps to change their traffic laws to take account of the drinking driver so why should New Zealand? It was a question of where Britain doesn't go we don't go. Where she stands still we stand still.

Breath and blood technology - Overseas developments and New Zealand beginnings

As we enter the 1980's there would be few people who are unfamiliar with the breath and blood tests presently available to law enforcement agencies. Such testing in one form or another goes back to the 1930's (blood samples) and the 1950's (breath samples). In Australia the State of Victoria had, in 1961, adopted bench model Breathalyser testing as part of its traffic law and thus joined with 22 other countries or states using blood or breath tests either as absolute standards of intoxication or as objective supporting evidence in clinical reporting on fitness to drive.[3]

United Kingdom and New Zealand initiatives were however to come from the respective medical establishments not the political.

The British Medical Association (United Kingdom) had published a report in 1960 entitled "Relation of Alcohol to Road Accidents". Despite the fact that that report stated conclusively that "a concentration of 50 millilitres of alcohol per 100 millilitres of blood is the highest that can be accepted in a person whilst driving a motor vehicle that is entirely consistent with the safety of other road users" it attracted little political attention either in the United Kingdom or New Zealand. The exercise was for all intents and purposes repeated by the New Zealand Branch of the British Medical Association in 1963. The conclusions and results, both medically and politically, were the same.

Paradoxically the New Zealand report was commissioned by the Minister of Transport for the following purposes:

> "To review the application of chemical tests and the recognition of intoxication and its effects of New Zealand driving conditions"...
>
> and to re-examine an earlier Medical Association report in 1953 (which had been unenthusiastic about chemical tests)
>
> "In the light of any additional information which may have become available since that time".[4]

[3] Motor Car Act 1958 (Victoria) ss 80B-82.

[4] Report of the Medical Association of New Zealand on the assessment of Alcoholic Intoxication of persons in charge of motor vehicles (1963).

Given the fact that the Minister himself had sought this information the chances of reform looked promising. The Committee comprised some of New Zealand's most eminent pathologists, specialists, surgeons and academic doctors. Its findings were clear and unequivocal namely -

(a) The presence of alcohol in the body even in relatively small amounts impairs the ability to drive a motor vehicle with safety.

(b) Clinical tests are of little value in estimating the degree of impairment in driving ability.

(c) The level of alcohol in the body fluids is closely related to the degree of impairment in driving ability.

(d) Chemical examination of samples of blood give accurate information of the level of alcohol in body fluids.

(e) Present methods of breath samples are not sufficiently accurate to be reliable in themselves.

(f) There should be legal provision to facilitate the carrying out of blood or breath tests to assist in resolving doubt as to a persons fitness to drive.

The Committee stopped short of advocating compulsory testing but recommended that where a person refused to consent to the giving of any kind of specimen his refusal should be regarded as supporting evidence given on behalf of the prosecution with respect to his condition. The report ended on the following definitive basis:

> "The cold hard fact is that in a prosperous country with alcohol freely available some form of legislation embodying tissue assessment of alcohol offers the only recognised means of improving the present situation".

The Report sank in a sea of public indifference. No politician drew attention to its findings and in legislative terms the results were nil (the Transport Act having been substantially amended and re-enacted the year before). Driving under the influence of drink remained the principal offence and tests for alcohol remained outside the scope of the legislation.

Overseas research into drinking/driving 1963-65

While New Zealand continued to treat the subject as one of academic interest only (and a medical academic one at that) the Americans were combining toxicology and sociology to produce the classical study in this field of science.

Researchers from Indiana University working under Professor R.F. Borkenstein had studied over a one year period the drinking and driving habits of the population of Grand Rapids Michigan a city with the population of 201,000. This study[5] was to have a profound affect on thinking in the United Kingdom and ultimately in New Zealand. Not being a purely medical study it sought to determine if there was any behavioural connection between blood alcohol levels in very large stable control groups, age groups, racial groups, occupational groups and so on. The researchers were particularly directed towards ascertaining the probability of accident where a single individual was in charge of a motor vehicle.

The single most important result of the research is what has come to be known as the "Grand Rapids Curve". This is expressed diagrammatically in Appendix but stated briefly the significant point is that real accident risk commence at around 50 milligrams/ 100 millilitres and climbs drammatically after that. The exact probability and risk factors are set out in Appendix II. A small amount of alcohol in a drivers blood is of no great significance. Some drivers need to drink very little to reach a level of 50 milligrams and others need to drink more but in terms of probability of accident the "arbitrary" level of 50 milligrams and certainly 80 milligrams now had a solid research basis.

The new Labour Government in Britain took notice and ordered a White Paper on the subject.[6] The eventual result was the introduction into Parliament of a bill which was to become the Road Safety Act 1967.

The McAlpine era and the Lysaght decision

Mr John McAlpine was the Minister of Transport from December 1960 to December 1966. During that time he was not noted for having any strong views on road safety even though the road toll was showing a steady rise from year to year. (Appendix ) Both he and his cabinet colleagues saw this as an inevitable consequence of greater motor vehicle usage which flowed from the increasing affluence of the New Zealand society in the 1960's.[7] All questions of a political nature involving liquor were considered too sensitive to meet head-on.

McAlpine left political life a year before the referendum on 6 o'clock closing and before the Road Safety Select Committee became an established standing committee of the House. His conservative stance on the road safety aspects of alcohol could not be shaken merely by the occasional public statement from the New Zealand Medical Association or the New Zealand Road Safety Council, an ad hoc body of no great standing.

[5] R.F. Borkenstein et al "The Role of the Drinking Driver in Traffic Accidents" (Indiana University) 1964.

[6] White Paper on Road Safety Legislation 1965-6 (Cmnd 2859).

[7] Expressed in graph form in Appendix III.

Certainly there was no demand for change from the New Zealand Law Society nor were the Police or Transport Department (as it then was) seeking legislation based on the Grand Rapids study or comparable to the laws of certain Australian States.

That McAlpine was to ultimately provide one of the greatest stimuli to legislative change is the supreme irony.

Quite independently of the Government however scientific testing of impaired drivers was becoming a fact in other areas. In September 1964 a Mr Lysaght sustained a slight accident whilst in a state of intoxication sufficiently bad for him to be arrested and examined by a medical practitioner. He was charged with driving under the influence of alcohol. In the course of a clinical examination Lysaght consented to the taking of a blood sample. In the Magistrate's Court the doctor who administered the clinical examination gave evidence that Lysaght was in fact fit to drive a motor vehicle. The prosecution produced evidence from the D.S.I.R. that Lysaght's blood alcohol level was 250 milligrams and further medical evidence showed that under no circumstances was a person with such a level fit to drive a motor vehicle. This evidence was accepted by the Court and Lysaght was convicted.[8] A full bench in the Supreme Court affirmed the conviction thus creating a debate which was to go in public for the next three years. If conventional methods of proof were to lose out to more modern methods ought not the modern technological methods be institutionalised and made part of the law?

Blood or breath?

It is a quirk of history that the emerging public consciousness of the issue did not develop as such as a debate involving the taking of blood samples from drivers. The word which caught the public imagination was "Breathalyser". The full range of technology available in 1964 and now available is more particularly described in Appendix IV (Suffice it to say at this point that the breathalyser has never been used in New Zealand or the United Kingdom. The only breath testing equipment used until 1978 was the Draeger Alcotest in various models and specifications.)

Few politicians, lawyers or media journalists in New Zealand fully appreciated that "Breathalyser" testing, even in Sweden, was in fact a Draeger tube used as a rule of thumb screening device to enable the authorities to seek a compulsory blood specimen and prosecute at a level of 50 milligrams/100 millilitres.

Despite the confusion on these points the Minister was to come under both private and public pressure to investigate the possibility of moving New Zealand traffic enforcement methods to a more scientific plain.

[8] Lysaght v. Police [1965] NZLR 405.

Following the Lysaght decision Cabinet in November 1965 requested the Minister to submit a memorandum in February the following year setting out the "pros and cons" of chemical tests for the determination of alcohol levels in the blood of drivers. Although the word "chemical" could have been taken to include breath testing the Minister chose to go directly to the question of blood testing. Whilst acknowledging that alcohol had been a factor in no less than 1388 fatal or injury accidents during 1964 the Minister in his report to Cabinet came down heavily against any form of blood testing largely because he considered it "arbitrary" and might even encourage some drivers to drink up to what they believe to be the safe level. The Grand Rapids study was not in any way referred to.

Publicly there was a most important development from an entirely different quarter when from the bench of the Magistrate's Court in Christchurch and the Court in Dunedin two separate Magistrates made strong statements clearly designed to stimulate Government debate and action on chemical testing.

Mr H.J. Evans, S.M. in early February 1965 issued a statement after dismissing a charge of intoxicated driving. In it he indicated that the medical evidence was so overwhelming that compulsory testing of blood specimens was an urgent development badly needed in New Zealand. In his view "the facts are plain and inescapable and with the modern means of testing now available they call for a different, more radical, approach by our law to the problems of proof of intoxication ... compulsory tests are not an interference with the rights of the subject ... I cannot be indifferent to the fact that there are drivers travelling our roads daily whose faculties are seriously impaired by alcohol and who are therefore a danger to the lives and limbs of themselves and others and yet who escape being charged or convicted through difficulties of proof. A situation which amounts to a challenge for sensible and determined people to put right."[9]

The same month Mr T.J. Ross, S.M. made a statement from the bench and elaborated in writing to the Minister himself. He made his memorandum to the Minister public.[10] In it he indicated that an offence based on compulsory blood sampling would inevitably become part of New Zealand law. In the meantime it would be useful for the Government to distribute to all drivers some form of elementary breath testing equipment so that the public at large could test themselves and thereby come to know how many drinks it would take for them to reach a level of for example 80 milligrams per 100 millilitres. The Magistrate

[9] This statement was circulated in typed form only and became evidence before the 1966 Committee.

[10] Otago Daily Times 18th March 1966.

was convinced that "there is a sufficiently large body of otherwise responsible citizens who may frequently imbibe sufficient to raise their proportion of blood alcohol to 80/100 milligrams per 100 millilitres" and that compulsory blood testing would "give rise to widespread protest and would be regarded as a violation of the rights of the individual".

Neither suggestion was debated by Cabinet but both were forwarded to the Road Safety Select Committee which had been constituted in September 1965.

The Road Safety Select Committee

By 1965 the Government was sufficiently worried by the rising road toll at least to set up a select committee to enquire into and investigate means of improving road safety in New Zealand. Through it could be channelled the many hundreds of submissions received by various Ministers and organisations in the course of a year. In the first place the order of reference did not even suggest that the committee should investigate the adequacy of legislation or suggest any particular changes.[11] Indeed in its report of 1 June 1966 (after assembling on 23 occasions and sitting for 71 hours) it quite pointedly stressed that most progress in road safety would be made by increasing publicity about accidents, educating the public via broadcasting, improving traffic engineering and making more efficient the policing of existing laws. Mr Evans, S.M.'s view that the absence of compulsory blood testing "makes nonsense of law enforcement in the wider sense in this important field" did not find favour with the committee. Rather the committee felt that "it is unlikely that any single activity can of itself result in a large reduction in accidents. We believe that the problem cannot be solved by legislation alone because many accidents are due to the unintentional momentary aberrations or road users or classes."[12]

Given the bipartisan composition of the committee it is difficult to resist the conclusion that it was heavily dominated by the Minister and senior departmental officers (the Commissioner for Transport and the Assistant Commissioner for Transport both of whom at that stage were far from convinced that chemical testing was necessary).

In the final outcome out of 32 pages of report only 2½ are devoted to the question of chemical testing. The Ministry and Law Society views clearly prevailed in the final recommendation that a form of voluntary testing be introduced by way of the Transport Act so as

[11] Extract from Journals of House of Representatives 14 September 1965 - a Select Committee set up to ..."consider methods of improving road safety in New Zealand".

[12] Road Safety Select Committee Report 1966 p.5.

to raise certain presumptions in determining whether a driver is under the influence. Since refusal to take a blood test would not be presumptive evidence of either guilt or innocence it was clear that legislation along the lines suggested would be completely without teeth.

The Law Society had indicated that on a pure analysis of criminal law it is repugnent to determine the guilt of an individual by reference to an average persons reactions particularly when an individual may be unwittingly above the statutory limit.[13]

The committee had also been fairly easily convinced that there was great difficulty in taking blood samples from non-consenting persons and had been surprised that a "few drops" of blood was insufficient to test for alcohol concentration. Fear that compulsory testing might lead to random testing was also darkly hinted at.[14]

The recommendations of the committee were incorporated in the Transport Amendment Act 1966 which turned out to be the legislative non-event of the year.

McAlpine Exits

Practically the last official act of the Minister prior to his retirement from politics after the 1966 general election was to commission a series of tests related to blood alcohol levels in motorists. As the Transport Act had already been changed in form, if not in practical effect, it was difficult to deduce immediately why an outgoing Minister should wish to do this at all.

The tests consisted of administering an equivalent amount of alcohol to ten different people of a one hour period. Blood samples were taken and the milligram levels varied from 17 to 117. The Minister then indicated that he considered the results to be "completely conflicting and contradictory". As far as he was concerned blood alcohol tests were of no great value. Now it became obvious that the tests were designed to lay the testing bogey to rest for all time!

But such an assessment was based on the assumption that the relevance of tests is limited to reflecting the quantity of alcohol ingested by a driver. Nonetheless the Minister did receive support in the press. The Timaru Herald and the Bay of Plenty Times were both cockahoop. The Herald's editorial 28.11.66 exalted "blood tests were meant to do away with the rule of thumb assessment of the experienced, but perhaps prejudiced, police officer and the reluctant appraisal of

[13] This submission occupied ½ page and was a pure expression of opinion unrelated to research of law or medicine.

[14] Committee report 1966 p.9.

the hastily summoned general practitioner. It was science to the rescue. It is ironical that the balloon has been burst by simple tests carried out in Wellington with results completely conflicting and contradictory. Learned reports and authoritative statements have been revealed as worthless there should be a few red faces around at the moment." The Bay of Plenty Times on 30.11.66 wrote in similar vein and added "in relinquishing his portfolio of Transport on retiring from politics, Mr McAlpine could make no more fitting parting gesture in the eyes of the public and the motorist in particular than his attempts now to draw the attention of his successor in office and Parliament to the flaws in this piece of legislation. As it stands in its present form the Transport Amendment Bill is no testimonial to the legislators' collective powers of judgement". The Wellington Evening Post and the Christchurch Star were in full agreement. Not all newspapers were as jubilant though.

The Otago Daily Times on 5.12.66 described the retiring Minister's attitude as "a good excuse for not tackling the problem". It described a driver who has consumed a fair amount of liquor as "frequently a potential accident waiting to happen".

After the initial editorialising by newspapers a very marked public reaction became noticeable. Those newspapers vigorously supporting the Minister were bombarded with letters from doctors, police surgeons, scientists, lawyers and other readers pointing out that the Minister had only demonstrated that blood levels of alcohol are related to rates of metabolism not to impairment of judgement. The South Canterbury Division of the BMA issued a public statement expressing concern over the flippant tone of the Timaru Herald's editorial. On November 30, 1966 the Herald printed a much longer editorial and acknowledged that the Scandinavian countries had made significant progress as a result of compulsory testing legislation. It added "the test may accordingly be justified on the grounds of expediency."

Next the Senior Police Surgeon in Christchurch (Dr P.B. Maling) and the Chairman of the Canterbury Branch of the New Zealand Institute of Chemistry (Professor L.F. Philips) together delivered a stinging attack on the departing Minister. His statement was branded as "so far at variance with scientific findings that it could be ignored if it were made by someone less responsible than the Minister of Transport". Next the Canterbury Division of the BMA spoke out and referred to the Minister's tests as "unofficial, unpublished and unverified and used as an argument against progressive legislation on this subject". Two months later the New Zealand Automobile Association came out in support of the introduction of compulsory blood tests. Thirteen branches of the Automobile Association had favoured legislation setting the level of 100 milligrams and two had favoured 150 milligrams. Each branch had made its decision on the basis of the British White Paper which had been published contemporaneously with Mr McAlpine's parting statement.

## THE TRANSPORT AMENDMENT ACT 1968

### Mr Gordon Enters

It would be difficult to imagine a greater contrast between one Minister and his successor than between Mr McAlpine and Mr J.B. Gordon the new Minister who was to specialise in the Transport portfolio for the next six years. Leading departmental officials[15] have invariably described him as being both "progressive" and "aggressive". Yet on this particular subject he began cautiously. Departmental files show that officer attitudes had changed little from the McAlpine days and when, for example, the Presbyterian Church sought, in late 1967, details of the new Minister's stance he indicated that the question of compulsory blood tests was far "from being a straightforward one". Furthermore certain people "could not reasonably be expected to give blood samples for health or religious reasons". The Department of Scientific and Industrial Research was to be asked for reports on "the reliability of tests other than blood tests". (The Presbyterian Church was far from satisfied with that answer and subsequently wrote to the Prime Minister Keith Holyoake but by that time the matter had been referred to the Road Safety Select Committee and Holyoake refused to comment.)

By the end of 1967 there is no doubt that both the Minister and the Department were undergoing a radical change in thinking. Most of it was related to the developments in the British Parliament.

### The Road Safety Act (UK) 1967

The new Minister was in Britain while the Bill was being steered through the House by the UK Minister Mrs Barbara Castle. In addition to observing the legislative process Mr Gordon had access to many British and World experts assembled in London to observe the implementation of the British White Paper Report. Mr Gordon was not only impressed with the proposed legislation itself but also with the public reaction to it. He now recalls that "the reaction was nowhere near as rabid as I thought it would have been even allowing for the fact that per capita the United Kingdom has less motor vehicles than New Zealand". The very fact that Britain had enacted the legislation was sufficient impetus for the National Party to agree in Caucus that the time had come to, as Mr Gordon says "pick up the ugly baby."

### The 1968 Select Committee

It was resolved by Parliament on 24 November 1967 "that a select committee be appointed to enquire into the adequacy of existing legislation related to tests for blood/alcohol levels in motor drivers and in particular, to review and

[15] I have interviewed all surviving departmental officials involved in the 1968 exercise and all confirm this. I have interviewed Mr Gordon myself and was impressed by his obvious enthusiasm about this topic 11 years after.

report on the accuracy of breath testing and its application in New Zealand as a preliminary "on the spot" test to determine whether a motorist should be required to submit to a blood test.

Once again under the chairmanship of Mr D.J. Carter the committee was to meet but with a more specific brief than two years earlier. New on the committee were Mr G.F. Gair, Mr J.R. Harrison, Mr J.L. Hunt, Mr N.J. King, and Mr W.L. Young. (The latter had in fact only recently resigned from a sub-committee of the New Zealand Road Safety Council which had prepared very detailed and supportive submissions for presentation to the committee that year.) The Minister was not a member of the committee but attended most meetings and was able to give many personal impressions gained from his experiences in England during the passage of the UK legislation.

The other brief of the committee for the year was the demerit points system but of the 52 hours of sitting time of the committee well over 40 were spent on blood/alcohol issues.

The movement for reform could not have seen a committee meet at a more felicitous time. For in the United Kingdom between the months of October 1967 and March 1968 there was a 14 percent reduction in fatal and serious casualties in road accidents and during the 10 pm to 4 am part of the day the reduction was 40 percent. (This initial dramatic drop was by no means sustained but the obvious causal link between an immense drop in liquor sales and a corresponding drop in road accidents was not lost on the New Zealand politicians.)

The committee got down to business and worked extremely well. As will be seen shortly it heard and cross-examined 24 different organisation representatives and departments and considered in depth 26 written submissions. The committee also received a vast assortment of background papers (including the Grand Rapids study and copies of the UK legislation) far more than in 1966. The bipartisan dedication (Gordon called it "camaraderie"), of the committee appears to have been its single largest asset. So much so that when the Minister suggested that members should undergo blood tests to see for themselves MPs from both sides of the House willingly rolled up their sleeves.

Gordon had already discounted in his own mind the "experiments" commissioned by his retiring predecessor. The objective this time was to have people of different sizes and builds take alcohol over an extended period under medical supervision so as to gauge an individual's reaction as to whether he thought himself fit to drive. The Minister was anxious to discover if there was in fact a level at which a person irrespective of the result of a scientific test knows that he is unable to control a car satisfactorily.

The D.S.I.R. and a team of medical specialists conducted the tests under strict security at Parliament House. As many as three blood tests per subject were taken at regular intervals. Not all of the subjects were MP's and not all were males. The actual results of one round of tests are set out in Appendix V .

From the tests it clearly emerged thatwhen a level of 100 mgs/100 millilitres of blood was reached almost every subject had distinct reservations about their own ability to drive. The tests also convinced the D.S.I.R. Chemistry Division that using the best technology available the only reliable measure was blood/alcohol. Breath analysis alone was itself not sufficiently reliable as a basis of prosecution.

Groups appearing before the 1968 Select Committee

(a) The New Zealand Law Society -

The Society had had considerable success in persuading the 1966 Committee that compulsory chemical testing was -

(i) an invasion of the rights of the individual which could not be justified

(ii) was only an observation of what happened to the average person and could therefore not determine the guilt of a particular individual; and

(iii) was unfair as an offence creating determinent because it was impossible for a driver to know what proportion of alcohol he had in his blood at a particular time.

Now in 1968 the Law Society was prepared to re-state its 1966 position. Where it went further was for it to launch a broadside against the British Medical Association for changing its mind between 1953 and 1963 on the subject of chemical testing. The Society chose to use this as a Court lawyer might do to cast doubt on the credibility of a witness in a Court case. Rather than examining the evidence which now existed the Society chose to point to the earlier BMA report to show that this was a field in which "there was no certainty". The Society was only prepared to accept breath tests when the technology was sufficiently advanced for motorists to test themselves in the absolute certain knowledge that the results they would achieve would be the same as those achieved by law enforcement officers. Furthermore the only law enforcement officers which were acceptable to the Society were those specially trained in the taking of such tests.

(b) Justice Department -

Submissions were prepared and delivered by the then Secretary for Justice Dr J.L. Robson. This submission together with those of the Crown Law Office and Mr D.S. Firth, an Auckland lawyer, amounted to a most substantial challenge to the Law Society position. The latter position had been well publicised and since it differed so little from the 1966 position many other groups took to attacking it as by 1968 it appeared an extremely vulnerable one.

The Department supported compulsory blood testing largely on the ground that it saw no difference between a 100 mg limit in no significantly different light from a 30 miles per hour speed limit. The 'assault' of taking blood was seen on a par with arrest which also amounts to an assault on the person. The discomfort of the test was seen as being neutralised by the innocuous nature of the screening test which in itself raised a form of presumption of guilt. Self-incrimination by blood sample was explained away by examining the common law reasons for the privilege of an arrested person not having to speak in his defence or otherwise. Briefly, the distinction was seen as this. A blood sample cannot lie whereas a person when he is arrested is tempted to do just that to his subsequent embarrassment when the matter comes to Court.

(c) Crown Law Office -

These submissions were given by the then Solicitor-General Mr J. White. All the legal arguments made by the Justice Department were reiterated and furthermore it was broadly suggested that all enforcement officers should have sweeping powers to test at random. The analogy given was with weights and measures inspectors who from time to time test the scales of all traders who use them. In such circumstances it can hardly be suggested that a person having his scales tested was being subjected to some kind of slur.

(d) R.C. Savage Q.C. -

Mr Savage was later to become Solicitor-General. Although Mr Savage was a member of the Crown Law Office at the time he made it clear that his submissions was that of an individual wishing to assist the committee with some of the more difficult questions of law. Paradoxically however his major submission was that for the Law Society to call blood sampling "an assault" is not really correct. To do so would be only to use lawyers language and in fact "to most of us it is nothing of the sort". He also made the telling point that very few people fail to go overseas simply because they have to submit to inoculations.

Mr Savage quoted every conceivable legal principle in all known areas of the law where persons are subjected to criminal sanctions whilst not knowing that they themselves are guilty of an offence. He exhorted the Parliamentarians to accept that there is a greater evil than that inherent in blood testing and that the road toll was sufficiently harmful to warrant "the strictest possible measures".

(e) D.S. Firth -

This Auckland lawyer was clearly incensed by what he found to be a negative attitude on the part of his own professional body the Law Society. In by far the most comprehensive submissions presented to the Committee Mr Firth set out a set of references which have been paralleled only in the United Kingdom white paper and the Kirby report (infra). His submission was long involved and brilliantly reasoned. Reference was made to the Grand Rapid study and all subsequent English, Swedish, American and Australian authorities. The main thrust of the submission was that provided the level above which guilt was presumed could be set at 100 mg then it would be possible to frame a law which circumvented every single objection of the Law Society. Mr Firth was to appear before the committee twice having received many letters of encouragement from police surgeons and pathologists in the Auckland area. He began a correspondence with Dr Finlay (a member of the committee) to clarify the finer points of law. He even provoked a second appearance by the Solicitor-General and the Secretary for Justice. In the end (see table of submissions) his point of view was to be accepted by the Committee in all but one respect.

(f) Police -

This Department made an extremely telling submission in that it reminded the Committee that although many submissions had been made on the question of fairness the existing law providing for voluntary blood sampling was itself inherently unfair. In effect it meant that the person who co-operated with law enforcement officers was more likely to be charged with an offence than the person who simply refused to co-operate at all. The time had come now to rectify the situation by making all tests compulsory with an offence level of 80 mg.

(g) Health Department -

The main point which the Health Department wished to make was that the victims of road accidents were now, increasingly, proving an economical drain on health and welfare services. In 1967 8,320 persons had been admitted to hospital as a result of motor accidents. It gave a rough estimate that 55,869 patient days had been caused because of alcohol related activities on the roads and the cost in 1967 was $850,000.

(h) The Medical Association of New Zealand -

The Association had not changed its mind significantly from 1966 and recommended compulsory blood testing with a level of 100 mg. Chemical tests were seen as "essential" for the degree of impairment of driving skill to be assessed with any accuracy. As a general observation the Association felt that provided a persons treatment was not affected his doctor should even in hospital be able to take a blood sample for evidential purposes. In essence the United Kingdom position was re-stated as the total basis of the submission.

(i) New Zealand Medical Association -

This breakaway group of the MANZ presented an unusually liberal submission signed by many prominent doctors. It concerned itself less with what the law ought to be rather than what society's attitude to drinking/driving could most usefully become. What was required, they said, was a wider enquiry into alcoholism and its treatment. The punitive aspect of the law should be downplayed considerably and in particular the Association was very much against medical sampling "by stealth" which the Association felt would only undermine public confidence in doctors generally. Refusal to give a sample should not be an offence rather it should be a condition of a licence that a person should submit to tests as required and if a person did not co-operate he would lose his licence for failure to meet an implied condition. Rather than rely on clinical tests which were not sufficiently specific it would be better for a person suspected of drinking and driving to be taken for a driving test. (The Association did not elaborate on who would occupy the passenger seat in such circumstances.)

(j) The New Zealand Automobile Association -

(This Association had for some time been sponsoring seminars throughout New Zealand in order to gauge response. It had brought many overseas experts to New Zealand with a view to promoting public debate and much of the AA submission was based on the outcome of those seminars and the imported knowledge brought by these overseas experts. It might also be pointed out that Mr W. Brown National Party M.P. for Palmerston North had been a prime mover in the Association during that time and had been an enthusiastic supporter of blood testing promoting the matter in Caucus and urging the Minister, Mr Gordon to raise the matter in Cabinet wherever possible.)

The Association saw itself as being in the position of protecting its law abiding members at the expense of its non-law abiding members. It's UK counterpart had assembled a fair amount of material on the success of the British legislation. Much of this was passed on to the Select Committee by the New Zealand body. It was recorded for example that in November 1967, in England the following drop in fatal accidents had been noted.

8 am to 6 pm two percent less fatal accidents

8 pm to 4 am 38 percent less fatal accidents

10 pm to midnight 49 percent less fatal accidents

midnight to 4 am 39 percent less fatal accidents

Saturdays and Sundays 10 pm to midnight 69 percent less fatal accidents.

It was recorded that an AA sponsored gallup poll of 2477 motorists showed that 80 percent agreed with the new penal provisions and indeed 19 percent were already in favour of random testing.

TABLE OF MAJOR SUBMISSIONS TO COMMITTEE

| | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9a) | (9b) | (9c) |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Automobile Association | ✓ | ✓ | ✓ | ✓ | ✓ | X | ✓ | X | — | — | ✓ |
| Alliance | ✓ | ✓ | ✓ | X | ✓ | ✓ | X | X | ✓ | — | — |
| Presbyterian | ✓ | ✓ | ✓ | ✓ | NIL | NIL | NIL | NIL | ✓ | — | — |
| Law Society | X | ✓ | X | X | NIL | NIL | NIL | X | — | — | — |
| BMA | ✓ | ✓ | ✓ | NIL | ✓ | ✓ | X | NIL | — | — | ✓ |
| MANZ | X | X | X | X | X | X | X | X | — | — | — |
| Justice Department | ✓ | ✓ | ✓ | ✓ | NIL | NIL | NIL | NIL | — | — | — |
| Crown Law | ✓ | ✓ | ✓ | NIL | NIL | NIL | NIL | ✓ | — | — | — |
| Police | ✓ | ✓ | ✓ | ✓ | ✓ | X | ✓ | X | — | ✓ | — |
| D S Firth | ✓ | ✓ | ✓ | NIL | NIL | ✓ | X | X | — | ✓ | — |
| Road Safety Council | ✓ | ✓ | ✓ | ✓ | NIL | X | ✓ | X | — | — | — |
| Municipal Association | ✓ | ✓ | NIL | NIL | NIL | NIL | NIL | ✓ | — | — | — |

(1) Compulsory testing
(2) Blood
(3) Specific offence level
(4) Offence to refuse test
(5) Hospital sampling
(6) Two breath tests
(7) One breath test
(8) Random testing
(9) Suggested offence level (a) 50
(b) 80
(c) 100

Parliamentary Counsel and drafting of the 1968 Amendment

Senior Parliamentary Counsel (Mr J. McVeagh) was assigned the task of sitting in on committee and even government caucus deliberations and ultimately drafting "an improved version" of the UK legislation incorporating more explicit safeguards but generally keeping the major recommendations of the committee which have reported on 31 October 1968. The major recommendations were -

1. An officer must have good cause to suspect that someone has committed an offence of driving with excess blood alcohol before being permitted to administer a screening test.

2. Two screening tests to be administered where the power to arrest where suspect refuses to co-operate in the procedures.

3. Compulsory taking of blood samples by medical practitioners from motorists who give positive screening test.

4. Analysis by D.S.I.R. of a blood sample with right of independent analysis of a part of that sample.

5. An irrebuttable presumption in law that blood analysis should be treated the same as the blood level when the person was driving (no time limit placed on the taking of a sample in relation to the time of driving).

6. Legal limit 100 milligrams/100 millilitres.

7. Refusal to give a blood sample to be an offence in itself.

8. Blood sampling from hospital patients subject to medical control.

9. Evidential shortcuts for expert witnesses from D.S.I.R. and medical profession to give evidence by way of certificate.

(It is noteworthy that when the committee reported the Wellington Evening Post expressed profound shock that such a report could have been brought down by a committee of the New Zealand Parliament. The Post found that it had "quite disturbing implications" conjuring up visions of traffic officers hauling motorists out of their cars in broad daylight thus showing the "potential for gross public humiliation of perfectly decent people".)

Parliamentary Counsel was by this stage well aware that although the English legislation had shown short term promise in its social aims it was having an extremely bad time in the Courts. It had admittedly enabled the British police forces to be successful in a 50 percent of drinking prosecutions as opposed to only 10 percent prior to the 1967 Act.[16] Nonetheless defences were arising almost daily in the Courts and Parliamentary Counsel in New Zealand attributed much of this to the fact that not enough detail had been written into the United Kingdom Act.

(Curiously nine years later the Blennerhassett Report[17] was to bemoan the fact that the 1967 Act had sidetracked the Police away from using their trained judgement as officers and making them "conform to an artificial ritual in the knowledge that if they deviate from this, a prosecution is likely to fail".[18] Nonetheless New Zealand was to opt for a considerably more detailed step by step legislative code).

The draft which was eventually put into Parliament was a finely detailed piece of legislative drafting running to five pages of print. From the policy point of view it clearly indicated an entirely new legislative approach in that it created a "statutory lie" to provide that in the new blood/alcohol offence even though a blood sample may be taken some hours after driving has concluded nonetheless there was an irrebuttable presumption that the alcohol level shown was that applicable at the time of driving. The penalty for this offence was to be the same as for driving under the influence (retained as a separate offence) but the draconian penalties for the latter were now put on equal footing with the new offence namely three months imprisonment coupled with mandatory loss of licence for six months minimum and a fine of $400.

The detailed steps relating to actual breath testing would be set out in a breath tests notice gazetted by the Minister. Instead of relying on the carrying out of manufacturers instructions (as was the case in Britain) these instructions were expanded upon and developed by the D.S.I.R. into a code of operation almost as complex as the legislation in the Act.[19(a)]

The Passage through Parliament

The Bill was of necessity introduced very late in the session (16 October 1968). The new drinking driving provisions received by far the most scrutiny but nonetheless with a build-up of legislation it became clear in the course of debate that members on both sides were anxious to bring the Bill into law because in the words of the Minister of Justice Mr J.R. Hannan "the public are demanding that something be done".[19] Nonetheless opposition

[16] See Report of the Dominion Analyst 1977 (DSIR) C.D. 5614 p. 109. Also on p. 112 it was concluded that "the alcohol legislation in Great Britain is being administered in a very unsatisfactory manner".

[17] Department of Environment (UK) Drinking and Driving 16.2.76. HMSO.

[18] Ibid paragraph 1.14.

[19] Hansard 1968 p. 2354

[19(a)] Transport (Breath Tests) Notice 1969 S.R. 1969/70.

member Martin Finlay was anxious to table two amendments and to have the drafting generally tidied up by the Statutes Revision Committee.

The Minister was anxious to see that the drafting was put right if there were any deficiencies but he was extremely nervous as were Mr Hanan and several other Government members of the possibility of the Bill bogging down in yet another committee with possible policy changes being made to it thus frustrating the timetable of having it as law on 1st April 1969.

In the event the Bill was referred to the Statutes Revision Committee for the purpose of tightening up clauses 11, 12 and 25 on matters restricted to points of law.

When the Bill returned to the House Dr Finlay sought to introduce amendments which would -

(i) Leave to the Court what inferences were appropriate in any individual case where a suspect refused a blood test. The offence of refusing a sample would thus be removed.

(ii) Ensure that good cause to suspect was established to the satisfaction of the Court where a breath testing device was not available. (This gloss was to be added by the Courts in any event.)

Amendment (i) was rejected out of hand by the House but a division was called for on (ii). Despite the fact that government members had been given a free vote on the curious ground that this was "liquor legislation" the vote went 32-30 against the amendment exactly along party lines.[20]

The 1968 Act in Practice

The Act was to fare much better than its British counterpart. Although it did not have any immediate dramatic affect on the road toll. The latter was to rise and fall in a rough correlation with the percentage increase and decrease in the growth of vehicle ownership (see Appendix III).

The reasons for the inexorable rise in the road toll may however be found in factors which can only be discovered on a minute sociological examination of statistics outside the scope of this paper certainly it can be said that the burgeoning use of motorcycles by young drivers may have more than covered for any improvements brought about by such methods as alcohol testing and seatbelt usage. (See Appendix VI.)

In the Courts however it was clear that many of the defences routinely used by Defence Counsel in Britain[21] were not succeeding in New Zealand but nonetheless the following could be observed about the New Zealand legislation -

[20] Ibid p. 3928.

[21] See "All Known Defences [1973] New L.J. 192.

(a) The Courts were refining the legislation to the point where only experienced lawyers were able to appreciate the full implications of the law.

(b) The percentage of successfully defended cases in New Zealand was very low indeed.[22] (But note (e) below.)

(c) The "average" offender in New Zealand was showing a considerably higher level than in most parts of the world. As can be seen from Appendix VII in 1977 the average blood alcohol level was around 164 milligrams.

(d) The use of technical defences was embarrassing both general practitioners and medical staff of hospitals who were increasingly required to give evidence at the option of the defence and more often than not showed memory lapses or evidential shortcomings which led to dismissal of the case.

(e) Junior traffic officers particularly were fighting shy of getting involved in blood alcohol procedures for fear of becoming caught in long involved hearings of defended cases. Even after the legislation had been in force for eight years the average number of breath tests carried out by the 880 Ministry of Transport officers was 9.5 tests per annum. In this context the 96.5 percent conviction rate obtained in the Courts loses some of its lustre.

Nonetheless the number of persons convicted had risen from 7367 in 1973 to 9751 in 1977. It is probably fair to say that aside from the highly technical amendments brought about by adverse Court decisions there were some significant changes between 1968 and 1977 recommended by the Select Committee. The main changes were -

(1) Widening the grounds of "good cause to suspect" on the part of the traffic officer so that suspicion of drinking alone enabled the administering of a breath test.[23]

(2) Placing a positive duty on doctors and ancillary staffing in hospitals to take blood specimens from accident victims.[24] And most important of all -

[22] In 1977 the Ministry of Transport lost only 235 cases out of 5778 taken (see Breath Tests in N.Z. 1977 M.O.T.).

[23] Section 58A (1B) inserted 1974.

[24] Section 58D inserted 1971 and 1974.

(3) The inclusion of a "reasonable compliance" provision[25] something which Parliamentary Counsel describes as "a provision the British Draftsman would give his eyeteeth to have" (Mr McVeagh had in fact discussed the matter with his opposite member in Westminster who expressed amazement that such a provision could find its way into the law with such ease).

The effect of amendment (3) was to excuse minor lapses in procedure where it was clear that a conscientious effort had been made to comply with the legislation and where technically the departure should have led to a dismissal of the charge on the strictest analysis of the requirements. By 1976 the Court of Appeal had given a most liberal interpretation to the reasonable compliance provision[26] and there was a general feeling among Police and Transport prosecutors that the legislation was beginning to settle down a little and that acquittals were becoming slightly less easy to come by.

## THE TRANSPORT AMENDMENT ACT 1978

### The Road Safety Select Committee under the Chairmanship of M. Minogue, M.P.

After the National Government was returned to power in 1975 the Select Committee came under the chairmanship of Michael Minogue, M.P. a Hamilton lawyer. As an experienced defence counsel he knew better than most politicians that the blood/alcohol sections of the Transport Act were still too complex and not sufficiently effective as a social tool. Under his chairmanship the Committee struck out in new directions. Minogue had conducted a good deal of research on his own behalf. He had strong desire to initiate policy and to this extent he was in no way impeded by the new Minister Mr C.C.A. McLachlan who allowed him a remarkably free hand. The Minister himself was in charge of a more comprehensive portfolio than had been the case with Ministers in the 1960's. He was Minister of Railways, Civil Aviation, Marine and Transport all of which involved policy considerations of an economic nature far more broadly based than mere road safety.

Minogue on the other hand was intensely interested in the subject of road safety and sought to persuade fellow members of the committee (both Labour and National) and indeed any government department who was involved in road safety that radical changes were needed in this field and that this time it would be preferable for New Zealand to be in the vanguard rather than 15 years behind.

### The political climate and public acceptance of measures taken to curb drinking and driving

Coupled with Minogue's political initiative was the slow but inexorable growth of a climate of public acceptance that strong measures were needed to curb the road toll which once again was rising at a rate greater than the rise in the number of motor vehicles.

[25] Section 58 (2) inserted 1970.

[26] Coltman v. Ministry of Transport [1976] C.A. 36/76 unreported.

Intensive advertising campaigns in all sections of the media had been promoted by the Minister of Transport for more than three years before Minogue entered politics. These continued in intensity and were supported by the pronouncements of prominent medical experts of whom the best known was Mr Frank Rutter the Chairman of the Auckland Hospital Board who frequently stated on television and in the newspapers that hospital waiting lists could be reduced almost to nothing if the accident wards could be cleared of motor accident victims.[27] By the end of 1976 Police, Ministry of Transport and politicians generally were convinced that in more aggressive legislative stance would be welcomed by the New Zealand public. The attitude was clearly one of "hit the drinking driver". In such a climate it would have been easy and tempting for the Road Safety Committee to have recommended -

(a) A drastic reduction in the permissible blood alcohol level.

(b) Random testing of drivers.

(c) A return to ten year disqualification penalties.

Minogue almost single handedly steered the committee into a more discriminating direction. He was able to do this largely because the composition of the committee had changed radically since the days of the 1968 legislation. The Minister was a member but because of the burdens of office was hardly ever in the position to attend meetings. At the most seven members including the Chairman represented a full complement of the committee. Pressure of other Parliamentary business both in New Zealand and overseas was to ensure that between 1976 and 1978 the composition of the committee was to go through so many changes that the only consistent philosophy remaining was that of the Chairman.[28] It was he who was to report continuously to Caucus and it was he who perceived most profoundly that simplification of the legislation was the key to progress. As a long term goal he sought the abolition of the blood test and the elimination of "technical defences". The combined effect of this it was hoped would be the more efficient use of enforcement of personnel who would be less afraid to take matters into Court and would have a better chance of sustaining convictions.

[27] There was also a very opportune research report published in mid 1978 which clearly linked alcohol with many forms of violent offending particularly on the roads. It received wide publicity in newspapers -

Violence on the road K.R. Parsons N.Z. Department of Justice 1978 Research series No. 6 in particular Chapter 5.

[28] In 1978 Messrs Austin, Couch, Lange, Minogue, Friedlander, Arthur, Lambert, La Varis, McLachlan, and Miss Dewe all attended meetings. Many attended only one.

The 1977 report of the Road Safety Committee contains a scheme of evidential breath testing backed up by the existing form of blood testing in cases of doubt as to the accuracy of an evidential breath test. In addition the Minister was requested to submit draft legislation to the committee radically altering the scheme of the 1968 legislation so that in alcohol cases the prosecution need only prove four very basic facts related to driving, drinking, identity and the level of analysis. It is of note that no such legislation was ever put before the committee.

Evidential breath testing

The concept was not new. Indeed as can be seen from Appendix IV there were many descriptions of "breathalyser" which had for many years been purporting to be reliable measures of tissue alcohol where analysis was based purely on a breath sample. The State of Victoria in Australia had since 1961 used such machines as an advanced form of Draegar alcotest as a factor in clinical examinations to support the observations of a doctor on the driving ability of a suspect.

The Road Safety Select Committee in the early 70's had seriously considered recommending the use of a special Draegar Alcotest tube device calibrated for a rough equivalent of 150 milligrams to be used as a "high screen" to create an irrebuttable presumption of intoxication bearing in mind that New Zealand motorist offenders had shown a notoriously high level of blood alcohol referred to earlier in this paper. After two years of testing and discussion with the committee the D.S.I.R. recommended that the Draegar tube technology was not sufficiently accurate to allow the Minister to approve it as an evidential device. Furthermore in due course it could be seen that electronic machinery would soon render the tube technology obsolete and legislation along the proposed lines never materialised.

The 1977 recommendation for legislation in 1978 to introduce evidential testing can now be seen as an extremely precipitate one. It was based largely on advice contained in papers submitted from the Ministry of Transport which conceded the lesser accuracy of breath tests as opposed to blood tests but stressed their greater "relevance" in that they are based on samples taken from an area of the body closest to the brain and closer to the actual time of driving bearing in mind that they can be administered by traffic officers. The Ministry confidence which Mr Minogue shared in equal degree was based largely on overseas developments which seemed to fulfil the D.S.I.R. predictions of a new breed of accurate electronic breath testing devices. Indeed the D.S.I.R. recommended in 1977 an evidential breath testing procedure which bore many of the hallmarks of the early 1970 suggestion of a high screen. the D.S.I.R. estimated that at least 60 percent of drivers would be screened off in this way and if the blood alcohol limit were

were reduced to 80 milligrams the calibration of the breath device could be lowered even further to skim off the badly intoxicated drivers and still leave a good margin of error where the drivers involved could be blood tested for absolute accuracy.

The Impact of United Kingdom (Blennerhassett) Report and the Australian Law Reform (Kirby) Report

The British enforcement authorities were by 1975 satisfied neither with the conviction rate nor the detection procedures achieved or imposed pursuant to the 1967 legislation, (which was being amended in almost as piecemeal a manner as the 1968 N.Z. Act).

The Blennerhassett Committee sat, on and off, for almost two years to produce a 36 page report much of which is devoted to the assessment of statistics and matters of historical note only. The main recommendation was to introduce evidential breath testing with the option of the motorist to seek a blood specimen as a separate check on the accuracy of an evidential breath device. There was also an oblique reference to the desirability of a reasonable compliance provision not unlike the one inserted into the New Zealand legislation inserted in 1970. It was also suggested that random testing (the administering of screening and subsequent tests not necessarily based on any particular pre-conditions) might be introduced as a legal possibility leaving it to the Police to decide the circumstances in which full use would be made of the provision.[29]

This report does not excite very much attention either in the Ministry of Transport or among the members of the Select Committee. This notwithstanding the fact that the British legislation for all its omissions and problems in the United Kingdom Courts was in essence very similar to the New Zealand legislation.

The Kirby report however was to make a profound impression on the Chairman of the Committee even though it was viewed with some suspicion by the Ministry and was almost ignored by the Dominion Analyst.

On the fact of it the Kirby report is a masterly document. Its 219 pages encompass searching examinations of most of the known alcohol testing systems of the world, indepth analysis of public opinion discussions on the relevance and desirability of random testing, the relationship of alcohol to other drugs, evaluations of all known methods of breath and blood sampling and is topped off with a summary of recommendations running to over 100 paragraphs together with draft legislation and a comprehensive index. It is faintly ironic that such a mighty effort was put into the recommendation for updating the alcohol test laws of Australian Capital Territory. For Canberra has a population of just 192,700, a police force of 567,

[29] Blennerhassett paragraph 5.16.

[30] Australian Law Reform Commission Report 4 (1976).

an area of jurisdiction smaller than Auckland City and no blood testing laboratories. The report betrays not a hint of the limited task it was designed for initially. Vast resources were employed in its compilation and this is reflected in the scale of the finished article: 220 pages.

In addition to Mr Justice Kirby (Chairman of the Law Reform Commission) there were three other commissioners, a draftsman, three research personnel and 11 consultants. Information was sought from no less than 17 different overseas countries and organisations. The report was doubtless a major work (it was an epic compared with the British report) yet its relevance to New Zealand conditions was extremely doubtful.

What the Government Departments wanted from new legislation

The major enforcement agencies in New Zealand are, for all intents and purposes, the Ministry of Transport, the Police and the Auckland City Council. They are responsible for enforcing the law amongst a scattered population in an area greater than Great Britain. It is not uncommon for officers to have to confront rowdy and objectionable motorists who are very heavily intoxicated in situations where offenders outnumber officers 3 to 1. Officers who are not otherwise policemen or scientists have since 1968 been called upon to arrest excitable and often violent people, lead them through medical procedures and obtain convictions through the Courts where they may be both witness and prosecutor. For the whole of New Zealand the Ministry has less than 900 active officers and in many cases one officer may be alone in a traffic station during the hours of darkness. He is often not respected as a policeman and is less likely to be trusted by the public. In a blood/alcohol case the Court can be seen to place much greater reliance on the fact that a blood sample has been analysed by the D.S.I.R. and that a defendant has always had the right of separate independent analysis of the sample.

Yet from late 1977 onwards Mr Minogue had shown great enthusiasm in seeking to persuade members of the committee that the recommendations of the Kirby report could be adopted totally in a simplified version of existing New Zealand legislation.[31] That it did not bear testimony to the combined efforts of the Ministry of Transport, the Police the Dominion Analyst and Parliamentary Counsel who in varying degrees were to convince the Committee that the abovementioned New Zealand conditions were in sharp contrast to conditions in Australian Capital Territory. In particular -

[31] This would have meant the complete abolition of blood sampling (except in hospitals under section 58D) and a system based entirely on breath analysis carried out by single traffic officers.

(a) Canberra has a well staffed police force operating out of only three police stations.

(b) that city has a compactpopulation serviceable by large mobile breathalyser units suburb by suburb.

(c) the existing law in the territory already relied heavily on an imperfect form of blood testing based largely on breath equivalent i.e. because of lack of blood testing facilities a blood concentration was worked out from a complicated mathematical formula based on a not particularly accurate breath reading.

(d) the breath devices used required specially trained "approved testers" to operate them. (These are the latest model Breathalysers see Appendix IV ).

(e) a major ground for good cause to suspect was that a motorist had been guilty of "culpable driving" - a concept not known to New Zealand law.

(f) there was no provision for any form of breath testing more than two hours after driving had ceased. In a small area like Canberra that is realistic; in New Zealand where accidents often remain undetected for considerably longer periods such a provision is not.

(g) the large breathalyser machines used in Canberra have a printout facility so that the result of tests can be handed directly to the person being tested. The small scale technology required in New Zealand (see Appendix IV paragraph (d)), would have to rely on the honesty of an officer to record a digital readout.

(h) Fully half of the recommendations are of a legally "cosmetic" nature. They would make only minor drafting changes to the existing A.C.T. legislation. Of the remainder, half would simply adopt features already in the New Zealand legislation and the other half involved necessary changes which New Zealand would have to adopt in any system of law based on evidential breath testing.

The state of the 1968 law after ten years

It is easy to sympathise with the Select Committee of 1977 in its wish to eradicate technical defences from the law. With only one lawyer (the Chairman) on the Committee for that year the existing sections of the Act made extremely daunting reading. It was well known that in a defended prosecution

it was necessary for the Crown to establish up to 157 points of proof. The failure on any one of which (reasonable compliance notwithstanding) would invariably be fatal. What had started out in 1968 as five pages of sophisticated expansion on a British theme had now swollen to 15 pages representing conceivably the most complex road safety provision in the Commonwealth. One example will suffice. Sub-section (6) of section 58D (inserted by the Transport Amendment Act 1974) reads as follows:

> (6) The provisions of sub-sections (3) and (4) and sub-sections (6) to (15) of section 58B of this Act, as far as they are applicable and with the necessary modifications, shall apply with respect to every specimen of blood taken pursuant to sub-section (2) of this section, as if -
>
> (a) That specimen had been taken pursuant to the said section 58B and
>
> (b) the reference to a registered medical practitioner in sub-sections (4) and (13) of the said section 58B were references to the person by whom the specimen of blood was taken pursuant to sub-section (2) of this section; and
>
> (c) the reference in sub-section (11) of the said section 58B to a specimen of blood provided by the defendant under that section were reference to a specimen of blood taken from the defendant pursuant to sub-section (2) of this section.

Translated that means that blood specimens taken in hospitals are taken in the same way as those taken at police stations.

This does not mean to say that enforcement officers were completely unable to meet the challenges of the legislation. The enthusiastic blitzes launched by the Auckland City Council traffic section and later by the Ministry of Transport during 1977 and 1978 were to have extremely successful results both in Court and appear to have been a very real factor in temporary drops in the road toll. (See Appendix VIII.)

All this aside however there was a very strong feeling on the Committee and amongst enforcement officers and administrators that the time had come to make the legislation more readable, understandable, considerably shorter, and less like a series of 'loophole' stoppers strung together by section numbers. There was no shortage of suggestions from within Government Departments alone.

The Minister himself strongly favoured putting breath testing procedures on exactly the same basis as fingerprinting in the police code of practice. Under such scheme no detailed 'nuts and bolts' provisions would be included in the Act. It would simply be left to the Court to decide whether a proper job had been done and if any doubt existed as to the accuracy or use of equipment evidence could be called in a way not unlike microwave speed measuring devices I dealt with under section 197 of the Transport Act. This approach did not find favour with either Crown Counsel or the D.S.I.R. but at least it served an indication to those drafting the law that the Minister was prepared to support a very much simplified scheme and defend it to his Cabinet colleagues. (As we will see later such an approach already had very broad measure of support within the Government Caucus.)

The 1977 Committee's approach to the technicality of the legislation has already been discussed. It will be recalled that draft legislation had been called for which focussed the whole of the proof on four very central facts. When approached by the Ministry however Senior Crown Counsel was prepared to go further and suggest a scheme based on proof of one central fact, namely that a suspect had driven with excess breath or blood alcohol concentration. The Ministry Legal Section was to find at a very early stage that neither approach found favour with Parliamentary Counsel who made it perfectly clear that he was looking to draft the new legislation as far as possible along the lines of the existing sections of the Transport Act.

The Select Committee Hearings of 1978

The hearings took place against a background of rising public disgust against the road toll and a continual barrage of correspondence directed both at the Minister and the Select Committee demanding that a "tough line" be applied to drinking drivers. The recurring themes were that bad cases of drinking driving should result in lifetime disqualification from driving, fines of anything up to $5000 automatic prison sentences and no granting of limited licences where persons have been disqualified.

Clearly there had been a remarkable turnaround in public opinion in that many people were accusing the Government of total timidity even though it had been elected as a strong 'law and order government' in 1975. Even the medical profession was far less concerned with forensic issues. Hospital Board chairmans from all round New Zealand were to make a personal deputation to the Minister mid 1978 to seek his personal assurance that legislation would be introduced by the end of this session which would be both ruthlessly efficient and heavily punitive.

In fact such an approach had already been approved by Cabinet in early March 1978. Furthermore heavy increases in penalties had been approved in 1977 but Parliamentary time had not been available for the passing of the necessary legislation.

The composition of the Road Safety Committee was at its strongest and most stable during the early part of 1978 and it was during those meetings that the Chairman made it known that he strongly supported the ACT approach to the change in legislation. Such an approach he felt would cast a very wide net and make it virtually certain that the repeatedly drinking driver would inevitably be apprehended within a reasonable period. Because if blood testing were eliminated officers who might otherwise catch one drinking driver per month would in many cases be able to apprehend half a dozen or more per weekend. Less of his time would be spent supervising and taking of blood and he would be involved in less defended hearings which are extremely time consuming when proof of blood sampling and analysis is involved.

As a general proposition this was unanimously accepted by all the members of the committee, the Government Caucus the Ministry of Transport, Police, Justice and Crown Law. Outside of Government and Parliament it was becoming increasingly clear that general practitioners and house surgeons in hospitals were in agreement also that blood testing should be dispensed with except in accident cases and both sets of parties were prepared to redouble their efforts to co-operate with enforcement officers provided the law did not require them to go to Court, and suffer humiliation at the hands of experienced defence counsel. The Law Society appeared to have no public stance whatever except o comment generally on the undesirability of random testing which for a few days became a live public issue when a Supreme Court Judge ruled that with all intents and purposes the existing law conferred a right of random testing on traffic officers.[32]

Such general unanimity was not departed from in spirit but as the legislative process began to pick up momentum questions of practical detail began to emerge. For although the Chairman of the committee was himself well versed in the law and had read the overseas reports thoroughly the continually changing personnel on the committee found difficulty coming to grips with the various rough drafts supplied by Parliamentary Counsel. Much of the time at committee hearings was taken up with bringing new personnel up to date with what had been happening in the Courts, in legislative amendment prior to 1978 and with the various stages of the D.S.I.R. tests of prospective evidential breath test devices.

[32] For all practical purposes the stopping of a vehicle at random to check equipment thereon is a valid way of checking a driver for drinking at the same time. This is defacto random checking for alcohol.

In the latter area the pivotal witness before the committee was the Dominion Analyst (Mr I.R.C. McDonald). Of all the persons involved in the legislative exercise it is quite clear that the Dominion Analyst had the most comprehensive knowledge of all the facets of such technical and complex legislation. He had travelled extensively overseas and had first hand knowledge of all major blood and breath testing systems throughout the world. In particular he had observed close up the "pre-Kirby" testing systems in ACT. He viewed the resulting ACT legislation as a desperation measure designed to legislate breath testing simple because blood testing as it was known in New Zealand had become an impossibility in the Territory. This was because of lack of blood analysis facilities and a Police Force capable in its entirety of administering breath or blood tests because of reasons related to Australian Constitutional law.

Nonetheless Mr McDonald's longterm goal was the elimination of blood testing wherever possible in New Zealand. He had assured the committee in late 1977 that the system proposed in the report of that year would be workable given a certain amount of "lead in" time and the successful testing of certain evidential devices which by that stage were being used under field conditions by the Auckland City Council. In his mind such a system would on present progress lead to a 50 percent reduction in the number of blood samples and would fulfil all the specifications of a "high screen" which the D.S.I.R. had searched in vain for in the early 1970's. Such a system would be cheap and could be introduced nationwide as the equipment was not bulky nor particularly expensive. It was however in the development stage and that was its only drawback.[33]

At each hearing of the committee the Dominion Analyst adduced further evidence that the Alcosenser field devices were performing well as a high screen but it became clear by late March as more Government backbenchers made their first appearnce on the committee that Caucus was expecting a system significantly more radical. The committee in general was becoming increasingly impatient with any suggestion that blood testing needed to be retained at all. Either evidential machines were accurate or they were not and if they were not then the whole exercise was futile. Furthermore the government members on the committee were (often in the strength of attendance at just one meeting) advocating -

(i) the removal of independent defence analysis of blood specimens;

(ii) the abandonment of a defence right to require doctors to attend court at all;

[33] At that stage the Ministry favoured the Kitigawa tube but the D.S.I.R. were making the greatest effort to improve and modify the Alcosensor II for NZ use. Eventually it became clear that Kitigawa was not suitable for N.Z. testing conditions.

(iii) not changing the 100 mg level for blood as it was in their view an anchronistic system now that breath testing could be used for evidence.

The tension between the Departments and the committee was further exacerbated by the fact that the Ministry Legal Section had not been able to discuss the matter in great depth with Parliamentary Counsel. By mid year only broad matters of policy had been discussed and a specimen draft had been obtained, at two days notice, whichwas meant to be illustrative only. By this it was meant to illustrate to the committee what parts of the existing legislation could be pruned and abbreviated references were made to evidential breath testing procedures but only in parallel with existing breath and blood testing procedures and as if there were two offences and test systems running in parallel to the existing overall scheme. Presented in this way there was a suggestion that the new law would be even more prolix and cumbersome than the existing one.

The result was that before the committee had a chance to put in even an interim report there were rumours leaking back from the committee through Caucus to Cabinet that what was being proposed was not what the Minister had announced to the press in February 1978.

Clearly the Government was publicly committed to introducing a form of evidential breath test procedure and equally clearly it had not announced what the approved evidential device used to introduce the scheme would be. There were many photographs in newspapers of D.S.I.R. personnel holding up to the camera as many as three different devices but, it later emerged, none were field tested in New Zealand and none were of the kind used in Australia or certain states of America where breath testing was used evidentially to some degree.

It thus became necessary to clear the air between the Government Departments and the committee. This was done on 28 March 1979 when the Dominion Analyst in consultation with all enforcement authorities made a special report to the committee in writing. The implication was that the report had the standing of a definitive statement by the Government's Chief Scientific Adviser in such matters. (The D.S.I.R. has its own Minister as does the Parliamentary Counsel Office the significance of which will be seen later.)

The D.S.I.R. report was to solve many problems arising from confusion over short term Government aims and available technology. It assured the committee that the D.S.I.R. was not being deliberately obtuse or obstructive in failing to instantly nominate an evidential breath test device.

The field tests had been designed to find the most accurate machine under operating conditions and to indicate the range within which such a machine was capable of giving a "definitive positive" test. The most promising machine (the Alcosensor II) gave a definitive positive digital readout in 115 out of 163 tests, a "doubtful positive" in 40 tests out of 163 and negative results in 8 tests out of 163. In each case the suspect had been in varying degrees over 100 milligrams with his results had been available. In practice this meant that one suspect would be incorrectly released and three drivers would be incorrectly presumed to have breath alcohol levels above 500 micrograms of alcohol per 1 litre of breath. (Speaking purely as a statistical probability). If an officer were to be able to require a blood sample at the very lowest end of the scale (i.e. 20-25 percent of the time) a workable and fair system could be introduced. It would be furthered, in accuracy, if the corresponding blood alcohol offence were made to apply over 80 milligrams rather than the existing 100 milligrams. At all times a suspect should have the right to give a blood sample if only on the basis that an officer can make a mistake in reading a moving digital readout. To some extent therefore there was going on behind the scenes a classic compromise which was to form the basis of the interim report of the committee delivered in June 1978.

The interim report 1978

The introduction to the report made reference to the committee's "concern to see early legislative action" on the new blood and breath alcohol legislation. The report was very much to the point in terms of what was to appear in the procedural parts of the Act.

The scheme proposed by the D.S.I.R. for conducting breath tests was fully adopted including the lowering of limit for blood alcohol offences to 80 milligrams.

There was to be only one screening test and not two even though the Ministry had expressed grave reservations of the consequences in the event of no evidential breath test device being available to a particular enforcement officer. This would in effect lead to blood testing after a single screening test had showed positive.

The Chairman was however determined to simplify the procedures as that is what had been implemented in Canberra.

Good cause to suspect was to be redefined to enable screening tests to be carried out on -

(a) a person suspected of drinking

(b) on any person who had been involved in an accident; or

(c) where a "culpable driving offence" was suspected.

(The reference to a culpable driving offence was lifted directly from the Kirby report but initial discussions with Parliamentary Counsel had indicated to the Ministry that such an expression could not be included in the legislation as it could well open up a flood of cases arguing degrees of culpability in this vital area of preconditions to testing. In the end the draftsman opted for "an offence against Part V of the Transport Act" which is the major Road Safety Code within the Act.)

(d) A blood sample could be requested where drugs other than alcohol were suspected. (This was the result of an off-the-cuff request in committee by a police representative who pointed out that a doctor conducting a clinical examination could not obtain a compulsory blood test from a suspect who was believed to be under the influence of drugs other than alcohol. The committee had endorsed this suggestion without any further comment.)

(e) The hospital blood sampling procedures were to be simplified considerably largely to rely on the initiative of those doctors who conscientiously believed that samples should be taken. From road accident victims. The legislation was to guarantee in effect that any such sample taken would be analysed and not passed from hand to hand and end its life as an unidentified red bottle in an overcrowded hospital refrigerator as had been the fate of so many samples under the previous legislation.

(f) The general public demand for tougher provisions in respect of limited licences and penalties was to be satisfied in ways suggested in various combinations by the Ministry, Police, Medical Deputations and leader writers.

This report was well publicised and when Cabinet Legislation Committee met to consider legislative priority the Ministry had no difficulty in persuading senior Government members that a Bill should be accorded the highest priority and become law before the end of the session.

Parliamentary Counsel

The Parliamentary Counsel assigned to the task was both young but nevertheless well experienced. He was however labouring under an immense workload. He had spent most of 1978 preparing innovative

and major legislative drafts which were to become the Securities Act of 1978. His timetable left no more than five working days to draft and discuss the Transport Amendment Bill (No. 3) instructions for which were completed in early August. These instructions were drawn up in the light of a most useful submission from the New Zealand Law Society drawn up in great haste and under intense protest. For unlike the 1968 exercise no special interest or pressure group appeared before the committee.

In instructing Parliamentary Counsel however the Ministry of Transport found itself duty bound to bear in mind the recommendations of the 1977 committee in respect of technicalities, its discussions with hospital boards and junior doctors, its discussions with the Crown Law Office and Justice Department and indeed to listen to comments from senior prosecuting officers to whom hurriedly typed copies of the legislation were speedily issued.

With no further guidance from the Minister, the Committee or Cabinet the Police and Ministry Legal Sections set out to assist Parliamentary Counsel to understand the technology involved and the deeper meanings behind the succinctly expressed committee recommendations. Unlike 1968 Parliamentary Counsel was under such pressure that he was unable to attend Select Committee meetings to get a 'feel' for what was required in the legislation.

The Ministry suggested that the legislation had been in existence long enough to institutionalise certain terms of art (e.g. "positive test", "hospital sample", "enforcement officer", "private analyst" etc). By doing this the legislation would then take on a more familiar and varied context referable back to the major cases on the subject. It then had to be acknowledged that once a scheme of evidential breath testing was fully operative not a great deal of the new legislation would be needed to be referred to by the Courts. The sequence would simply be -

(a) good cause to suspect

(b) positive screening test

(c) positive evidential breath test.

In late 1978 however it had to be borne in mind that it would be impossible to equip all traffic and police stations with evidential equipment overnight. Nor was the breath tester sufficiently accurate to preclude blood test options. On both counts therefore blood testing had to remain a viable alternative to breath testing.

(a) At the request of the suspect; and

(b) at the request of an enforcement officer.

It was observed in the final draft that of the ten pages of legislation considerably less than two pages can be isolated as referring to evidential breath testing alone. (This is best illustrated diagramatically by comparing a typical blood sampling sequence from the 1968 Act with a breath testing sequence under the 1978 Act where the suspect does not seek a blood sample to check the evidential test level (See Appendix IX ).) Aside from blood testing in hospitals, which will presumably continue to be a fact of life as breath testing cannot be carried out there, one further significant improvement in electronic devices would have the fact of simplifying evidential test provisions even further and obliterating references to blood tests altogether.

The draftsman however was faced with the almost impossible task of attempting to avoid technicalities whilst being required to legislate the exercise of a very specific blood test option by an intoxicated person who may well revert to being violent and abusive and having first requested a test will then refuse it either to an officer or a doctor. (The new section 58A (4) is a highly technical and complex "non-admissibility of device" provision which seeks to carry out this requirement.)

The Police and the Ministry were content to assure Parliamentary Counsel that the new 'policy' at least from the Department's point of view, was to cast the net wide rather than to make the holes in the net ever smaller. Such processes had in the past proved to be self defeating. Rather than to seek a 100 percent conviction rate it would be better to have officers on patrol for longer periods using simpler devices to apprehend drivers who would be content not to seek a blood test. Previous experience showed that blood tests were far from popular and given the choice at least nine out of ten people would probably opt for the breath test alone.

The one time that the Ministry supplied an actual draft was in an attempt to meet the committee's demand for an express technicalities avoidance provision. The Ministry suggested that a section along the following lines should replace the reasonable compliance provision -

> "no charge shall be dismissed solely because of a defect in the procedures relating to apprehension or testing of a suspect unless the Court is satisfied that for reasons of identity or unconscionable behaviour on the part of an enforcement officer a conviction would amount to a miscarriage of justice".

This approach was actively discouraged by senior Crown Counsel who believed that the developing case law in the reasonable compliance area had been more than satisfactory and it would be unwise to disturb the equilibrium at such a late stage.

The comments of the New Zealand Law Society were respected and insofar as they did not relate to changing stated policy were incorporated into the draft. The Society was in fact as supportive of the changes in the law as could be expected from an organisation which did not appear before the committee. The Secretary-General in his written submission on behalf of the Society deeply regretted that there had been no opportunity for personal presentation of the Society's views. As to the social problem of the drinking driver the Law Society whilst stating that it could "no more hope to speak with a totally united voice on this subject than can any other group in the community" it graciously acknowledged that "an extremely serious situation exists and urgent steps should be taken to improve it". It did however point out that the committee report was distinguished by "exceptional brevity". This brevity was at times a handicap not only to the Law Society but to those instructing Parliamentary Counsel.

The Parliamentary process

The Bill was introduced on 14 September and met with rapturous bipartisan acclaim particularly from those who had not read it. The Bill had received so much publicity and the pressures for its passage had become so intense that no less than 11 members (from both sides of the House) attempted to make long speeches after the Minister's introduction speech.

As in 1968 there was only the slightest hint of political manoeuvring when Mr J.L. Hunt gave oral notice of his intention to seek amendment to lower the permissible blood alcohol level to 50 milligrams. He did not in fact do so.

The only amendments made were those introduced by supplementary order paper with the approval of the government caucus transport committee at the instigation of the department. One of the changes, introduced as a drafting change, was to highlight the fundamental flaw of the legislation. For it became apparent that although the Act was to be brought into force on a date set by Order in Council the Minister was anxious that it should be brought in very quickly. The Bill had not had its second reading before Ministry officials became aware that the Minister was already discounting 1 April 1979 as a commencement date. This in spite of the fact that the D.S.I.R. had recommended such date as "prudent" and their Minister had so advised Cabinet in writing.

The supplementary order paper provided therefore that in making a requirement to a suspect to accompany for a test (after a screening test) an officer could require "an evidential breath or a blood test or both". (Section 58A (3)). This was a very shorthand and, as later proved, risky way of watering down the scheme of the new legislation to, in effect, keep the 1968 scheme in operation in parallel with the new scheme of evidential breath

testing. For logistically the Ministry could not cope with a new scheme in 1978 and many officers felt that even 1 April 1979 was an optimistic target date when up to 300 highly experimental machines had to be imported from USA and officers trained to use them. In the event the Bill passed with all amendments through second and third stages with almost no debate in the early hours of the morning (4th and 6th October 1978). It was just one of over 30 major bills passed in the last week of the 1978 session.

Introduction of the new law

The new breath/alcohol provisions came into force on 1 December 1978. After passage of the Bill the Department prepared a press statement which suggested that the starting date would be 1 April. The Minister issued it but later he expressed the view that he was "annoyed" that he had done so.[34] He said that his previous statement, "issued by his office", must have been an error. The law was to come in "before Christmas" and the new evidential devices would most likely be imported from Australia. (In fact the only supplier of Alcosensor in the world is in St Louis Missouri).

On 1 December 1978 there was not a single Alcosensor in New Zealand outside a handful of prototype models in the D.S.I.R. workshop.

Conclusions

The nature of the exercise in 1968 was considerably different from that in 1978. The 1968 law was arrived at by a painstaking process of receiving a mass of evidence and using it to adapt an established overseas law to New Zealand conditions. By comparison the 1978 legislative process could be characterised as a stab in the dark. It depended entirely on the interplay of experts and non-experts both working in a highly experimental field while still working with legislation that was falling down under its own weight. Although both amendment acts sought to do similar things the social context surrounding their enactment give rise to vastly differing conclusions. Broadly these can be stated as:

(a) In 1968 public opinion was not sufficiently uniform to be said to be putting pressure on either the Government or the Select Committee. By 1978 this kind of pressure bordered on the hysterical with the matter having moved out of the road safety area into that of law and order. In 1968 it would have been possible for the law to have been changed only to a small extent. Ten years later Parliament could safely have enacted the most draconian laws in the world.

[34] Evening Post 2.11.78.

(b) The early legislation was not bound up in technical matters in the sense that there were plenty of precedents throughout the world upon which to base new testing laws. The 1978 amendment was based on goals artificially set by politicians and translated into a legislative scheme which neither the Government nor the opposition fully understood. The debate on the Transport Amendment Act 1979 makes this point clear beyond all doubt.

(c) The Road Safety Select Committee is so lacking in research facilities that there is an overwhelming tendency either to accept what civil servants require or to accept overseas material without having the chance to test it in the New Zealand context. The committee always has made and continues to make recommendations in a rapidly changing technical field. With a high turnover of personnel it can never quite keep up with developments when it persists in meeting for only two hours at a time. The committee would probably do better to establish longterm social goals putting non-departmental witnesses and departmental officers on record so that Parliament generally can digest reports and debate them in the open.

(d) The Minister of Transport is invariably a Minister in a position to 'sell' ideas to Cabinet. In this respect the committee is no more than a pressure group. If the Minister is unenthusiastic about a proposal it would generally not be taken up. McAlpine was determined to keep blood alcohol legislation to a minimum and succeeded in this. In 1968 notwithstanding the generally favourable select committee report it took the enthusiasm of Peter Gordon to convince both Cabinet and Caucus that politically there was nothing to either lose or gain by sponsoring legislation through the House on a free vote. By comparison Mr McLachlan was under intense pressure from both Caucus and Cabinet to ensure that the committee came up with a tougher and simpler law. He did not interfere with the drafting of that law but his handling of the introduction of the legislation and its administrative implementation has had disastrous consequences.

(e) The Select Committee does not deal with matters which should ever be regarded as secret. All hearings should be in public which would ensure a higher level of information going outwards and a greater degree of responsibility being shown

by members of the committee. Had it been public knowledge that in 1978 the average attendance at the committee was four (including the Chairman) there could well have been much closer scrutiny of the legislation when it finally appeared. As it was the 1978 Bill reflected much more the requirements of the D.S.I.R. and Parliamentary Counsel than the committee or the governing caucus.

(f) The 1968 practice of incorporating Parliamentary Counsel into all stages of discussion only accentuates the fact that in 1978 the pressure on Parliamentary Counsel Office was far too intense. By leaving only five working days for the drafting of the Bill the Parliamentary timetable forced the draftsman into making further piecemeal amendments to an already heavily amended piece of legislation. If the draftsman had been given the opportunity of drafting during the recess a more innovative and elegant draft could have been introduced into the House the following year. It is difficult to escape the conclusion that the legislation was required more for the 1978 election campaign than anything else.

(g) The pressure groups were given a fair opportunity to mould the legislation in 1968. All persons coming before the committee were well and truly listened to. The most powerful pressure group from the 1966 hearings (the Law Society) was in 1968 badly outflanked by groups from within its own ranks when its submissions came to be heard in 1968.

By 1978 it was not possible for individuals to make submissions to the committee direct. The fact that many valid observations by outsiders and interest groups (i.e. Law Society, senior enforcement officers outside Ministry of Transport Head Office, junior house surgeons, Crown Law Office and Automobile Association) found some place in the new Act is attributable to Ministry unease that the Bill was being drafted with too little information available. The Ministry could easily have ignored these groups totally.

POSTSCRIPT

The flaw which the supplementary order paper sought to patch up in advance did not survive the scrutiny of the Court of Appeal.[35] The Court, in August 1979, ruled that the overall scheme was one of evidential breath testing and until a good supply of devices was available blood samples alone could not be sought.

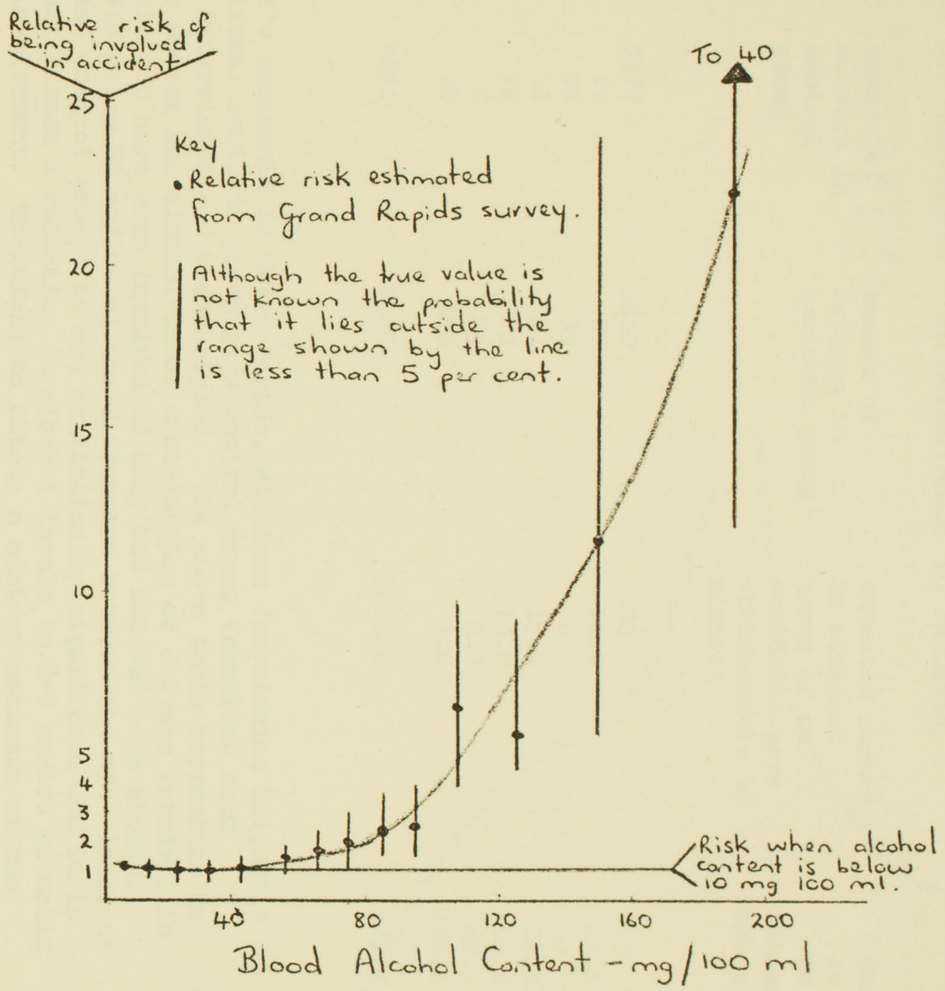
On 12th September 1979 the House passed the Transport Amendment Act 1979 to attempt to correct this situation ...



[35] Auckland City Council v. Fulton & Dewitte C.A. Unreported C.A. 140/79 29.8.79.

# Appendix I

## Variation of Accident Risk With Blood Alcohol Content — Grand Rapids Curve




These analyses are based on a study by the Department of Police Administration, Indiana University. They compared a group of 5985 drivers involved in accidents in the City of Grand Rapids, Michigan, with a control group of 7590 drivers selected from the City's traffic.

rxSM SMITH, D.M. Blood-alcohol and breath-alcohol provisions of the Transport Amendment Act, 1968 [illegible]

APPENDIX II

## ESTIMATION OF PROPORTION OF DRIVERS WHOSE INVOLVEMENT IN ACCIDENTS - ATTRIBUTABLE TO ALCOHOL

| Blood alcohol level mg/100 ml | Number of drivers in control group | Number of drivers in accident group | Expected number in accident group if no accidents were attributable to alcohol | Drivers whose involvement in accidents was attributable to alcohol | |
|---|---|---|---|---|---|
| | | | | Estimated Number | Percentage of accident group |
| 0 - 79 | 7477 | 5530 | 5530 | 0 | 0 |
| 80 - 89 | 28 | 39 | 20.7 | 18.3 | 0.31 |
| 90 - 99 | 27 | 39 | 20 | 19 | 0.32 |
| 100 - 119 | 21 | 92 | 15.5 | 76.5 | 1.28 |
| 120 - 139 | 20 | 73 | 14.8 | 58.2 | 0.97 |
| 140 - 159 | 7 | 54 | 5.2 | 48.8 | 0.82 |
| 160 and over | 10 | 158 | 7.4 | 150.6 | 2.52 |
| TOTAL | 7590 | 5985 | 5613.6 | 371.4 | 6.21 |

Study of one year's accidents in Grand Rapids, Michigan (population 201,000)* Two groups of drivers: accident group plus control group (sampling from traffic stream); interviewed and breathalysed. The above table represents an estimation of the number and alcohol-level distribution of drivers involved in accidents who would not have been involved if they had not had high alcohol levels. For levels below 80 mg/100 ml the difference between the distributions of the accident and control groups is not statistically significant and it is not certain to what extent a reduction in alcohol levels to 0-9 mg/100 ml would effect accident involvement. Therefore to obtain a minimum estimate of the proportion of drivers who would not have been involved, the small number who may have had levels below 80 mg/100 ml has been ignored and these levels are combined in Row 1.

*1964

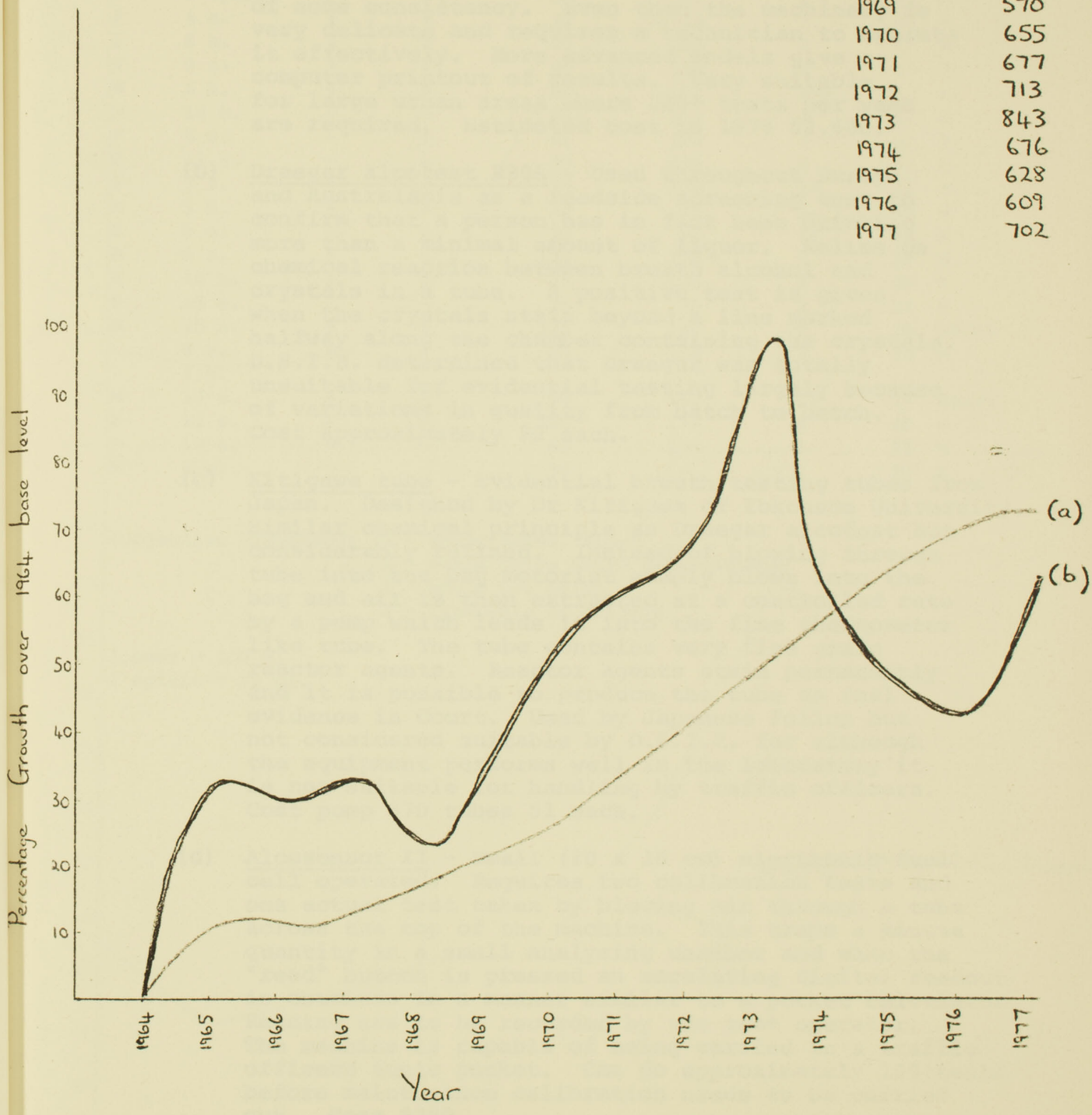
# APPENDIX III

Percentage Growth since 1964 in

(a) N.Z. Vehicle Ownership

(b) N.Z. Road Deaths

| YEAR | ROAD TOLL |
|---|---|
| 1964 | 428 |
| 1965 | 559 |
| 1966 | 549 |
| 1967 | 570 |
| 1968 | 522 |
| 1969 | 570 |
| 1970 | 655 |
| 1971 | 677 |
| 1972 | 713 |
| 1973 | 843 |
| 1974 | 676 |
| 1975 | 628 |
| 1976 | 609 |
| 1977 | 702 |



(a) The Breathalyser - Size of an IBM typewriter manufactured only as bench model. Developed first in USA in early 1950's when it was generally regarded as a highly erratic piece of machinery. The breathalyser has been through specification changes and by early 1970's was achieving results of some consistency. Even then the machinery is very delicate and requires a technician to operate it effectively. More advanced models give a computer printout of results. Very suitable for large urban areas where 200+ tests per week are required. Estimated cost in 1978 $2,600.

(b) Draegar alcotest R80A - Used throughout Europe and Australasia as a roadside screening test to confirm that a person has in fact been drinking more than a minimal amount of liquor. Relies on chemical reaction between breath alcohol and crystals in a tube. A positive test is given when the crystals stain beyond a line marked halfway along the chamber containing the crystals. D.S.I.R. determined that Draegar was totally unsuitable for evidential testing largely because of variations in quality from batch to batch. Cost approximately $2 each.

(c) Kitigawa tube - Evidential breath testing tubes from Japan. Designed by Dr Kitigawa of Yokohama University. Similar chemical principle as Draegar alcotest but considerably refined. Instead of blowing through tube into the bag motorist simply blows into the bag and air is then extracted at a controlled rate by a pump which leads it into the fine thermometer like tube. The tube contains very fine grain reactor agents. Reactor agents stain permanently and it is possible to produce the tube as real evidence in Court. Used by Japanese Police but not considered suitable by D.S.I.R. for although the equipment performs well in the laboratory it is not suitable for handling by traffic officers. Cost pump $70 tubes $1 each.

(d) Alcosensor II - Small (20 x 10 cm) electronic fuel cell operated. Requires two calibration tests and one actual test taken by blowing air through a tube across the top of the machine. This traps a minute quantity in a small analysing chamber and when the "read" button is pressed an escalating digital readout is obtained in a manner similar to a pocket calculator. Reading has to be recorded by the test operator. The machine is capable of being carried in a traffic officers tunic pocket. Can do approximately 100 tests before maintenance calibration needs to be carried out. Cost $350.

APPENDIX V

| Subject | Alcohol | Draegar Early Reading | Draegar Later Reading | Breathalyser | Blood | Subjective Assessment | Age | Meal |
|---|---|---|---|---|---|---|---|---|
| M | 11 Beer | - | + | 60 | 93 | 3 | 29 | Med. |
| F | 6 Spirit | - | + | 30 | 77 | 4 | 27 | M |
| F | 4 s. | - | + | 12 | 14 | 1 | 34 | M |
| F | 6 s. | - | + | 50 | 63 | 2 | 47 | M |
| F | 9 s. | + | + | 85 | 124 | 2 | 27 | M |
| M | 3 b. | + | + | 80 | 167 | 4++ | | M |
| M | 14 b. | - | + | 95 | 143 | 2 | 47 | M |
| F | 8 s. | - | + | 82 | 105 | 3 | 32 | M |
| F | 11 s. | - | + | 90 | 126 | 3 | 31 | M |
| F | 7 s. | + | + | 75 | 109 | 1+ | 39 | M |
| M | 3 b. | - | + | 15 | 26 | 1 | 40 | M |
| F | 6 s. | - | + | 50 | 82 | 1+ | 25 | M |
| M | 6 b. | + | + | 130 | 176 | 3 | 34 | M |
| M | 14 b. | + | + | 75 | 106 | 2 | 29 | M |
| F | 10 s. | - | - | 35 | 75 | 2 | 32 | M |
| M | 26 b. | + | + | 178 | 218 | 4 | 26 | Light |
| | 6 s. | - | - | 85 | 114 | 2 | 38 | M |
| | 7 b. | | | | | | | |
| M | 17 s. | + | + | 90 | 141 | 1+ | 33 | Heavy |
| F | 19 s. | + | + | 120 | 178 | 4 | 40 | M |
| F | 12 s. | + | + | 65 | 106 | 1 | 37 | M |
| M | 6 b. | - | - | 30 | - | 2 | 30 | M |

Subjective Assessment 1 - would drive, sober
2 - would drive (with reservations)
3 - would not drive
4 - incapable of driving

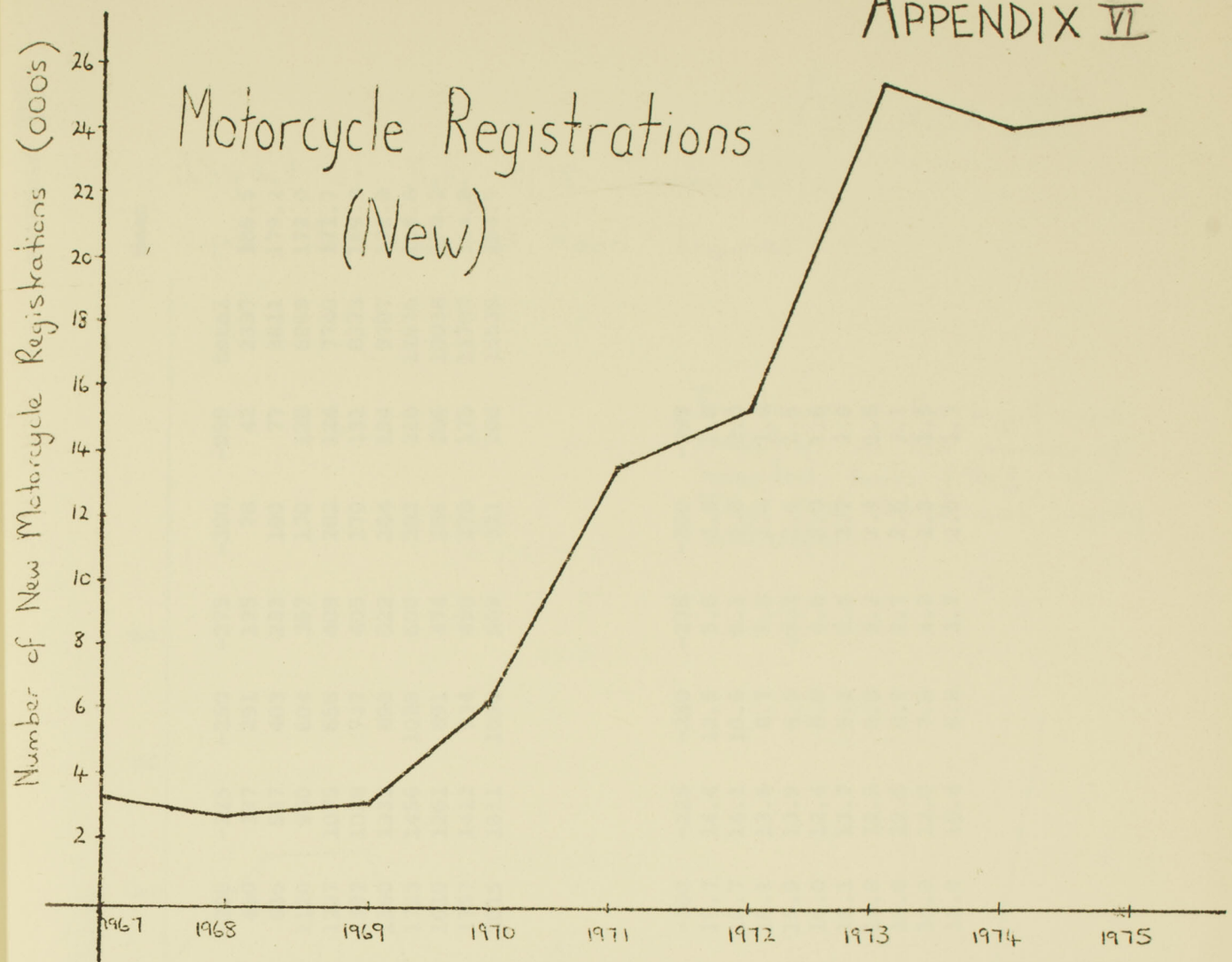
1 beer = 300 ml
1 spirit = 25 ml.

Source: DSIR Chem. Division

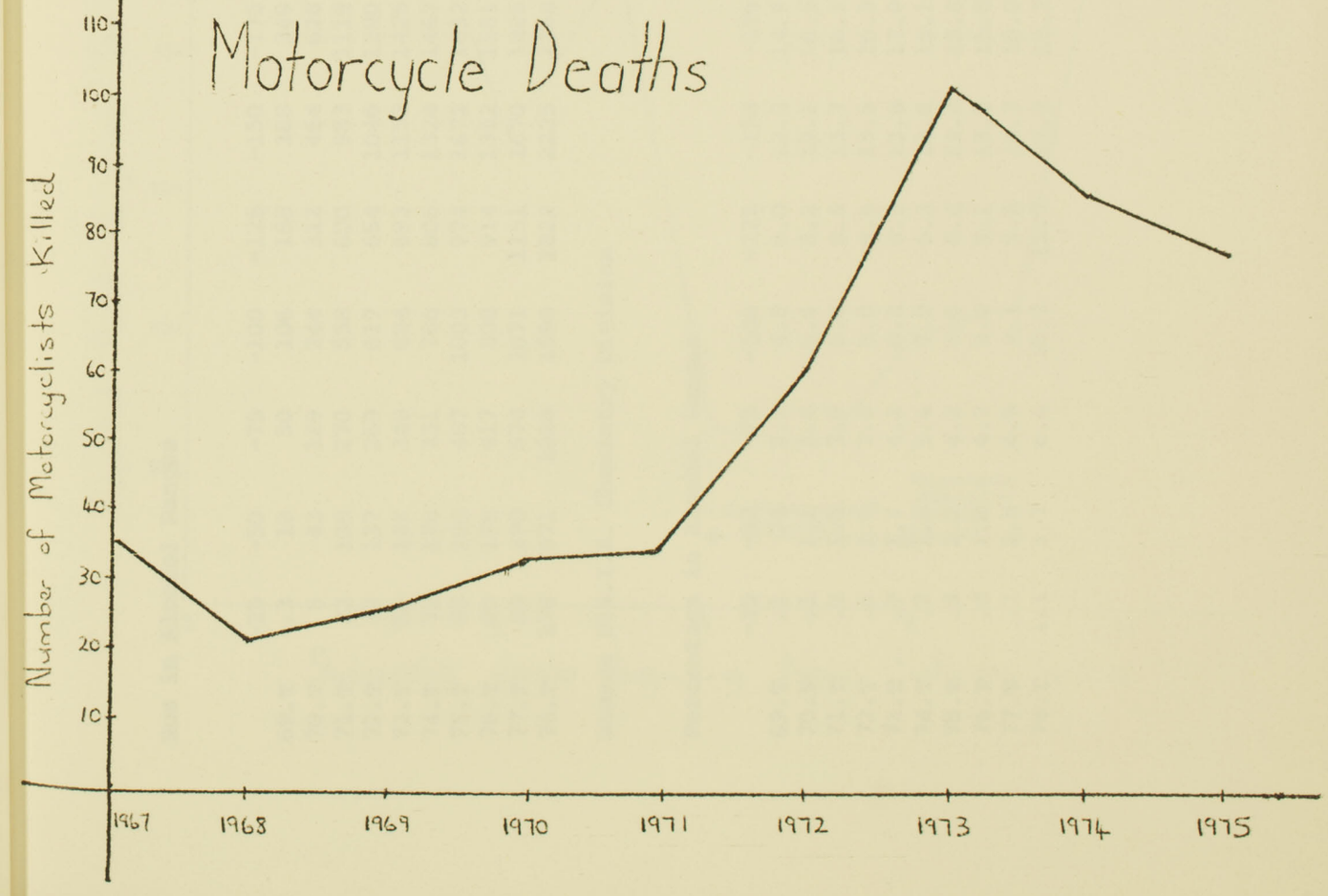
RXSM SMITH, D.M. Blood-alcohol and breath-alcohol provisions of the Transport Amendment Act, 1968 D.1968

APPENDIX VI

## Motorcycle Registrations (New)




## Motorcycle Deaths



Nos in Alcohol Ranges

| | -25 | -50 | -75 | -100 | -125 | -150 | -175 | -200 | -225 | -250 | -275 | -300 | -999 | total | Mean |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 69.T | 3 | 10 | 50 | 106 | 188 | 288 | 349 | 460 | 337 | 291 | 135 | 78 | 42 | 2337 | 186.5 |
| 70.T | 5 | 43 | 129 | 244 | 312 | 464 | 628 | 636 | 537 | 403 | 233 | 100 | 77 | 3811 | 179.2 |
| 71.T | 22 | 108 | 270 | 558 | 600 | 953 | 1119 | 1120 | 950 | 604 | 367 | 170 | 128 | 6969 | 172.0 |
| 72.T | 42 | 137 | 269 | 617 | 654 | 1046 | 1280 | 1227 | 1075 | 658 | 409 | 202 | 124 | 7740 | 171.7 |
| 73.T | 56 | 141 | 348 | 684 | 693 | 1153 | 1425 | 1392 | 1038 | 737 | 405 | 170 | 131 | 8373 | 169.3 |
| 74.T | 72 | 178 | 331 | 766 | 806 | 1324 | 1467 | 1560 | 1333 | 890 | 522 | 264 | 194 | 9707 | 172.8 |
| 75.T | 89 | 260 | 487 | 1003 | 974 | 1672 | 1832 | 1723 | 1456 | 1028 | 600 | 282 | 210 | 11616 | 168.8 |
| 76.T | 80 | 178 | 417 | 808 | 914 | 1352 | 1581 | 1610 | 1261 | 891 | 474 | 266 | 206 | 10038 | 170.2 |
| 77.T | 80 | 290 | 574 | 1071 | 1151 | 1670 | 1885 | 1757 | 1412 | 934 | 498 | 270 | 175 | 11767 | 164.2 |
| 78.T | 178 | 571 | 1028 | 1590 | 1822 | 2225 | 2368 | 2015 | 1611 | 1050 | 569 | 311 | 200 | 15538 | 154.9 |

Source D.S.I.R. Chemistry Division

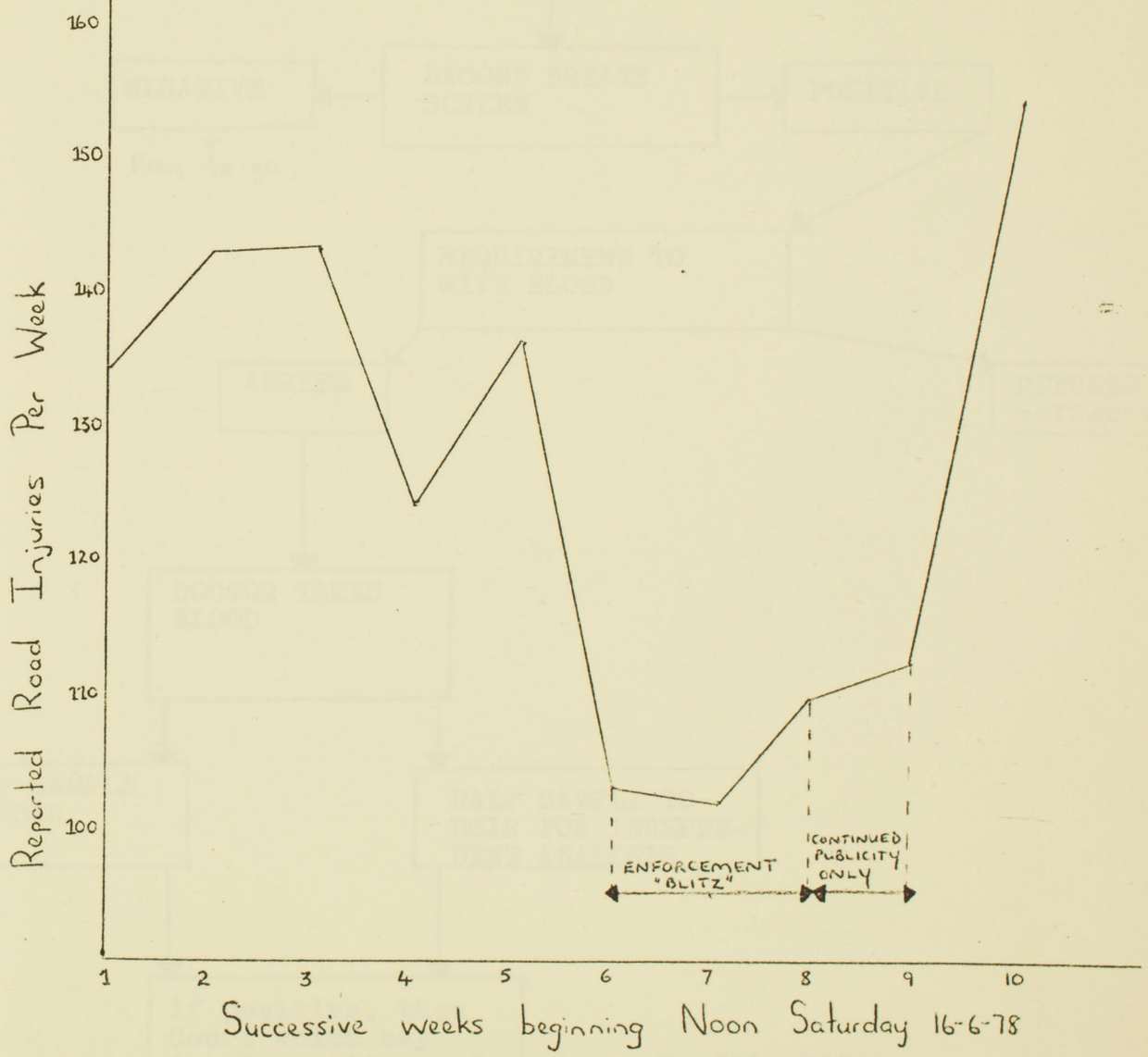
Percentage in Alcohol Ranges

| | -25 | -50 | -75 | -100 | -125 | -150 | -175 | -200 | -225 | -250 | -275 | -300 | -999 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 69.T | .1 | .4 | 2.1 | 4.5 | 8.0 | 12.3 | 14.9 | 19.7 | 14.4 | 12.5 | 5.8 | 3.3 | 1.8 |
| 70.T | .1 | 1.1 | 3.4 | 6.4 | 8.2 | 12.2 | 16.5 | 16.7 | 14.1 | 10.6 | 6.1 | 2.6 | 2.0 |
| 71.T | .3 | 1.5 | 3.9 | 8.0 | 8.6 | 13.7 | 16.1 | 16.1 | 13.6 | 8.7 | 5.3 | 2.4 | 1.8 |
| 72.T | .5 | 1.8 | 3.5 | 8.0 | 8.4 | 13.5 | 16.5 | 15.9 | 13.9 | 8.5 | 5.3 | 2.6 | 1.6 |
| 73.T | .7 | 1.7 | 4.2 | 8.2 | 8.3 | 13.8 | 17.0 | 16.6 | 12.4 | 8.8 | 4.8 | 2.0 | 1.6 |
| 74.T | .7 | 1.8 | 3.4 | 7.9 | 8.3 | 13.6 | 15.1 | 16.1 | 13.7 | 9.2 | 5.4 | 2.7 | 2.0 |
| 75.T | .8 | 2.2 | 4.2 | 8.6 | 8.4 | 14.4 | 15.8 | 14.8 | 12.5 | 8.8 | 5.2 | 2.4 | 1.8 |
| 76.T | .8 | 1.8 | 4.2 | 8.0 | 9.1 | 13.5 | 15.8 | 16.0 | 12.6 | 8.9 | 4.7 | 2.6 | 2.1 |
| 77.T | .7 | 2.5 | 4.9 | 9.1 | 9.8 | 14.2 | 16.0 | 14.9 | 12.0 | 7.9 | 4.2 | 2.3 | 1.5 |
| 78.T | 1.1 | 3.7 | 6.6 | 10.2 | 11.7 | 14.3 | 15.2 | 13.0 | 10.4 | 6.8 | 3.7 | 2.0 | 1.3 |

# APPENDIX VIII

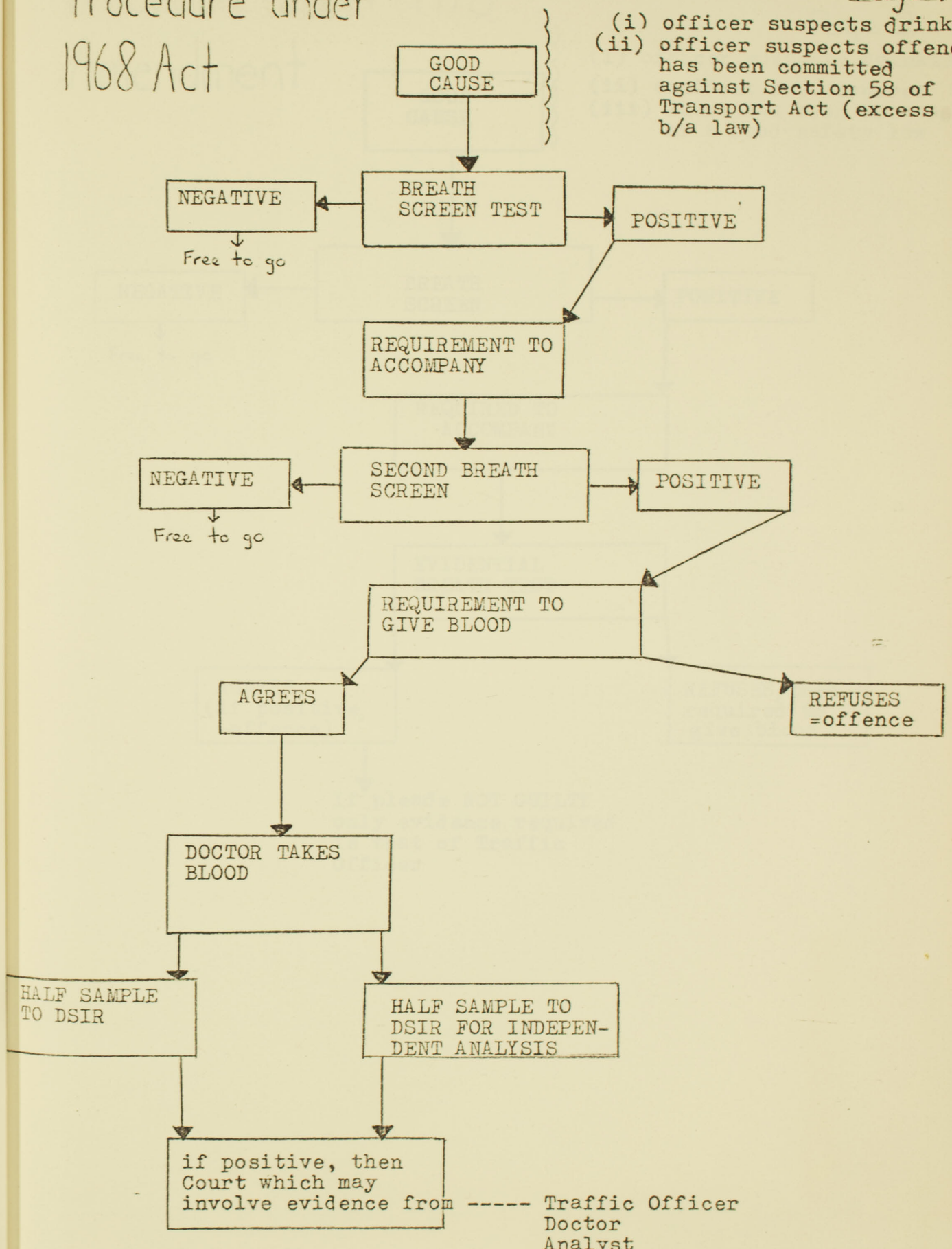
## Impact of July 1978 Traffic Blitz upon Incidence of Road Injuries

In terms of the significant reduction in the number of hospital beds filled, the July 1978 blitz was highly successful.



# Procedure under 1968 Act

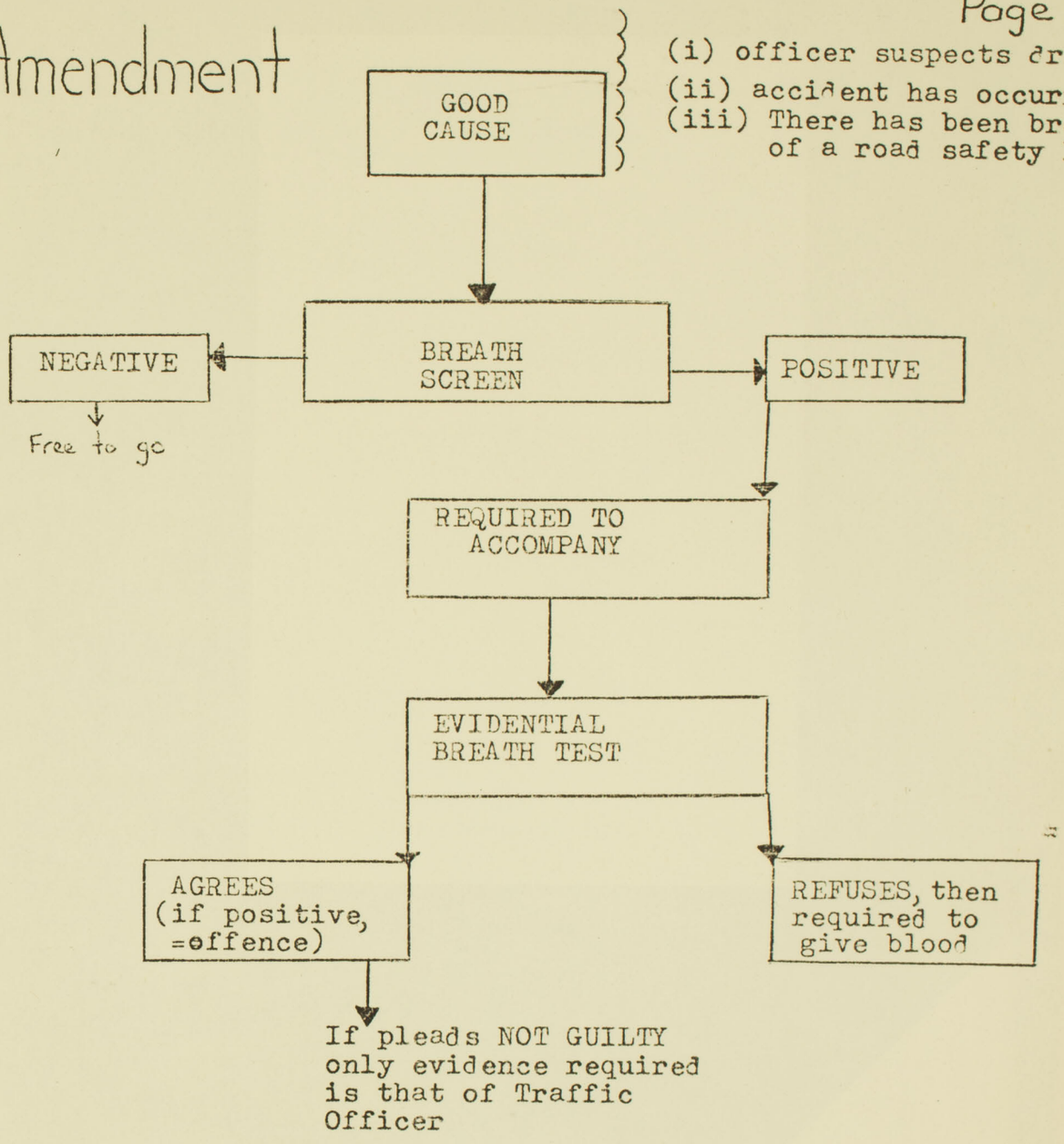




# Procedure under 1978 Amendment

APPENDIX IX

Page 2



rXSM SMITH, D. M. Blood-alcohol and breath-alcohol provisions of the Transport Amendment Acts 1968 & 1978.