Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Land Transport (Drug Driving) Amendment Bill

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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 (Drug Driving) 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 provisions of the Bill are inconsistent with the rights to be secure against unreasonable search and seizure, the right not to be arbitrarily detained, and the right to be presumed innocent until proved guilty as affirmed in ss 21, 22 and 25(c) 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.

4. At the outset I note that I consider two simple changes, to focus on preventing impaired drivers from driving rather than general deterrence, if implemented, would be more likely to be make the Bill consistent with the Bill of Rights Act:

    4.1 Introducing an infringement offence threshold, below which the presence of a qualifying drug would not be an infringement offence; and

    4.2 A consequential amendment to the approval of the oral fluid testing device to include only those devices that are likely to detect the presence of drugs at this infringement offence level.

5. I understand that Cabinet has requested that Ministers consider these changes be raised at Select Committee stage.

The Bill

6. The Bill amends the Land Transport Act 1998 ('the principal Act') to insert a random roadside oral fluid testing scheme. The purpose of the Bill is to introduce a more effective regime for detecting and deterring drug-impaired driving, as part of the Government's general objective to increase road safety.

7. The current approach to roadside drug testing is through a compulsory impairment test ('CIT'). This is a type of behavioural test that an officer may require a person to take if the officer has good cause to suspect that the person has consumed a drug or drugs. The test involves an eye, walk and turn, and one-leg-stand assessment. If a person fails the CIT, they may be required to provide a blood specimen.

8. The testing device and the manner in which the test is to be carried out is to be approved by the Minister of Police by notice in the Gazette. Before doing so, the Minister of Police must:

    8.1 consult with the Minister of Transport and the Science Minister; and

    8.2 have regard to the accuracy of the device; and

    8.3 be satisfied that the device and the testing method will only return a positive result if it detects a level of recent use of a qualifying drug specified in the notice.

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9. This reflects the general policy intent to capture only those persons with the kind of recent drug use that is likely to impair driving. The device will be set at a threshold to capture this type of use. Though I note that the Bill will not define the threshold or levels of the qualifying drugs for the oral fluid testing device to be set to test at.

10. Clause 20 of the Bill (proposed new ss 71A – 71F) sets out the procedure for the oral fluid testing scheme. Key features of the oral fluid testing scheme include:

    10.1 a person may be required to undertake a first oral fluid test without cause, whether or not the person has already undergone an alcohol breath-screening test. However, they cannot be required to undertake an oral fluid test if they have already been required to undergo a CIT;

    10.2 the oral fluid test detects the presence of drugs, not the amount;

    10.3 if the first oral fluid test is positive, the person will be required to undertake a second oral fluid test. The person may be required to undertake a further test if the first or second test yields no result;

    10.4 unless they elect to have a blood test, the person commits an infringement offence if the second oral fluid test is also positive and the results of both oral fluid tests indicate the use of:

        10.4.1 the same qualifying drug;

        10.4.2 2 or more qualifying drugs (but with a higher penalty than for a single drug); or

        10.4.3 the same qualifying drug and the proportion of alcohol in the person's breath ascertained by an evidential breath test is less than 400mcg of alcohol per litre of breath (the legal limit is 250mcg);[1]

    10.5 alternatively, if the person refuses to undergo a first or second oral fluid test, the person will be required to permit the taking of a blood specimen to determine the proportion of the qualifying drug(s) (also referred to as an evidential blood test);

    10.6 depending on the proportion of the qualifying drug(s) in their blood, a person may either commit an infringement offence or a criminal offence. It will be a criminal offence if the proportion is at or above the limit specified in proposed new sch 5 (cl 31 of the Bill), and an infringement offence if it is below. Criminal offences, similar to the infringement offences, may arise from use of a qualifying drug, 2 or more qualifying drugs, or a qualifying drug in combination with alcohol;

    10.7 a person may be liable to pay the blood test fee and associated medical costs if they elect to have a blood test (after receiving two positive oral fluid test results), and the blood test establishes that the person has committed a

[1] There are lower limits if the person is younger than 20, or holds an interlock licence.

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criminal offence because the proportion of the drug(s) in their blood is at or above the level in proposed new sch 5.

11. Qualifying drugs are defined in the Bill as the controlled drugs specified in the Misuse of Drugs Act 1975,[2] which includes cannabis. Clause 31 of the Bill inserts proposed new sch 5 that will specify the level of qualifying drugs at and over which a person commits a criminal offence. The Ministry of Transport has advised that it is intended that the initial levels in sch 5 be inserted by Supplementary Order Paper at the Committee of the Whole House stage. Once the Bill is in force, any changes to existing levels or levels for new drugs are to be set by the Governor-General by Order in Council, on recommendation from the Ministers of Transport and Police. Before making a recommendation, the Ministers must seek and consider advice from independent experts who will try to identify the proportion of each drug that would cause the equivalent level of impairment as the limit for alcohol.[3]

12. I note that my analysis of the Bill is similar to previous 2018 advice in relation to the Land Transport (Random Oral Fluid Testing) Amendment Bill, a member's Bill, which was also found to be inconsistent with the same rights in the Bill of Rights Act.[4]

Section 21 of the Bill of Rights Act (freedom from unreasonable search and seizure)

13. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.[5] The touchstone of this section is a reasonable expectation of privacy.[6]

14. In order for a statutory power to be consistent with s 21, the intrusion into the values noted above must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and be accompanied by adequate safeguards to ensure it will not be exercised unreasonably. The Supreme Court has held that, logically, an unreasonable search or seizure cannot be demonstrably justified with reference to s 5 of the Bill of Rights Act.[7] Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and if so, whether that search or seizure is reasonable.

[2] More particularly, Schedules 1, 2 and 3 (but only Parts 1 to 5, and 7 of Schedule 3) of the Misuse of Drugs Act 1975.
[3] These experts will consider the specific effects of the drug, the proportion of a qualifying drug in a person's blood that is likely to impair a person's driving to a similar extent as alcohol, and have regard to the purpose of aligning the impairment limit for each qualifying drug as far as practicable with a blood-alcohol limit of 80 milligrams of alcohol per 100 millilitres of blood.
[4] Hon David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Land Transport (Random Oral Fluid Testing) Amendment Bill* (12 May 2018).
[5] See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.
[6] At [161].
[7] *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

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The oral fluid test constitutes a search

15. As outlined above (see paragraphs 7 to 10), the Bill introduces an oral fluid testing regime. The Bill does not specify what the device will be or how the test will be carried out (this is to be notified in the *Gazette*).

16. The Ministry of Transport advises that, depending on the device procured, the testing process could be a few swipes of the tongue, which can be done in seconds with a small device. A test could detect 6 different drugs, and indicate which drug is present, but not the amount. In their cost benefit analysis, Ministry of Transport have assumed oral fluid testing devices are likely to be approximately 95 percent accurate, and take 1 to 8 minutes to administer, with an average time of 3 minutes.[8]

17. While I have not been able to consider the actual test that will be carried out, and how invasive it will be, my view based on the information provided is that undergoing the test will constitute a physical search of the person and seizure of a bodily sample for the purposes of s 21.

There is a sufficiently compelling public interest

18. The Ministry of Transport and Police's figures show that in 2014, 18 people were killed in crashes where the driver had consumed drugs before driving. By 2018, this had risen to 95 people. Further, only 26 percent of New Zealanders think they will be caught drug driving versus 60 percent for drink driving.[9]

19. The Ministry of Transport and Police consider that the current approach involving a CIT is not effective in deterring drug-impaired driving, because of the requirement to have 'good cause to suspect' a driver has consumed a drug or drugs. The Ministry of Transport and Police consider that there is likely to be a high number of drug-impaired drivers who are not tested because there may be no observable signs of impairment at the time of driving. Police do not have a record of the total number of CITs undertaken.[10]

20. While I consider that there is a sufficiently important public policy objective to justify the use of some search and seizure powers in this context, I do not consider that the approach taken in the Bill to conduct oral fluid tests is reasonable, for the following reasons.

[8] Ministry of Transport *Enhanced testing regime for drug-impaired driving cost benefit analysis* (April 2020).
[9] Starkey, N., and Charlton, S., The prevalence and impairment effects of drugged driving in New Zealand, University of Waikato, (2017).
[10] However, Police confirm that 473 blood specimens taken following a CIT were submitted for analysis in 2017/2018.

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The intrusion is not proportionate to the public interest

21. The scheme is intrusive in two ways:

    21.1 it intrudes into a person's privacy beyond the intended aim of the Bill, which is to prevent drug-impaired drivers, by detecting and holding a person liable for any level of a qualifying drug (beyond any threshold set on a device); and

    21.2 there is the taking of swabs from a driver's mouth.

22. Driving is a heavily regulated activity because of the importance of road safety and the risk to other road users caused by unsafe practices. The driver must have a lowered expectation of privacy as a result.[11]

23. Any search of the body, rather than a search of a car or house, creates a higher expectation of privacy, and the more invasive the procedure the greater the expectation of privacy.[12] Taking cellular material (e.g. blood, buccal samples) from a person's body is at the apex. Swabbing oral fluids is less intrusive but still further along the continuum than capturing aspirated material as a breath test would do.

24. The Bill uses 'recent use' as a proxy for impairment – essentially deeming someone who has recently used qualifying drugs to be impaired. The Bill does not define recent use. While this may be justifiable, the issue is that, as drafted, the proportion of the qualifying drugs that constitutes an infringement offence is not specified in the Bill. This means it cannot effectively be challenged.

25. Take, for example, a person who consumed qualifying drugs some time ago but is no longer at the recent use level that the oral fluid test should detect. If the person were to have 2 false positive oral fluid tests (given the predicted accuracy rate of 95 percent, there is a risk of false positives) and then elect a blood test, they would still commit an infringement offence despite being below the recent use threshold, because that threshold is not defined in the Bill (the offence simply refers to presence of drugs).

26. I acknowledge that the intrusiveness of the search cannot be changed due to the limitations of the devices available for oral fluid testing. I consider that the substantial abrogation of the rights could likely be justified if it were logically connected to the purpose of detecting impaired drivers and taking them off the road. The fact that any drug use, impairing or not, will be punished after a blood test weakens the connection to that purpose.

27. The oral fluid test could be linked to the purpose of the Bill if a deemed level of impairment that constitutes an infringement offence is set in the Bill, for example in sch 5, similar to the process for the proposed criminal levels to be set by independent experts. This could be set at a level that targets recent use (which I accept is an appropriate proxy for impairment), and the threshold for the oral fluid testing device could also be set at this level.

[11] *R v Jeffries* [1994] 1 NZLR 290
[12] *R v Williams* [2007] NZCA 52

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28. Without a definition of impairment at the infringement level, there is a risk that a driver may be issued an infringement notice for a non-impairing level of a qualifying drug, which goes beyond the objective of the Bill.

The scheme is not accompanied by adequate safeguards to ensure it will not be exercised unreasonably

29. Further, I do not consider the safeguards provided in the Bill are adequate.

30. While a second oral fluid test reduces the possibility of false positives,[13] it will only function as another screening for the presence of drugs, confirming the result of the first oral fluid test, rather than detecting the proportion of any drugs. This is different to the alcohol testing regime, where a breath-screening test takes place to screen for the presence of alcohol, and upon a positive indication, an evidential breath test is conducted to then ascertain the level of alcohol and whether it is over the legal limit that constitutes impairment.

31. The purpose of conducting an oral fluid test is to secure evidence. If both oral fluid tests are positive, a person may elect to have a blood test. However, there is a risk that in doing so, they will either incriminate themselves further, and then be subject to more serious criminal offences, or confirm the infringement offence. Because the Bill does not define impairment at the infringement level, there does not appear to be any benefit in providing such a blood specimen, unless the person had not consumed any drugs at all (bearing in mind that many drugs are detectable in blood long after they have been taken and any impairing effects have worn off). Even if a blood test confirms that the proportion of drugs is less than the level the oral fluid testing device would normally detect, a person would still be subject to an infringement offence under the Bill. As such, the election to provide a blood sample does not operate as an effective procedural safeguard as there is a significant disincentive to requesting it.

32. The absence of subsequent testing leads to reliance (for evidential purposes) on a test regime which may result in false positives between 0.01 percent and 5.5 percent of the time. If it were 5.5 percent of the time, approximately 1 in 20 results would be in error.

33. Finally, in contrast to a CIT, the Bill does not require an officer to have good (or any) cause to suspect a driver has consumed a drug before an oral fluid test can be required.

34. As I noted above, the central concern is that the oral fluid testing procedure, leading to an infringement offence, can result in outcomes that are not connected to the objective of reducing drug-impaired driving. If the Bill were to include a deemed level of impairment for an infringement offence, mirroring the breath testing scheme, this connection could be strengthened. This would allow targeting of drug-impaired drivers and strengthen the existing safeguards where the oral fluid testing device returns false positives. If this were included, it would be less likely to constitute an unreasonable search and seizure.

[13] The Ministry of Transport advises that the second oral fluid test reduces the probability of a false positive from between 10% and 1% of the time to between 5.5% and 0.01% of the time. Ministry of Transport. (2020). Enhanced testing regime for drug-impaired driving: Cost-benefit analysis. Retrieved from www.transport.govt.nz.

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35. While I note the view that the current drug testing regime does not act as an effective deterrent, for the above reasons, demonstrating zero-tolerance or other general deterrent purposes, while socially valuable, is not of sufficient import to justify an intrusive regime. I therefore consider that as currently designed, the requirement to undergo one or more random compulsory oral fluid tests is inconsistent with s 21 of the Bill of Rights Act.

Section 22 – Right not to be arbitrarily detained

36. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. A person is regarded as detained within the meaning of s 22 if, amongst other things, there are no statutory restraints of a person's movements (accompanied by penalties for non-compliance).[14] The existing breath-screening test (in relation to alcohol) is considered by the courts to amount to a detention.[15]

37. The Court of Appeal has held that a detention may be "arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures".[16]

38. Under the Bill, an enforcement officer may require a person to:

    38.1 remain in place where stopped to undergo the test, or if it is not practicable to undergo the test where stopped, to accompany the officer to any other place where they can undergo the test;

    38.2 remain at the place where the test was taken until after the result of the test is ascertained;

    38.3 permit the taking of a blood specimen under s 72(1)(a) of the Act if the person refuses to undergo a first oral fluid test or a second oral fluid test.

39. Refusal or failure to comply with these requirements may result in an arrest without warrant, and the arrested person may be taken to or detained at a place to undergo the test at that place

40. In my view, the oral fluid test can be considered to amount to a detention as it places a statutory restraint on a person's movement in order to undergo the test and is accompanied by penalties for non-compliance. The length of the detention is open-ended but limited because of the maximum number of times the test can be administered.

41. The cost-benefit analysis prepared by Ministry of Transport suggests that based upon the experience in Queensland, the assumption is that it will take approximately 10 to 15 minutes to conduct the first oral test with the possibility that this is extended for a second test or longer if either test fails to produce a result. Since each test can only be repeated once, the maximum number of tests is four. This suggests roadside detention

[14] *R v Blake* HC Auckland T1737/99, 28 September 2000.
[15] *Temese v Police* (1992) 9 CRNZ 425 (CA).
[16] *Neilsen v Attorney-General* [2001] 3 NZLR 433; (2001) 5 HRNZ 334 (CA).

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could last 30 to 40 minutes but in most cases would be half that time for someone who returns two positive tests.

42. Compared to roadside detention for breath alcohol procedures, the time difference is significant. The combination of a passive breath test and breath-screening test, if both are needed, will only take a few minutes with reasonable driver cooperation. All evidential testing is undertaken at a police station or booze bus.

43. The principal Act currently requires a motorist to remain stopped for up to 15 minutes just for the purpose of ascertaining their identity (s 114), therefore detention for the purpose of testing for an even greater length of time would not in and of itself be arbitrary. However, in my view, detention for the purpose of testing under the Bill is arbitrary because there is a risk that a driver may be issued an infringement notice for a non-impairing level of a qualifying drug, which goes beyond the objective of the Bill.

44. I therefore consider the Bill appears to be inconsistent with the right not to be arbitrarily detained as affirmed in s 22 of the Bill of Rights Act.

45. As noted above in relation to s 21, if the Bill were to include a deemed level of impairment for an infringement offence that matched the oral fluid testing device, mirroring the breath testing scheme, a temporary restriction on movement may be less likely to give rise to an inconsistency with the right to be free from arbitrary detention.

Section 25(c) - right to be presumed innocent until proven guilty

46. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to the law.

47. In order to give full recognition to this right, which is also a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and the onus for disproving any potentially available defence, must remain on the prosecution.

48. As noted above, cl 9 (new ss 57A(2), 57B(2) and 57C(2)) of the Bill introduces new strict liability offences (through an infringement regime) which shift the onus of proof onto the defendant, by requiring them to disprove an element of the offence in order to escape liability. For example, that the device has registered a false positive and they did not in fact have the requisite level of a qualifying drug in their system (cl 25, or new s 77A).

49. I also note that the statutory defences available in s 64 of the principal Act (for example if the drug was consumed in accordance with a current and valid prescription) are only available if the person elects to have a blood test or is required to provide a blood specimen. There are also accompanying offences, as noted above, for failure or refusal to comply with testing.

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50. Strict liability offences raise a prima facie issue of inconsistency with s 25(c) of the Bill of Rights Act.[17] I have therefore considered whether this limitation on the right is nevertheless demonstrably justified under s 5 of that Act.

51. Where a provision is found to pose a limit on a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court decision in *Hansen v R*, the s 5 inquiry may be summarised as:

    51.1 does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?

    51.2 if so, then:

        51.2.1 Is the limit rationally connected to the objective?

        51.2.2 Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

        51.2.3 Is the limit in due proportion to the importance of the objective?

52. In the specific context of strict liability offences, considerations especially relevant to the reasonableness of limits on s 25(c) are the nature and context of the conduct being regulated, the ability of the defendants to exonerate themselves, and the penalty levels.

Is the objective sufficiently important?

53. As noted above, I consider the policy objective of reducing harm and deterring drug-impaired driving to be a significant and important objective which may justify the imposition of strict liability offences to ensure that there is an onus on a person driving to adhere to their obligations under the Bill. The objective of including roadside testing and strict liability offences appears to make the drug driving regime more effective and efficient, as in most cases two positive oral fluid tests will be an accurate indication of offending. In increasing road safety, effectiveness and efficiency gains may be sufficiently important to justify some limitation on the right to be presumed innocent.

Is there a rational connection between the limit and the objective?

54. I do not consider that the limit on the presumption of innocence is rationally connected to the objective. While the Bill provides that the oral fluid testing device must be set at a level so as to detect recent use of a qualifying drug, this is not linked to the infringement offences, nor is this level defined.

55. In particular, new ss 57A(2), 57B(2) and 57C(2) contain infringement offences for two positive tests for the presence of a drug, not recent use. This means that even if a person elects a blood test, and presence of a drug was found, they would still be subject

[17] *R v Hansen* at [38] – [39] per Elias CJ, [202] per McGrath J, [269] per Anderson J.

to an infringement offence, even if the proportion of the drug was less than the level set on the oral fluid testing device.

Does the limit impair the right no more than reasonably necessary?

56. I consider that the Bill appears to impair the right more than necessary because there are reasonable alternatives that impair the right to a lesser degree. Including an infringement level of impairment in the Bill, linked to the recent use threshold of the oral fluid testing device and the infringement offences, would rationally connect the limit to the objective, and would allow the blood test to function as an effective safeguard.

57. I note that the introduction of infringement offences for breath testing attracted a s 7 report for inconsistency with the presumption of innocence, but the inconsistency was clearer in that instance because the result of the evidential breath test is conclusive, meaning that it cannot be challenged at all.

58. In this Bill, a person has a right to contest the charge (because the test is presumptively rather than conclusively valid), but it is limited because the infringement offences penalise any level of drugs, regardless of quantity. If a person also had an effective right to a blood test (a blood test which could exonerate them from impaired driving), that would impair the right to a lesser degree. However, because the blood test will result in an infringement offence if there is any detected drug, regardless of the quantity, it is not sufficiently effective.

Is the limit in due proportion to the objective?

59. The reversal of the onus of proof may be seen as proportionate because it is restricted to an infringement offence which does not carry a criminal conviction. However, the limitation on the presumption of innocence does not appear proportionate because the road safety regime would still be able to operate reasonably effectively with an impairment level set in the Bill that is the same as in the oral fluid testing device, and linked to the infringement offences. Any efficiency gains are unlikely to outweigh the right to be presumed innocent.

60. Further, as discussed above, I consider the process of conducting the oral fluid test constitutes an unreasonable search and seizure and amounts to an arbitrary detention because of the lack of requisite due cause and adequate procedural safeguards. In my view, it follows from this conclusion that the strict liability offences arising from a positive oral fluid test or a failure to comply with testing constitute an unjustified limitation on the right in s 25(c).

61. I also discussed above that there may be concerns with the reliability of the testing regime, which, coupled with the potentially significant consequences – a fine and significant demerit points – although with no accompanying criminal conviction, indicate that the offence (which is for presence rather than impairment) is not proportionate to the harm sought to be addressed.

62. In my view, the limit placed on the right in s 25(c) by the introduction of these offences based on a testing regime that involves unreasonable powers of search, seizure, and

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detention, and is likely to be without sufficient checks to ensure the reliability of evidence, cannot be justified under s 5 of the Bill of Rights Act.

Conclusion

63. I have concluded that the Bill appears to be inconsistent with the right to be secure against unreasonable search or seizure, the right not to be arbitrarily detained and the right to be presumed innocent until proved guilty affirmed in ss 21, 22 and 25(c) of the Bill of Rights Act.

Hon David Parker
Attorney-General

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