Te Tari Ture o te Karauna
Crown Law

16 May 2023

Attorney-General

Land Transport (Road Safety) Amendment Bill — Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/380

1. We have reviewed the Land Transport (Road Safety) Amendment Bill (**Bill**)[1] and advise that it appears to be consistent with the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990 (**NZBORA**).

SUMMARY OF ADVICE

2. The Bill has two main objectives: to improve legislative response to fleeing drivers, and to address safety matters within the land transport system. For this advice the key changes in the Bill are the amendments to the penalties for "**fleeing driver offences**", being offences against s 52A(1) of the Land Transport Act 1998 (**LTA**) by failing to stop or to remain stopped, or failing to give information on demand once stopped, in breach of s 114 of that Act.

3. These aspects of the Bill are a response to concerns that existing penalties are inadequate in the face of a marked increase in fleeing driver events in recent years, and that Police are facing challenges identifying fleeing drivers after changes to Police pursuit policy in December 2020 (they now refrain from pursuing and apprehending fleeing drivers for safety reasons).

4. Amendments to the LTA will increase the maximum driver licence disqualification period for a second fleeing driver offence (from one year to between one and two years), and increase the period for which Police may impound vehicles involved in fleeing driver events (from 28 days to six months). The Bill also provides for a new power to seize and impound for 28 days a vehicle used in a fleeing driver offence, in response to a failure to give information in certain circumstances. Amendments to the Sentencing Act 2002 will enable courts to issue forfeiture orders post-conviction in respect of vehicles used in the commission of certain fleeing driver offences (rather than confiscation orders).

5. Crown Law provided you with a preliminary briefing on the NZBORA implications of the policy proposals underpinning the fleeing driver aspects of the Bill on 17 November 2022, before the proposals were put to Cabinet for approval (**November advice**). A copy of the November advice and its enclosures

1 Land Transport (Road Safety) Amendment Bill 2023 PCO 25123/21.0

is **attached** for ease of reference. We are comfortable that the amended penalties for fleeing driver offences as currently drafted in the Bill are not inconsistent with the NZBORA.

6. In addition to the amendments concerning fleeing driver offences, the Bill provides enforcement agencies with a number of new tools to ensure they can carry out enforcement activities in a timely manner. It introduces the ability for officials to request and use electronic addresses in various provisions concerning requests for information and the service of notices; provides for infringement notices to be issued automatically using electronic systems; and introduces the use of point-to-point average speed systems to provide evidence of actual speed in proceedings against a person for a speeding offence. The Bill also contains a number of consequential amendments to the Summary Proceedings Act 1957 and to secondary legislation.

7. None of these additional changes have any NZBORA implications.

8. In conclusion, the Bill appears to be consistent with the NZBORA.

ANALYSIS

9. We will consider the changes concerning fleeing driver offences in the LTA and Sentencing Act in turn, before addressing briefly the remaining miscellaneous amendments in the Bill.

Fleeing drivers: Land Transport Act amendments

10. The Bill amends the fleeing driver offence penalties in the LTA in three key respects.

Extended period of disqualification for second offence

11. First, it increases the period of disqualification that a court must order for a second fleeing driver offence from 1 year to "not less than 1 year and not more than 2 years".[2]

12. This amendment does not raise any NZBORA concerns because no protected rights are prima facie engaged.

Extended period of impoundment for fleeing driver offence

13. Second, the Bill provides for vehicles used in fleeing driver offences to be seized and impounded for six months,[3] with the registered owner of the vehicle liable to pay the costs of towage and storage.[4]

14. Section 96(1AB) of the LTA currently provides that an enforcement officer may seize and impound, or seize and authorise the impoundment of, a motor vehicle

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2 Clause 7.

3 Clause 10, new section 96AAA.

4 Clause 13, new section 97A(2).

for 28 days if the officer believes on reasonable grounds that a person driving the vehicle has failed to stop (or remain stopped) as signalled, requested, or required under s 114.

15. Clause 10 of the Bill replaces s 96(1AB) with new s 96AAA. New s 96AAA(1) provides:

> An enforcement officer may seize and impound, or seize and authorise the impoundment of, a motor vehicle for 6 months if the officer believes on reasonable grounds that—
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> (a) the person driving the vehicle has failed to stop (or remain stopped) as signalled, requested, or required under section 114 (see section 52A(1)(a) and (b) for offence); and
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> (b) the vehicle—
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> (i) is not a stolen vehicle; and
>
> (ii) has not been converted; and
>
> (iii) is not a write-off; and
>
> (iv) has not suffered severe damage.

16. As is currently the case, the vehicle must be released to the registered owner if charges are not filed, and may be released if the registered owner was not driving at the time of the offending and has provided the information requested under s 118(4).[5] In addition, the registered owner may appeal the impoundment via the Police (or subsequently via the District Court) in a range of situations. The Bill also introduces a new ground of appeal, if seizure and impoundment have resulted in hardship and release of the vehicle is not contrary to the interests of road safety.[6]

17. We have considered whether or not the increased period of impoundment engages the rights in ss 21, 27, 9 and 18 of the NZBORA, and set out our conclusions in that order.

Section 21: unreasonable search or seizure

18. Section 21 of the NZBORA provides:

> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

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5 See cl 10, new s 96AAA(3) and (4). Section 118(4) as amended by cl 21 of the Bill will read: "If a vehicle failed to stop (or remain stopped) as signalled, requested, or required under section 114, an enforcement officer may request the owner or hirer of the vehicle to give all information in his or her possession or obtainable by him or her which may lead to the identification and apprehension of the driver, and the owner or hirer must give the officer that information immediately".

6 The Bill consolidates all the grounds for appealing an impoundment under new s 96AAA into new s 102(1A): see cl 17(5).

19. The courts have generally focused on the personal privacy interests protected by s 21,[7] although in the context of standalone seizures it may be that s 21 provides dual protection for property rights and privacy rights.[8] It protects against unreasonable searches and seizures arising in the context of offending:[9] "the controlling feature should ... be who is involved and what they are doing rather than the purpose for which they are doing it".[10]

20. Here, the power to impound is predicated on the reasonable belief of the enforcement officer that the driver of the vehicle has committed an offence. Furthermore, if the Police decide not to take proceedings against the driver or owner, or they are acquitted, the vehicle must be returned. As such, we consider impoundment of a vehicle in reliance on this power would be a seizure within the scope of s 21. The question becomes whether or not such a seizure would be reasonable.

21. The objective of extending the power to impound vehicles used in fleeing driver offences from 28 days to six months is to strengthen the deterrent effect on fleeing drivers and improve road safety. This is a legitimate and important objective in light of the increase in fleeing driver events and the threats to road safety that they pose. Evidence referenced in the Cabinet paper that led to the Bill indicates that penalties that emphasise loss (of a licence or vehicle) can be effective.

22. As noted in our November advice, we consider there is a sufficiently rational connection between the objective and the measure. It is true that impoundment of a vehicle does not prevent the offender from committing further fleeing driver offences in a different vehicle, but it removes a vehicle that has been used to endanger public safety from the road, and it is reasonable to expect that it would reduce opportunities for reoffending, especially if a driver whose vehicle was impounded was also disqualified from driving.

23. In terms of proportionality, the change from 28 days to six months is significant, and sets impoundment in response to fleeing driver offences apart from impoundment for other offences against the LTA, which remain at 28 days.[11]

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7 See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10]: "The rationale for this provision is the protection of privacy"; *P F Sugrue Ltd v Attorney-General* [2006] 3 NZLR 464 (PC) at [23] :"Constitutional provisions such as s 21 of the Bill of Rights Act are primarily directed towards preventing the invasion of personal freedom and privacy"; *Williams v Attorney-General* [2007] NZCA 52, [2007] 3 NZLR 207 at [48]: "A touchstone of s 21 of the Bill of Rights is the protection of reasonable expectations of privacy".

8 See the obiter comments of Collins J in *Kamo v Minister of Conservation* [2018] NZHC 1983 at [72]–[73]: "...[I]n *Hamed v R*... Blanchard J also said, 'the guaranteed right under s 21 reflects an amalgam of values: property, personal freedom, privacy and dignity'. These observations support the notion that both privacy rights and property rights may be engaged by s 21 of NZBORA. In my assessment, there is some merit in the submission that s 21 provides dual protection for property rights and privacy rights. ... While most cases to date focus on privacy rights, that is because they were decided in the context of law enforcement officers searching and seizing items located on or in property, rather than the seizure or confiscation of property by the state as a stand-alone measure."

9 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).

10 *Hamed v R*, above n 7, at [22].

11 See s 96.

The December 2020 change in Police pursuit policy discussed in our November advice is relevant here. Police no longer pursue and apprehend fleeing drivers, which has had positive impacts on road safety, but has reduced Police capacity to identify and prosecute drivers, which in turn reduces the deterrent effect of the risk of prosecution and punishment. In our view these circumstances justify the use of increased impoundment powers as an additional deterrent in fleeing driver cases.

24. It is arguable that increasing the period of impoundment by a smaller margin, for example to three months, would be more proportionate while still achieving the same objective, but on balance we are comfortable that the extension to six months sends a stronger message of deterrence without rendering the power unreasonable. The reasonableness of the seizures anticipated by new s 96AAA is further supported by the following points:

    24.1 The power to impound for six months after a fleeing driver event remains discretionary ("may"), whereas the power to impound for 28 days in other situations is expressed in mandatory terms ("must" (s 96(1)) or "must, if practicable" (ss 96(1AA), 96(1AAB), 96(1A)).

    24.2 The extended power is contingent not only on a reasonably held belief that the vehicle has been used in a fleeing driver offence, as it is now, but also on a reasonably held belief that the vehicle is not stolen, has not been converted, and has not suffered severe damage (new s 96AAA(1)(b)). This additional safeguard will likely reduce the occasions on which these extended impoundment powers are exercised and ought to mitigate any potentially disproportionate impact on registered owners of impounded vehicles who were not driving at the time of the offending.

    24.3 Registered owners may also have recourse to the review and appeal mechanisms discussed at [16] above.

25. In our view, the provisions of the Bill extending the impoundment period for vehicles used in fleeing driver offences do not infringe the right to be secure against unreasonable search and seizure in s 21 of the NZBORA.

Section 27: natural justice rights

26. There is a concern that impounding a vehicle for a long period of time may not have any materially different impact from forfeiture, and could amount to the imposition of a penalty without due process, implicating s 27 of the NZBORA.

27. However, we believe this concern is adequately mitigated by the fact that if the Police decide not to commence proceedings in respect of the offence, the vehicle must be released (although we note that no specific timeframe is stipulated within which charges must be laid), and by the mechanisms for review and appeal discussed at [16] above. The scope for impounding vehicles owned by persons other than the driver will be limited by new s 96AAA(1)(b), registered

owners can obtain release by providing the information requested under s 118(4), and there are several avenues for registered owners to challenge any impoundment.

28. We do not consider the power of impoundment for six months to be inconsistent with s 27 of the NZBORA.

Section 9: right to be free from disproportionately severe treatment or punishment

29. As we have concluded the power is reasonable and proportionate, it follows that there is no limitation on the right to be free from disproportionately severe treatment or punishment in s 9 of the NZBORA.

Section 18: right to freedom of movement

30. We have also considered whether the extended impoundment power engages the right to freedom of movement in s 18 of the NZBORA.

31. The right to move freely within New Zealand encompasses the right to travel by chosen means, for example, to travel by car, train, or plane.[12] That includes freedom to use the roads. Impoundment of the vehicle a person might use to exercise that freedom does not stop them from using the roads altogether—they could use alternative means of transport such as a different car, public transport, or a bicycle—but it arguably does limit their freedom to travel by their chosen means.

32. That said, the freedom to use the roads is far from absolute. It is clearly qualified by enactments, including the LTA, that regulate the use of those roads.[13] Even if the power to impound vehicles used in fleeing driver offences for six months can be said to limit the right to freedom of movement in s 18 of the NZBORA, we consider any such limitation is demonstrably justified in a free and democratic society in terms of s 5 of the NZBORA. By extension of the reasoning set out at [21]–[24] above in respect of s 21, the power to impound vehicles used in fleeing driver events for six months is rationally connected to the legitimate objective of deterring fleeing drivers and improving road safety, and impoundment for six months is within the reasonable range of alternatives to achieve that objective.

Conclusion

33. Overall, we conclude that the discretionary power to impound vehicles used in fleeing driver offences for six months instead of 28 days does not appear to be inconsistent with the NZBORA.

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12 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [16.4.3].

13 *Kerr v Attorney-General* [1996] DCR 951 at 955: "It must be observed that if s 18 is concerned with freedom to use the roads then it must be one of the most qualified of the rights and freedoms affirmed by the Act for it is subject to the provisions of the Transport Act 1962, the Traffic Regulations 1976, and myriad other statutory provisions regulating, prohibiting, qualifying and directing the use of the roads and activities in public places."

New power of impoundment for failure to give information

34. The third major respect in which the Bill amends the LTA is by introducing a power of impoundment for failure to give information about a fleeing driver offence. Clause 10 of the Bill introduces new s 96AAB, subsections (1) and (2) of which provide:

> (1) This section applies if a vehicle—
>
> > (a) is involved in the commission of an offence against section 52A(1)(a) or (b); and
> >
> > (b) has not been seized and impounded under section 96AAA.
>
> (2) An enforcement officer may seize and impound, or seize and authorise the impoundment of, a motor vehicle for 28 days if the officer believes on reasonable grounds that—
>
> > (a) either—
> >
> > > (i) the driver of the vehicle failed or refused to provide information or provided false or misleading information in response to a demand for information made by the officer under section 114(3)(b) (see section 52A(1)(c) for offence); or
> > >
> > > (ii) the owner or hirer of the vehicle, without reasonable excuse, failed or refused to provide information or provided false or misleading information in response to a request for information made by the officer under section 118(4) (see section 52(6) for offence); and
> >
> > (b) impounding the vehicle is necessary to prevent a serious threat to road safety.

35. The impoundment power covers both of the "failure to give information" offences that can arise in respect of fleeing driver events, in respect of requests for information under ss 114(3)(b) and 118(4) respectively.

36. As you are aware, a similar proposal was put forward in 2016 but did not progress. The Attorney-General at that time considered the proposal to be inconsistent with s 21 of the NZBORA because the power to impound a vehicle for failure to give information was not rationally or proportionally connected to the road safety objective (see Appendix B to our November advice). As the Attorney-General put it in his Section 7 report in 2016:[14]

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14 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 Representative, 12 September 2016, at [19] (enclosed with this letter as Appendix B to our November advice).

> 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.

37. We expressed similar concerns to Police about an earlier iteration of the current proposal, as noted in our November advice. In assessing whether this power as ultimately drafted in the Bill is "reasonable" for the purposes of s 21 of the NZBORA, we will turn first to the question of rational connection and then consider proportionality.

Rational connection between measure and objective

38. As originally drafted, the Bill made the new power to impound for failure to give information contingent on a reasonably held belief that the impoundment is necessary to prevent a threat to road safety. However, the original drafting did not adopt the preferred standard of "imminent" or "serious" threat. We understand that Police had objections to introducing the word "imminent" because they did not consider it would be operationally practical, for example if the vehicle was not being driven at the time of or immediately prior to seizure.

39. In our view, a simple or bare threat to road safety—such as a belief that the vehicle might be used in the commission of another fleeing driver offence at some unspecified time in the future—would not be not sufficient to remedy the disconnect between the measure and its objective. After discussion with officials about this concern, the draft Bill has been amended and now requires belief of a "serious" threat. The current drafting mitigates our concern without raising the operational complications that the Police foresaw with the use of "imminent", and would still allow Police to act on a genuine concern to get offenders off the road as soon as possible because of a heightened risk of further offending.

40. Accordingly, as it is now drafted, we consider there is a sufficiently strong and rational connection between the measure and its objective. The next question is whether impoundment is a proportionate response to the failure to give information. We will discuss proportionality by reference to existing penalties and appeal rights.

Proportionality: Existing penalties

41. The LTA already penalises a failure to give information under s 52A(1)(c) with a maximum fine of $10,000, and a failure to give information under s 52(6) with a maximum fine of $20,000.[15] In addition, as already discussed, there is an existing power to impound the vehicle used in the commission of the fleeing driver offence itself.

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[15] We note that the 2022 proposal to remove court discretion and set fixed fines in this context was not approved by Cabinet.

42. We acknowledge that the power in new s 96AAB only applies if the vehicle has not already been seized and impounded, and that its purpose is in part to facilitate Police ability to obtain information that could lead to that seizure and impoundment. It is also relevant, as it was in the context of the extension of the impoundment power from 28 days to six months discussed above, that the capacity for effective deterrence has diminished since the Police have significantly reduced their pursuing and apprehending of fleeing drivers.

43. That said, we questioned whether the additional threat of impoundment under new s 96AAB will materially increase the deterrent effect of the existing penalties for failing to give information. Police confirmed that in their opinion it would, because the risk of losing the vehicle for failing to give information would be immediate and significant, whereas it can take weeks or months for a fine to be issued, and the fines issued are generally relatively small in quantum. We accept that strengthening deterrence is a legitimate and important aspect of the overarching objective of improving road safety.

Proportionality: Appeal rights

44. Finally, we have considered the relief available to registered owners if the power to impound is exercised in a manner that cannot be justified. As is the case for other 28-day impoundments, the vehicle must be released to the owner if Police decide not to take proceedings or the person is acquitted.[16]

45. In addition, the current version of the Bill amends s 102 of the LTA to provide the same suite of appeal rights in respect of an impoundment for failure to give information under new s 96AAB as are available in other cases where officers have a power to impound a vehicle for 28 days.[17] In this specific context these would include, for example, cases in which the officer did not hold the requisite belief that the impoundment was necessary to prevent a serious threat to road safety; or an owner did not know and could not reasonably be expected to have known that the hirer of the vehicle would commit an information offence; or the owner took all reasonable steps to prevent the hirer of the vehicle from committing the offence. The owner could appeal to the Police by statutory declaration within 14 days of impoundment under s 102, and if unsuccessful they could further appeal to the District Court under s 110.

Conclusion

46. In conclusion, the Bill now sets out clear parameters for the exercise of the new power to impound vehicles for failing to give information in respect of a fleeing driver offence, by making it contingent on a reasonably held belief that doing so is necessary to prevent a serious threat to road safety. It also provides adequate relief against situations in which the power is exercised inappropriately. As such, seizing a vehicle in reliance on this power would be reasonable, and the new power is not a limitation on the right to be secure against unreasonable seizure

16 See cl 10 of the Bill, new s 96AAB(3), which provides that existing s 96(6) (among other provisions) will apply to seizures under this new power.

17 See cl 17 of the Bill, amending s 102 of the LTA.

in s 21 of the NZBORA. As we have concluded the power is reasonable and appeal rights are adequate, there are no implications for the rights in s 18 (freedom of movement) or s 27 (natural justice) either.

47. We consider that the Bill as currently drafted adequately resolves the concerns that arose in respect of earlier versions of this proposal and we conclude that this aspect of the Bill is consistent with the NZBORA.

Fleeing drivers: Sentencing Act amendments

48. The Bill also amends the Sentencing Act 2002 in respect of court-imposed penalties for fleeing driver offences, noting that it treats the offences of failing to stop or remain stopped (s 52A(1)(a) and (b)) differently from the information-related offences in s 52A(1)(c):

48.1 The power to order confiscation of a vehicle for any of the three offences against s 52A(1) is removed in respect of offences against s 52A(1)(a) and (b).[18] Instead, cl 40 inserts a new regime whereby if a person is convicted of failing to stop or remain stopped, the Court may order forfeiture of the vehicle used in the offence, if satisfied that at the time of conviction the offender or a substitute for the offender[19] owns or has an interest in the vehicle that was used.[20] The power to confiscate for information offences against s 52A1(c) remains in place.

48.2 If an order for forfeiture is made, it is an offence for the offender to acquire any interest in any motor vehicle within 12 months after the date of the order. If a person is convicted of this offence the court may order the confiscation of the vehicle concerned instead of, or in addition to, imposing a fine.[21]

48.3 The Bill creates offences for selling or disposing of a vehicle that is subject to a forfeiture or confiscation order under new ss 142AAB(3) or 142AAF(4) respectively, and for removing or attempting to remove a vehicle once it has been seized or surrendered.

48.4 Existing provisions in respect of confiscation orders will be applied to forfeiture orders with necessary modifications (new s 142AAE), including in relation to written cautions and appeals.

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18 Clause 38, amending s 128(1)(b), and cl 39, amending s 129(1)(a).

19 Section 127(3) of the Sentencing Act provides that "a person is, in relation to an offender, a substitute for the offender or a substitute if (a) the person is served with a written caution, under section 129B, about an offence committed by the offender; and (b) within 4 years after the date of the commission of the offence for which that written caution was served, the offender commits a further offence specified in section 128(1) involving a motor vehicle that, at the time of the commission of that offence, the person owns or has an interest in."

20 Clause 40, new s 142AAB.

21 Clause 40, new s 142AAF.

49. We have considered whether the new power for the courts to order forfeiture—instead of confiscation—of vehicles used in the commission of certain fleeing driver offences engages s 21 of the NZBORA.

50. In our view, consistent with our November advice, s 21 would not be engaged by a penalty imposed by a court at the end of an enforcement process, or by a seizure undertaken to give effect to that penalty. The High Court has held that "forfeiture upon conviction by operation of a statutory provision has nothing to do with unreasonable seizure".[22] Natural justice rights would be protected through the judicial process. For the same reasons we are comfortable that the other amendments to the Sentencing Act associated with the new forfeiture regime are consistent with the NZBORA.

51. Nor do we consider that the forfeiture regime amounts to disproportionately severe punishment in terms of s 9 of the NZBORA.

Other amendments not related to fleeing drivers

52. In addition to the main substantive changes to the fleeing driver penalties already discussed, we have considered whether the other amendments in the Bill raise any NZBORA concerns. We have concluded that they do not, and set out our reasoning briefly here, for completeness:

    52.1 The Bill introduces the ability for officials to request and use electronic addresses in various provisions concerning requests for information and the service of notices, in addition to existing modes of contact already provided for in the legislation. These changes do not engage any protected rights in the NZBORA.

    52.2 The Bill provides for infringement notices to be issued automatically in certain situations, through the use of an electronic automated infringement offence system approved by the Director of Waka Kotahi New Zealand Transport Agency (**Director**).[23] This amendment creates an automated process for infringement notices to be issued if the system detects the commission of a moving vehicle offence as defined in s 2(1) of the LTA (for example a speeding offence), recognises that images connected with the offence are of suitable quality to be used as evidence, and is able to identify (via the numberplate) the registered owner of the vehicle and their address for service of the infringement notice. The Bill contemplates the system being capable of operation in a way that requires an enforcement officer to verify any of those matters before a notice is issued in certain circumstances, and sets out quality assurance and approval safeguards. It does not affect existing processes and mechanisms for defending proceedings arising from an

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22 *McGlone v Ministry of Fisheries* [1999] BCL 107 (HC); *Director-General of Agriculture & Fisheries v William Rose Trawling Ltd* HC Napier CP 14-93, 21 February 1994.

23 Clause 26, new ss 139AAA and 139AAB.

infringement notice. We do not consider this process raises any concerns under the NZBORA.

52.3 The Bill introduces the use of point-to-point average speed systems, being approved vehicle surveillance equipment that consists of at least two cameras (and any associated equipment) and has the ability to calculate the average speed of a vehicle between two points on a length of road.[24] For the purposes of proceedings against a person for a speeding offence, the average speed calculated by such a system must be treated as the actual speed at which the vehicle was travelling between those two detection points.[25] The Bill provides that the Director must publish the elements of a point-to-point average speed system and the method for measuring distance in the *Gazette* and on the Waka Kotahi New Zealand Transport Agency website.[26] There is no new offence created here, only a new mechanism for creating and presenting the evidence that supports the prosecution of the offence. This amendment raises no NZBORA concerns.

52.4 The Bill also contains a number of consequential amendments, including to the Summary Proceedings Act and to secondary legislation, which do not have any NZBORA implications.

CONCLUSION

53. We have concluded that the Bill does not appear to be inconsistent with the NZBORA.

54. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel, and Peter Gunn, Team Manager.

Anna Bloomfield

Crown Counsel

Noted / Approved / ~~Not Approved~~

Hon David Parker
Attorney-General

~~16/5/2023~~ 16/5/23

Encl.

[24] Clause 28, new s 146A(4).

[25] Clause 28, new s 146A(1).

[26] Clause 28, new s 146D.

Te Tari Ture o te Karauna
Crown Law

[In Confidence]

17 November 2022

Attorney-General

Comment on proposals to respond to fleeing drivers and [redacted]
Our Ref: SOL115/2886

1. The Ministers of Police, Transport and Justice are seeking Cabinet's decisions on proposals relating to penalties for fleeing drivers, the identification of fleeing drivers, [redacted], and [redacted]

2. Crown Law gave advice on earlier iterations of similar proposals ([redacted]) and subsequently gave relatively urgent advice on the specific proposals in the Cabinet Paper in October. We have been asked to brief you on our Bill of Rights concerns and to give more specific advice about how they might be mitigated, if at all. We set that out below and note where our views have developed since our original input to the Cabinet paper. Where that has occurred, we have reflected that in the Cabinet paper. As this is comment on policy proposals rather than a bill, our advice is not formal s 7 vetting advice.

Current proposals relating to fleeing drivers

Impoundment of vehicle for six months

3. Currently, Police can impound vehicles used in fleeing driver events for 28 days. The Cabinet Paper seeks agreement to increase that period to six months. As is currently the case, the vehicle would need to be released if charges were not laid, and the registered owner could appeal the impoundment via the Police (or subsequently via the District Court) if the vehicle was stolen or converted at the time of impoundment.

4. In 2002, the Attorney-General considered that a proposal to give Police power to impound for 28 days vehicles believed to be involved in illegal street and drag racing engaged the s 21 right to be free from unreasonable search and seizure. It was judged inconsistent with that right for lack of rational connection to its objective (impoundment does not legally prevent a person from continuing to drive) and for disproportionality. A copy of the s 7 report is attached in Appendix A (see page 4).

5. We consider the proposed impoundment power would likewise engage s 21.

Previously, we advised that a s 7 report may well be issued for the same reasons. However, upon further reflection, we now consider the seizure involved in the current impoundment proposal may well be reasonable because of a material change in the circumstances.

6. Although impoundment does not prevent drivers using other cars, we consider there is a sufficiently logical link between impounding a vehicle used in fleeing and the objective of deterring drivers from fleeing. Further, in our view the seizure is not disproportionate.

7. What has changed is that for reasons of road safety Police now refrain from pursuing and apprehending a fleeing driver and as a result they are inhibited from identifying the driver and initiating a prosecution. That policy is well known. It follows that the capacity for the risk of prosecution and punishment to deter fleeing drivers is substantially reduced. That may well account for the recent increase in such events, noted in the Cabinet Paper. We note Justice officials were less inclined to consider the situation had changed sufficiently from 2002 to justify an alternative view on the proposals than that of the Attorney-General's view in 2002. However, they will continue to consider that point.

8. Fleeing will usually involve at least a short period of highly dangerous driving. Even without pursuit by the Police, fleeing drivers have died and there is an irreducible risk to the safety of other road users. The knowledge that the car will be identifiable from its registration plate and the probability that it will be found and confiscated by the authorities has the capacity to add back deterrence to some degree and thus reduce the risk to road safety that has been created.

9. An important factor in the reasonableness of the seizure is the current review and appeal mechanisms which ensure that an innocent owner to retrieve their vehicle although the procedure should be further streamlined for the owner of a stolen vehicle.

10. We also consider that s 27 natural justice rights are engaged as the impoundment can occur without prosecution or conviction. However, as the Cabinet paper notes, we think the current appeal and review mechanisms would apply and may mitigate the natural justice concerns. This makes the likelihood of a s 7 report on this basis low. We do not think any additional mitigation is necessary and clarify the position in the Cabinet paper.

Forfeiture of vehicles post-conviction

11. Currently, the courts may issue a confiscation order for a vehicle involved in a fleeing driver event. The court must issue a confiscation order if a second qualifying driving offence (which does not need to be a second fleeing driver event) is committed within a four-year period of the first. The Cabinet paper seeks agreement to enable a court to make a forfeiture order rather than a confiscation order. The court would retain the ability to consider undue hardship, and the current review and appeal mechanisms would continue to apply.

12. The Cabinet paper states that forfeiture of a vehicle, post-conviction, is likely to attract a section 7 report under section 21. However, on reflection, s 21 would not be engaged by a penalty imposed by a court at the end of an investigative/enforcement process. Nor, for completeness, do we think this proposal would engage s 9 rights to be free from disproportionately severe treatment. We have noted this in the Cabinet Paper.

Impound a vehicle for 28 days

13. The Cabinet Paper seeks agreement to a new power for Police to seize and impound for 28 days a vehicle used in a fleeing driver event if its owner does not comply with a request to provide information that may lead to identifying and apprehending the driver of the vehicle provided Police have a reasonable belief that impounding the vehicle is necessary to preserve road safety. The vehicle would be required to be released if charges were not laid, and review and appeal mechanisms are envisaged.

14. In 2016, the Attorney-General considered a similar proposal was inconsistent with s 21 of the Bill of Rights Act (see **Appendix B** at paragraphs 15-25). He considered it could not be rationally or proportionately connected to the primary purpose of Police vehicle impoundment, which is road safety. To help this connection, if progressed, the Attorney General proposed to include a limb in the section 118(4) power, which requires Police to form a reasonable belief that impounding the vehicle is necessary to prevent an imminent threat to road safety. The 2016 proposal did not progress beyond the Select Committee.

15. While the current proposal is more rationally connected to preserving road safety than the 2016 proposal, we were concerned that the Police had not adopted the standard of an *imminent* threat to road safety. Without that threshold the 2016 concerns may not be sufficiently mitigated and the penalty may remain disproportionate. We discussed the meaning of "imminent" with Police. They had considered there would only be an imminent threat to road safety if the car was being driven at the time. In light of those discussions a better option would be to set the standard at a serious risk to road safety, reflecting a genuine concern to get the offender off the road as soon as possible because of a heightened risk of further offending. We anticipate officials may be able to articulate the necessary connection to road safety in the drafting process so as to mitigate Bill of Rights concerns. We will work towards that. Final analysis will depend on the draft Bill.

[redacted]

16. [redacted]

[1] [redacted]

[redacted]

Mitigating measures

21. We have been asked for suggestions to mitigate Bill of Rights Act concerns. Our remaining BORA concerns relate to the proposal to impound a vehicle for 28 days if the owner does not adequately respond to requests for information about the driver in a fleeing driver event and [redacted]

22. We have suggested the same mitigation measure suggested in 2016 regarding the 28-day impoundment proposal (albeit without the use of the word "imminent"): that it be contingent on a serious threat to road safety. As above, the drafting process may enable sufficient mitigation in relation to these concerns.

23. [redacted]

Recommendations

24. We recommend that you:

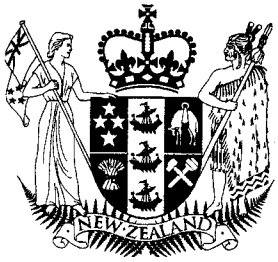
24.1 **Note** the contents of this briefing. Yes/No

Noted/Approved/Declined

_____ _____

Matt McMenamin / Austin Powell
Crown Counsel / Senior Crown Counsel
027 8391648 / 0272812272

Hon David Parker
Attorney-General
/ /2022



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002

As corrected

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 260 (as varied by the House of Representatives on 25 May 2000) of the Standing Orders of the House of Representatives

I have considered the Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002 (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 8 of the Bill appears to be inconsistent with section 21 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act and Standing Order 260 (as varied by the House on 25 May 2000) I draw this to the attention of the House of Representatives.

The Bill

The Bill amends the Land Transport Act 1998 (the "Act") by creating 3 new offences relating to illegal street and drag racing and providing enforcement officers (such as the Police) with the discretion to impound motor vehicles believed to be involved in these activities. The objective of the Bill is to combat the problem of illegal street and drag racing and the practice of performing wheel spins and other dangerous stunts on public roads.

The Bill of Rights Act issue

Clause 8 of the Bill would insert five new sections into the Act providing for a regime by which vehicles may be seized and impounded for 28 days where it is believed that the driver operated the vehicle in contravention of the offence provisions in the Bill. I have considered whether this impoundment power constitutes an "unreasonable seizure" for the purposes of section 21 of the Bill of Rights Act, which provides:

> "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

The initial question that falls to be answered is whether the impoundment would constitute a "seizure" within the meaning of section. While the Court of Appeal has not considered the scope of section 21 as it applies to seizure, the matter was considered by Williams J in *Wilson v New Zealand Customs Service* (1999) 5 HRNZ 134. Williams J held that the seizure and continued detention of a vehicle by Customs officers in the context of a suspected evasion of customs duties constituted a "seizure" and that the unreasonableness of that seizure could be challenged under section 21.

On its face, the approach of the Court in *Wilson* would give section 21 a considerably broader scope than that of the equivalent provision in the Canadian Charter of Rights and Freedoms. A series of Canadian Court decisions have held that section 8 of the Charter applies only to seizures undertaken to develop evidence that may be used to later incriminate a person. The New Zealand position was further clarified by the Court in *Westco Lagan v Attorney-General* [2001] 1 NZLR 40. The Court in that case stressed that section 21 had to be read within the context it fell in the Bill of Rights Act, that is, in the context of search, arrest and detention rights.

In light of the decisions to date and the lack of Court of Appeal authority on the issue, I consider that the appropriate approach to take is to view section 21 as protecting against unreasonable searches and seizures arising in the context of offending. This maintains the linkage of section 21 to the criminal process, as made by the Court in *Westco Lagan*, and is also consistent with my view that section 21 does not create a general property right.

I therefore consider that the circumstances of the impoundment proposed in clause 8, as a power arising in the context of offending, falls within the scope of section 21 of the Bill of Rights Act. In particular, I note that the power to impound is predicated on the reasonable belief of the enforcement officer that the driver of the vehicle has committed an offence. Furthermore, if the Police decided not to take proceedings against the driver or the driver is acquitted, the vehicle must be returned.

Having taken the view that the impoundment regime provides for a seizure that falls within the scope of section 21, I have also considered whether that seizure can be said to be "reasonable" in terms of section 21. I note that in undertaking an assessment of "reasonableness" under section 21, I consider that section 5 of the Bill of Rights Act is of limited application. In particular, it would appear inappropriate to use section 5 to justify a search that has already been assessed as unreasonable in terms of a section 21 inquiry.

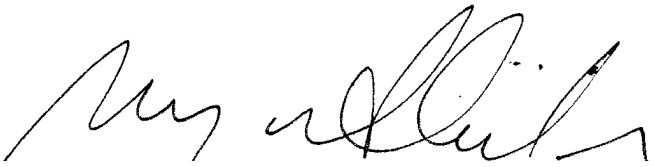
In considering the "reasonableness" of the impoundment regime provided for in clause 8, I have taken into account that the objective of the regime is to provide an effective deterrent to "boy racer" behaviour and that is an important and significant objective. However, in my view there is no rational connection between that objective and the power to seize and impound vehicles for 28 days under the proposed regime, and nor do I consider that the power is proportionate to the objective.

In particular, I note that impoundment of a vehicle does not legally prevent a person from continuing to drive; it merely takes away access to one of the possible instruments with which they are able to do it. By way of contrast, section 95 of the Act provides for mandatory suspension of a person's driver's licence in certain circumstances where they have been driving in a manner that might be described as posing a threat to the safety of road users. Furthermore, the Act provides for seizure and impoundment of a vehicle for 28 days where a person is driving while disqualified or without a licence. Clearly, in that situation it is not possible to suspend or revoke the person's licence so the seizure can be seen as a rational response to the need to provide an effective deterrent.

I also consider that the appeal rights attached to the seizure power are problematic in a way that compounds the "unreasonableness". In particular, I note an owner may appeal the seizure of the vehicle where he or she did not know and could not reasonably be expected to know that the driver would operate the vehicle in contravention of the offence provisions. However, the owner cannot rely on this ground of appeal if the driver had previously been convicted of one of these offences. There is no requirement that the owner know or be reasonably expected to know of that previous conviction.

Conclusion

I have concluded that the power to seize and impound vehicles under the regime contained in clause 8 constitutes an "unreasonable" seizure and is therefore inconsistent with section 21 of the Bill of Rights Act.



Hon Margaret Wilson

Attorney-General

WELLINGTON, NEW ZEALAND
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Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Land Transport 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 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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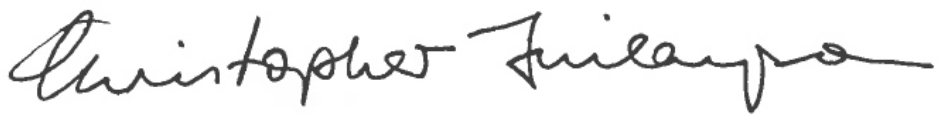
28. Clause 19 of the Bill provides for a separate sentencing approach for people who, because of their disability, are unable to use alcohol interlock devices.[5] The limit is justified because the right is impaired no more than is reasonably necessary. Interlock devices can be adjusted to operate on 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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