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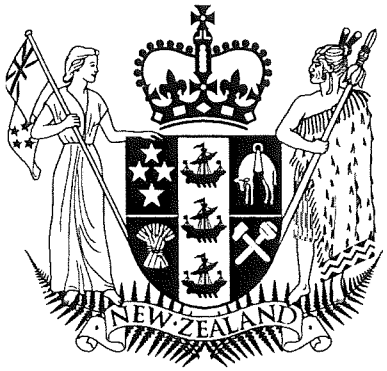


Report of the

ATTORNEY-GENERAL

on the Land Transport Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 260 (2) of the Standing Orders of the House of Representatives

VETTING FOR CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

LAND TRANSPORT BILL

1 I have considered this Bill for compliance with the New Zealand Bill of Rights Act 1990. I consider that clause 117 of the Bill limits the rights conferred by section 25 (c) in a manner that cannot be treated as a justified limit under section 5 of the New Zealand Bill of Rights Act. I also consider that clauses 56 and 57 of the Bill limit the rights conferred by section 26 (2) in a manner that cannot be treated as a justified limit.

Presumption of Innocence

2 Clauses 117 (1) and (2) of the Land Transport Bill provide as follows:

> "**117. Presumptions relating to alcohol-testing**—(1) For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which an evidential breath test was undergone by the defendant, it is to be conclusively presumed that the proportion of alcohol in the defendant's breath at the time of the alleged offence was the same as the proportion of alcohol in the defendant's breath indicated by the test.
>
> (2) For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which a blood specimen was taken from the defendant under **section 87 or section 88**, it is to be conclusively presumed that the proportion of alcohol in the defendant's blood at the time of the alleged offence was the same as the proportion of alcohol in the blood specimen taken from the defendant." (Emphasis added.)

Clause 117 (5) complements subclauses (1) and (2) by providing:

> "(5) It is no defence to proceedings for an offence against **section 35**—
>
> (a) That there was or may have been an error in the result of the breath screening test or evidential breath test; or
>
> (b) That the occurrence or likely occurrence of any such error did not entitle or empower a person to request or require an evidential breath test or a blood test."

3 Section 25 (c) of the New Zealand Bill of Rights Act provides:

> "Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: . . . (c) The right to be presumed innocent until proved guilty according to law."

Section 25 (c) of the New Zealand Bill of Rights Act raises difficult issues of application. The majority in *R* v *Oakes* (1986) 26 DLR (4th) 200 at 222 held in relation to the comparable provision in the Canadian Charter of Rights (section 11 (d)) that:

> "In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in section 11 (*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue."

4 The next stage in the development of these principles occurred in *R* v *Holmes* [1988] 1 SCR 194 where a majority of the Canadian Supreme Court indicated that any burden on an accused which has the effect of dictating a conviction despite the presence of reasonable doubt, whether that burden relates to proof of an essential element of the offence or some element extraneous to the offence but nonetheless essential to the verdict, contravenes section 11 (d) of the Charter. The Court indicated that an accused must not be placed in the position of being required to do more than raise a reasonable doubt as to his or her guilt. This applies regardless of whether that doubt arises from uncertainty as to the sufficiency of Crown evidence supporting the constituent elements of the offence or from uncertainty as to criminal culpability in general.

5 In the decision of *R* v *Whyte* (1988) 51 DLR (4th) 481, it was held that section 11 (d) applies regardless of whether the clause in question creates a presumption dispensing with proof of a fact otherwise required to be proved in order to establish a Crown case or establishes a separate defence which the defendant is required to prove. Section 11 (d) applies in determining whether or not a legislative provision which enacts a presumption or reverse onus clause infringes the protected right. *Whyte* indicates that the real concern is not whether the accused must disprove an element or prove an excuse, but whether an

accused may be convicted while a reasonable doubt exists. When that possibility exists there is an infringement of the presumption of innocence. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision infringes the presumption of innocence because it permits a conviction in spite of the reasonable doubt of a court or jury as to the guilt of the accused. Subsequent Canadian case law is generally consistent with the approach adopted in *Oakes*, *Holmes*, and *Whyte*. I have also considered the New Zealand decisions in *R* v *Rangi* [1992] 1 NZLR 385, *Sheehan* v *Police* [1994] 3 NZLR 592, *R* v *Drain* unreported, 11/10/94, CA 249/94, and *R* v *Clarke* 16/12/93, CA 417/93, which discuss section 25 (c) of the New Zealand Bill of Rights Act and/or the burden of proof. These decisions do not appear to be inconsistent with the approach described above.

6 A decision of particular relevance to clause 117 is *R* v *Phillips* (1988) 42 CCC 3d 150 in which the Ontario Court of Appeal considered the provisions of section 241 (1) (c) (iv) of the Criminal Code, which deals with evidential presumptions in the context of drink driving offences. That section provided that where samples of breath were taken in accordance with the section:

> "evidence of the results of the analysis so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by such analyses, and where the results of the analyses are different, the lowest of the concentrations determined by such analyses." (Emphasis added.)

It is notable that the discussion in this case is entirely concerned with the question of whether section 241 (1) (c) (iv) of the Criminal Code could be regarded as a justified limit on the presumption of innocence as the Crown conceded that a presumption displaceable by the existence of evidence to the contrary involved an infringement of the right conferred by section 11 (d).

7 In the light of the foregoing discussion, it is clear that clauses 117 (1) and (2) of the Bill infringe the rights conferred by section 25 (c) of the New Zealand Bill of Rights Act because they create a conclusive presumption that certain test results dispense with the need to prove facts which form a critical element of the offence. What is not so clear is whether the "conclusive presumption" created by the provisions is to be

treated as a "limit" on the right conferred by section 25 (c) of the New Zealand Bill of Rights Act or as an abrogation of the right, which by definition is incapable of justification. The issue arises because the conclusive nature of the presumption prevents an accused person from demonstrating his or her innocence (e.g., by proving that for some reason he or she was under the legal limit for a blood alcohol reading at the time of the test). The conclusive nature of the presumption may operate in certain circumstances to require the conviction of persons who are and can even demonstrate that they were under the legal limit at the time of the alleged offence.

8 There are at least two Canadian Supreme Court decisions suggesting that a complete denial of a Charter right should either not be treated as a "limit" at all or if it is to be regarded as a limit is incapable of being substantially justified (see *Attorney General of Quebec* v *Que Association of Protestant School Boards* [1984] 2 SCR 66 and *R* v *Big M Drug Mart* [1985] 1 SCR 295). A later case suggests, however, that except in the case of a truly complete denial of a right, it is necessary to consider whether the contravention of the right can be demonstrably justified (*Ford* v *Que* [1988] 2 SCR 712, 771-774). The learned author Peter Hogg summarises the position in this way in his book *Constitutional Law of Canada* (3 ed, loose leaf, 1997) at 35.11:

> "The result seems to be that even severe restrictions on Charter Rights will count as limits, and will therefore be susceptible to section 1 justification. The severity of the contravention would not be irrelevant, of course, because it would be harder to establish that a severe contravention was reasonably and demonstrably justified."

9 On the assumption that the infringements on the right conferred by section 25 (c) of the New Zealand Bill of Rights Act contained in clauses 117 (1) and (2) can be treated as a "limit" on the right, I proceed to consider whether they can be treated as a reasonable limit under section 5 of the New Zealand Bill of Rights Act.

10 Section 5 of the New Zealand Bill of Rights Act provides:

> "Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

11 In applying section 5, I rely on decisions of the Canadian Supreme Court on their equivalent provision (known as the "*Oakes* test" as originally articulated by the Canadian Supreme Court in *R* v *Oakes* (1986) 26 DLR (4th) 200). I also apply Richardson J's formulation of the test in *MOT* v *Noort* [1992] 3 NZLR 260 which involves balancing the following factors:

- The significance in the particular case of the values underlying the Bill of Rights Act;
- The importance in the public interest of intrusion on the particular right protected by the Bill of Rights;
- The limits sought to be placed in the application of the Act's provision in the particular case; and
- The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

12 Regardless of which approach is adopted, the view which has been adopted is that two essential components must be satisfied. First, the limit must be substantively justified. This has been taken to mean that the limitation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom (i.e., it must relate to concerns that are pressing and substantial in a free and democratic society). Second, it must be shown that the means used to achieve the objective are reasonably and demonstrably justified. Essentially, this involves a test of "proportionality" which consists of three components:

- the measures adopted must be carefully designed to achieve the objective in question, not arbitrary, unfair or based on irrational considerations; that is, they must be rationally connected to the objective;
- the measures should impair as little as possible the right or freedom in question; and
- there must be proportionality between the law limiting the right and the objective of the limitation; that is, the limitation must not be so deleterious of a right as to outweigh the substantive justification for the limitation.

13 The onus of justifying the limitation on the right or freedom rests on the party seeking to impose that limit (in this case the Crown) (see *Solicitor-General* v *Radio New Zealand Ltd* [1994] 1 NZLR 48). In achieving the specific objective of the limiting legislation, although the particular right should be impaired no more than is necessary to meet the objective, it is recognised that there is a margin of error within which reasonable

legislators could disagree (see *Attorney-General of Hong Kong* v *Lee Kwong Lux* [1993] 3 All ER 939 at 954 (PC)).

14 I do not consider that there is any difficulty in concluding that there is a substantive justification for limiting the right conferred by section 25 (c), by creating a presumption that the results of blood or breath alcohol tests can indicate the defendant's state of intoxication at the time of the alleged offence. The objective of such a presumption serves a pressing and substantial need to control problems created by drinking drivers, namely deaths and injuries on our roads. The Court in *R* v *Phillips* (1988) 42 CCC 3d 150 readily reached a similar conclusion. Similarly, such a presumption satisfies the rational connection test because it is based upon empirical data previously accepted by Parliament which rationally connects the proved and presumed facts.

15 The real issue is whether a conclusive presumption can be regarded as impairing the right in question as little as possible, or as "little as is reasonably possible", which was the formula adopted in *Edward Books and Art Ltd et al* v *The Queen* [1986] 2 SCR 713. The Police have indicated that they face real difficulties if the conclusive presumption is dropped in favour of a presumption that is rebuttable either by evidence to the contrary, or even proof to the contrary. They indicate that any possibility of rebuttal leaves it open to defendants to allege that evidential tests have no evidential value because they have ingested alcohol after the alleged offence took place (commonly known as the "hip flask" defence), or that because of scientific or other reasons, the evidential tests show a higher reading than was actually the case at the time of the alleged offence. There is, I understand, some evidence that where alcohol has been consumed immediately prior to the point of apprehension, a person's blood alcohol reading may continue to rise for a period after alcohol consumption has ceased. The Police are concerned that any relaxation of the "conclusive presumption" rule will lead to significantly increased difficulties in prosecuting drink driving offences, with more resources required to be devoted to prosecutions, legal uncertainty, and higher rates of acquittals.

16 In weighing these concerns, however, it must be noted that the "conclusive presumption" is capable of operating in such a way as to lead to the conviction of persons who in fact were under the relevant legal breath or blood alcohol limit, can demonstrate this fact, and may in no way be at fault. Such a result appears to be in complete conflict with the values underlying the presumption of innocence. In *R* v *Phillips* (1988)

42 CCC 3d 150 the Court in concluding that a presumption rebuttable by evidence to the contrary was a justified limit under section 1 of the Charter of Rights commented upon the position in the Commonwealth in the following way:

> "The experience of other free and democratic countries also provides justification for s. 241 (1) (c). The problems created by drinking drivers are universal and have been met elsewhere by similar legislation. The present Canadian law was acknowledged when it was enacted in 1969 to be modeled on the British Road Safety Act of 1967 which is now embodied in the Road Traffic Act 1972 (U.K.), 1972, c. 20 as amended by the Transport Act 1981 (U.K.) 1981, c. 56 ss. 6-12. The United Kingdom Act provides for compulsory breath tests by means of an approved instrument. The presumption is that the BAC at the time of the driving incident is the same as that established by the test and different levels of penalty are provided for driving with a BAC of 80 mg and 107mg per 100ml.
>
> The same type of legislation has been enacted in Australia by the States of South Australia, Western Australia, Victoria, New South Wales, Queensland, as well as in New Zealand: see South Australia, Road Traffic Act 1961-1967, as amended by the Road Traffic Act Amendment Act (No. 2), 1967, s. 6, Western Australia, Road Traffic Act 1974-1982, ss. 62-73, Victoria, Road Safety Act 1986, c. 127, ss. 47-58, New South Wales, Motor Traffic Act, 1909, as amended, s. 4E, Queensland, Traffic Act Amendment Act, 1974 No. 18, ss. 8-10, and New Zealand, Transport Act, 1962 R.S.N.Z., V. 16 ss. 57A-59.
>
> Although the pattern of Commonwealth legislation is the same as the Canadian, an accused in other Commonwealth jurisdictions faces a greater burden in rebutting the presumption created by it. In New Zealand, the presumption appears to be irrebuttable and in the other jurisdictions it prevails unless the defendant "proves" the contrary, rather than merely creating a reasonable doubt by evidence to the contrary as is the case in Canada." (Emphasis added.)

It can be noted in passing that the provisions of clause 117 are derived from provisions of the Transport Act 1962 (sections 58 (2)-(3)) which were enacted well before the enactment of the New Zealand Bill of Rights Act. That may explain, at least in part, why the "conclusive evidence" formula was originally adopted.

17 Making due allowance for the fact that the position of other Commonwealth jurisdictions as stated in *Phillips* is now somewhat dated, it is nevertheless significant that the infringement on the protected right created by clause 117 is more severe than has previously been adopted in the Australian states, and markedly more severe than in Canada. The decision in *Phillips*, appears to have been cited with approval in a number of subsequent Canadian decisions. It cannot accordingly be concluded that clause 117 infringes the right in question as little as reasonably possible. There are examples where other jurisdictions have adopted approaches which intrude less markedly (by allowing the presumption to be displaced by proof to the contrary), and at least in one case, much less markedly, upon the protected right (by allowing the presumption to be displaced by evidence to the contrary). For similar reasons, I am unable to conclude that the infringement on the right satisfies the proportionality test.

18 For these reasons, I conclude that clause 117 infringes the right conferred by section 25 (c) of the New Zealand Bill of Rights Act in a manner that cannot be treated as a reasonable limit for the purposes of section 5 of the New Zealand Bill of Rights Act.

Double Jeopardy

19 Section 26 (2) of the New Zealand Bill of Rights Act provides:

> "No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again." (Emphasis added.)

20 Clause 56 of the Land Transport Bill sets out a regime for mandatory suspension of driver licences for a period of 28 days. Clause 57 similarly provides for mandatory vehicle impoundment for 28 days. The period of suspension commences 7 days after a notice of suspension is delivered, which will generally occur shortly after a defendant is apprehended. The period of impoundment will generally commence upon apprehension of the defendant. There are provisions enabling persons whose licences are suspended or whose vehicles are impounded to appeal under clauses 62 to 63 and 70 and 71 respectively. In relation to vehicles that are impounded there is also provision requiring the release of an impounded vehicle if the Police decide not to bring a prosecution or if a person is acquitted of the offence relating to the conduct out of which the impoundment arose. An equivalent provision in relation to the administrative suspension of driver licences has been inserted into the most

recent version of the Bill. In relation to both suspension and impoundment regimes, there is no provision separately enabling a Court imposing sentence for an offence relating to conduct which gave rise to the vehicle suspension or impoundment to terminate the licence suspension or the period of impoundment.

21 The exact scope of section 26 (2) is not yet settled under New Zealand law. There is New Zealand authority suggesting that section 26 (2) can be read to encompass subsequent penalties imposed in civil proceedings for the relevant conduct (e.g. proceedings seeking exemplary damages) and not just subsequent penalties of a criminal nature (see *S* v *G* (1995) 2 HRNZ 11 at 22 (CA)). There are, however, other authorities suggesting that a narrower approach is appropriate and that the provision does little if any more than restate existing provisions in the general statute law and common law which apply the "double jeopardy" rule only in criminal proceedings *J L Caldwell* v *Croft Timber Co Ltd*, 26 March 1997, CP 44/95. I understand that a decision is expected shortly from the Court of Appeal on this issue which may give clearer guidance on the interpretation of the section.

22 However, even if a narrow approach is taken in interpreting section 26(2), as has generally been taken by the Canadian Courts in interpreting section 11 (h) of the Canadian Charter of Rights (see *R* v *Wigglesworth* (1987) 45 DLR (4th) 235), it would seem that in certain circumstances sanctions of a truly penal nature may come within the scope of the section.

23 The authorities which consider comparable automotive licence suspension regimes operating in various states of the United States are of assistance. In *Ohio* v *Gustafson* 668 NE 2d 435 (Ohio 1996), the Ohio Supreme Court considered whether provisions which allowed administrative licence suspensions, imposed on a somewhat similar basis as is proposed in this Bill, to be imposed and continue in effect both before and after the hearing of criminal charges infringed the "double jeopardy" provisions of the Ohio and United States constitutions. A majority of the Court held that the imposition of administrative licence suspension and the subsequent prosecution of a person whose licence is suspended does not infringe the double jeopardy provisions of the United States constitution. This is generally consistent with other US authorities. However, an administrative licence suspension ceases to be "remedial" and becomes punitive in nature to the extent that the suspension continues subsequent to adjudication and sentencing. Accordingly, because an

administrative licence suspension loses its remedial character upon sentencing, the Ohio and United States constitutions preclude continued recognition of an administrative licence suspension following the imposition of criminal penalties.

24 In reaching this conclusion, the Court indicated that short term suspensions of a reasonable duration of time may fairly be characterised as "remedial". Such a suspension serves the remedial purpose of providing interim protection of the public during the period of time required to obtain full and fair adjudication of the driver's guilt or innocence of criminal drunk driving. However, the need for administrative remedial suspension ends at the point where a criminal conviction of drunk driving is obtained at which time a court has authority to judicially impose a licence suspension in accordance with law and the individual circumstances before it. If the licence suspension continues beyond that point it must be characterised as punishment for "double jeopardy" purposes.

25 This line of reasoning was rejected by the minority, on the basis that it was inconsistent with the recent Supreme Court decision in *United States* v *Ursery* 116 S Ct 2135; 135 L Ed 2d 549 (1996) and difficult to reconcile with numerous decisions repeatedly upholding the imposition of civil penalties of various types in conjunction with the imposition of criminal penalties. The minority also referred to a number of other cases where lengthy periods of administrative licence suspension had been upheld in other states. In discussing *Ursery*, the minority in *Gustafson* indicated that the clearest proof must be shown that the licence suspension is so punitive either in purpose or effect that it becomes criminal punishment.

26 There are some distinctions between the licence suspension regime considered in *Gustafson* and that proposed under the present Bill. Under the Ohio scheme the period of administrative suspension was a minimum of 90 days and up to 5 years on subsequent occasions. It might be argued that the reasoning of the majority is inapplicable, because the shorter time periods applicable in New Zealand indicate that continuation of a licence suspension following sentence could continue to have a "remedial" purpose in the New Zealand context. I note, however, that the Court can in the ordinary course of events decide whether or not to impose disqualification, in accordance with the criteria set out in the Bill. I also note a reference in *Gustafson* to the case of *Murphy* v *Commonwealth* 896 F Supp 557 at 583 (D.C. Va. 1995) where it was held that a seven day licence suspension presented a double jeopardy claim that is colourable if not

compelling. The proposed 28 day suspension regime is significantly longer than that considered in *Murphy.*

27 In considering whether clauses 56 and 57 limit the right conferred by section 26 (2), some considerable weight can be placed on the stated purpose of the administrative licence suspension scheme and the impoundment scheme. The draft Cabinet Committee papers emphasise the likely deterrent effect of the proposals for both the licence suspension and impoundment regimes by stating that the deterrent effect of those proposals is a result of the imposition of swift, certain, and severe penalties on serious and repeat traffic offenders. In a very recent decision (5/8/97), *Horsefield* v *Registrar of Motor Vehicles* (1997) 30 OTC 138, the Ontario Court of Justice (General Division) considered whether an administrative licence suspension regime infringed section 7 of the Canadian Charter of Rights and Freedoms, a provision which has no exact equivalent in the New Zealand Bill of Rights Act.

In paragraphs 65, 67, and 68, the judgment summarises arguments by the Crown that "there is strong empirical evidence which concludes that the deterrent effect on drinking and driving is significantly increased by a swift penalty." The Court concluded that a 90 day suspension goes far beyond what is required to deal with "driver dangerousness" and can only be characterised as a "penal device" to punish and deter drivers by its inflexible severity" (emphasis added). There are considerable similarities between the types of justifications advanced by the Crown in *Horsefield* for the administrative suspension regime and those contained in the draft Cabinet papers relating to these proposals.

28 In light of the stated purposes of the licence suspension and impoundment regimes, it is difficult to avoid the conclusion that they will generally operate for punitive purposes, at least insofar as they continue in effect beyond sentencing. Such a conclusion is consistent not only with the majority decision in *Gustafson*, but can also be reconciled with statements in *Ursery* which suggest that clear proof must be provided before a penalty can be regarded as punitive in effect. Accordingly, clauses 56 and 57, insofar as they do not provide for the termination of administrative licence suspension and impoundment upon sentencing, limit the right conferred by section 26 (2) of the New Zealand Bill of Rights Act not to be punished twice for the same offence.

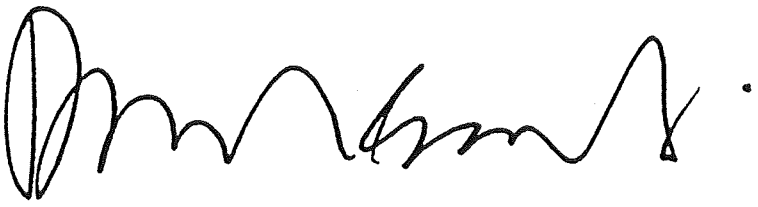
29 In considering whether such a limit can constitute a justified limitation of the right under section 5 of the New Zealand Bill of

Rights Act, I apply the criteria set out in paragraphs 10 to 13 of this report. In considering whether there is a substantive justification for limiting the right conferred by section 26 (2), I have noted suggestions by the Ministry of Transport that a provision automatically terminating administratively imposed licence suspension or impoundment may operate to frustrate the legislative intention of the regime by reducing its deterrent effect, and/or allowing drivers who present a risk to public safety to regain their vehicles, and/or be able to use their licences at an inappropriately early stage after apprehension. I consider that there may well be a substantive justification for limiting the right not to be punished for an offence twice, in some circumstances, because continuing the period of suspension and impoundment may in some circumstances continue to have a predominantly remedial effect. Similarly, it may be contended that allowing the continuation of a licence suspension or impoundment regime following sentencing is rationally connected with the objective of protecting the public from unsafe or disqualified drivers. I note that in general disqualification is likely to be imposed in the event of conviction for an offence arising out of conduct for which licence suspension was imposed. The Court, however, retains a discretion not to impose disqualification in certain circumstances (see clauses 38 and 55 of the Bill). The question of whether the limit impairs the right as little as reasonably practicable and satisfies the proportionality test is narrowly balanced. I note, however, statements in *Horsefield* indicating judicial disquiet at using a "deterrence" argument to justify the imposition of penal sanctions abrogating a protected right where increasing the prospects of detection of an offence would act as a more effective deterrent than imposing penal sanctions. On balance, I conclude that in order to constitute a reasonable limit the sentencing Court should be given some discretion to terminate a licence suspension or vehicle impoundment following sentencing of a defendant. Such a discretion would allow a weighing of all relevant factors to occur on an individualised basis.

Conclusion

30 On the information available I am satisfied that there is no substantive justification for the limit imposed on the right conferred by section 25 (c) of the New Zealand Bill of Rights Act by proposed section 117 (1) and (2) in the Land Transport Bill. I am also satisfied that there is no substantive justification for the limit imposed on the right conferred by section 26 (2) of the New Zealand Bill of Rights Act by proposed sections 56 and 57 in the Land Transport Bill.

Dated this 26th day of November 1997.



Attorney-General

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