Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Land Transport Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 265 of the Standing Orders of the House of Representatives

1. I have considered whether the Land Transport Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').

2. I have concluded that the Bill appears to be inconsistent with the right to be secure against unreasonable search or seizure affirmed in s 21 of the Bill of Rights Act.

3. As required by s 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill amends the Land Transport Act 1998 and consequentially amends a number of other Acts, regulations and land transport rules. The main purposes of the Bill are to:

    4.1 reduce road trauma and the cost of drink-drive reoffending by providing for mandatory alcohol interlocks

    4.2 increase penalties for drivers failing to stop and people failing or refusing to provide information to identify fleeing drivers

    4.3 regulate small passenger services

    4.4 manage fare evasion on public transport services

    4.5 update heavy vehicle regulation, and

    4.6 other miscellaneous amendments.

Inconsistency with s 21 — Right to be secure against unreasonable search and seizure

5. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, their property or correspondence, or otherwise.

6. The right to be secure against unreasonable search or seizure protects a number of values including personal privacy, dignity, and property.[1] In order for a statutory power to be consistent with s 21 the intrusion into these values must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and accompanied by adequate safeguards to ensure it will not be exercised unreasonably.

7. If a provision is inconsistent with s 21 of the Bill of Rights Act, it cannot be demonstrably justified with reference to s 5 of that Act. The creation of an unreasonable power of search and seizure cannot be justified in a free and democratic society.

[1] See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

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8. Clause 35 of the Bill:

   8.1 re-enacts the power to seize and impound a motor vehicle for 28 days where the police believe, on reasonable grounds, that the person driving the vehicle has failed to stop for police; and

   8.2 extends the power to seize and impound a vehicle where police suspect, on reasonable grounds, that the owner, person in lawful possession, or hirer of a vehicle knows the identity of or is the driver of a vehicle that has failed to stop; and has failed or refused to provide information about the identity of a person who failed to stop, or has provided false or misleading information, in response to a request for this information.

9. Section 21 has a predominant focus on law enforcement. That focus, however, need not be limited only to evidence taking.[2] I note, in this regard, the remarks of Tipping J in *Hamed v R* that, in identifying the scope of s 21 "… the controlling feature should… be who is involved and what they are doing rather than the purpose for which they are doing it".[3]

10. Impoundment is not necessarily undertaken for evidence taking. However, given that the power is exercised by an enforcement officer, with reference to belief or suspicion of offending, I consider that cl 35 of the Bill falls clearly within the bounds of s 21 of the Bill of Rights Act.

Impoundment of vehicles on reasonable belief of failing to stop is not unreasonable

11. I believe the power is not unreasonable in respect of the re-enacted power to impound a vehicle where there are reasonable grounds to believe a person driving the vehicle has failed to stop.

12. Deterring people from committing an offence against the Land Transport Act may be seen as a reasonable purpose for a search and seizure.[4] I understand that every year there are about 2,300 incidents of failing to stop when requested or signalled to do so by the Police. Frequently, the actions of fleeing drivers result in crashes, serious injury, or death. Impoundment in direct relation to failing to stop may, therefore, be considered reasonable. The question is then whether the power to impound a vehicle is a rational and proportionate means of achieving that objective.

13. Though impoundment will not necessarily prevent or deter further offending as a person may still legally be allowed to drive, it may reduce their opportunities to offend while Police consider whether to lay charges.

14. The Bill also includes some adequate safeguards, including that:

   14.1 impoundment ceases if, within the 28 day period, Police decide not to charge or there is an acquittal, and

[2] See, for example, *R v Ngan* [2008] 2 NZLR 48 (SC) at [110] per McGrath J.
[3] *Hamed v R* [2012] 2 NZLR 305 at [225].
[4] See, for example, *Attorney-General v P F Sugrue Ltd* (2003) 7 HRNZ 137 (CA).

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14.2 a person may appeal against impoundment, first to an authorised officer and then to the courts, on the grounds in s 102 of the Land Transport Act, including that the enforcement did not have reasonable grounds of belief to seize the vehicle.

Impoundment of vehicles in relation to failure or refusal to provide information is unreasonable

15. I consider, however, that the new power to seize and impound a vehicle in relation to failure or refusal to provide information is not rationally or proportionately connected to its purpose.

16. In reaching this conclusion I have considered the safeguards listed above and that the ability for officers to make follow up enquiries to locate, identify and hold to account fleeing drivers is an important goal.

17. However, under s 52 of the Land Transport Act, it is already an offence to fail or refuse to provide information, or provide false or misleading information, to an enforcement officer. Moreover, as noted above, s 96(1AB) also already confers on Police the power to impound a vehicle if they believe, on reasonable grounds, that the vehicle was used in a failing to stop incident, regardless of whether the owner of the vehicle refuses or fails to identify the driver. I am not aware of evidence that the additional threat of impoundment will be likely to reduce incidents of failing to stop, failure or refusal to provide information requested, or the provision of false or misleading information, which would justify the intrusion into a person's privacy and property rights occasioned by an extended impoundment power.

18. Moreover, a person who has committed an offence of failing or refusing to provide information will not necessarily pose a road safety risk, which may be seen as the primary purpose of impounding a vehicle. Nor will the power once exercised necessarily prevent the person believed to have failed to stop from driving, or further the goal of identifying the person who has failed to stop.

19. Because the provision will not sufficiently achieve its primary purpose of road safety, I do not think the power can be characterised as a rational intrusion on the rights affirmed in s 21. Giving enforcement officers the power to confiscate property in order to coerce the provision of information relevant to an investigation appears to be a disproportionate power, and one which should be carefully controlled with clear parameters as to when it would be appropriate to exercise it, and immediate relief provided for where it is exercised in a manner that cannot be justified.

20. These parameters go to the question of proportionality. The threshold for impoundment of a vehicle is lower for a person who has failed or refused to provide information than for a person who has committed an offence directly linked to road safety. For example, an enforcement officer must reasonably "believe" that a person has committed an offence of failing to stop. Conversely, an officer need only have reasonable grounds to "suspect" a person knows the fleeing driver's identity, or is the driver themselves, and has failed or refused to provide, or

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provided false or misleading, information in response to the officer's request. The sanction, however, remains the same. The Bill also increases the penalties for failing to stop and so seizure can be executed at a lower threshold in relation to a lesser offence. I consider that this is disproportionate.

21. Clause 36 of the Bill does provide for an appeal on the ground that the owner or person in lawful possession of the vehicle did not know, and could not reasonably be expected to know, the identity of the driver.

22. However, I consider the ability to appeal against impoundment on this ground alone appears unreasonably limited. It would not be possible to appeal the impoundment on the grounds that the officer did not have the reasonable suspicion they required to exercise the power.

23. As noted above, I consider the power to impound a vehicle for 28 days in relation to a refusal or failure to provide information is not rationally connected to the primary purpose of ensuring road safety. For the reasons discussed above, I also consider the power is disproportionate and, consequently, unreasonable.

24. Minor amendments to cl 36 could address the inconsistency. These are as follows:

    24.1 New s 96(1AB)(b) could be removed. Section 96(1AB) already confers on Police the ability to impound a vehicle if they believe, on reasonable grounds, that it was involved in a fleeing driver incident. New s 96(1AB)(b) therefore only serves the purpose of additional coercion for a person to provide information to identify the person who failed to stop. As discussed above, this is a disproportionate use of executive power and is not rationally connected to the objective of road safety.

    24.2 New s 96(1AB)(b) could be amended to require Police to form reasonable belief that impounding the vehicle is necessary to prevent an imminent threat to road safety. This would more rationally connect cl 35 to its purpose and render the seizure reasonable for the purposes of s 21 of the Bill of Rights Act.

25. As currently drafted, however, I conclude the Bill is inconsistent with s 21 of the Bill of Rights Act.

Consideration of consistency with other sections of the Bill of Rights Act

26. I also considered a further *prima facie* limitation in the Bill on the right to be free from discrimination affirmed in s 19(1) of the Bill of Rights Act.

27. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the prohibited grounds in s 21 of the Human Rights Act 1993. The grounds of discrimination under the Human Rights Act include disability.

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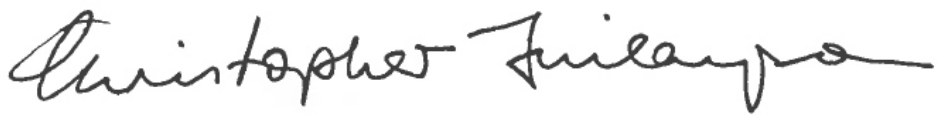
28. Clause 19 of the Bill provides for a separate sentencing approach for people who, because of their disability, are unable to use alcohol interlock devices.[5] The limit is justified because the right is impaired no more than is reasonably necessary. Interlock devices can be adjusted to operate on a reduced volume of breath to accommodate those drivers who have a medical condition affecting their lung capacity. Section 94 of the Land Transport Act also provides some mitigation for the longer disqualification period faced by those unable to use interlock devices by substituting a community-based sentence in place of a mandatory disqualification. There does not appear to be any further method to minimise the sentencing differences without removing the alcohol interlock system altogether.

29. Consequently, to the extent that the Bill limits s 19(1), I consider it to be justified under s 5 of the Bill of Rights Act.

Conclusion

30. For the above reasons, I have concluded the Bill's provisions relating to the power to impound a vehicle for 28 days for failure or refusal to provide information leading to the identity of the fleeing driver, or providing false or misleading information to be inconsistent with s 21 of the Bill of Rights Act.



Hon Christopher Finlayson
Attorney-General
12 September 2016

[5] An interlock device works by requiring the driver to breathe into the interlock before starting the vehicle. The device analyses the breath sample and, if alcohol is detected, the vehicle will not start. A person with, for example, limited lung capacity may be unable to operate an interlock device.

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