



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.

A handwritten signature in black ink, appearing to read 'Margaret Wilson', written in a cursive style.

Hon Margaret Wilson
Attorney-General