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REPORT OF THE

***ATTORNEY-GENERAL***

under the New Zealand Bill of Rights Act  
1990 on the Land Transport (Admissibility of  
Evidential Breath Tests) 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 262 of the Standing Orders of the  
House of Representatives

1. I have considered whether the Land Transport (Admissibility of Evidential Breath Tests) 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”). I have concluded that the Bill is inconsistent with the right to be presumed innocent affirmed in s 25(c) of the Bill of Rights Act and cannot be justified under s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 262, I draw this to the attention of the House of Representatives.

### **The Bill**

2. The Bill amends the Land Transport Act 1998 (‘the Act’) to include new circumstances in which a positive evidential breath test is admissible in evidence in proceedings for certain offences under the Act. Section 77(3)(b) of the Act sets out conditions under which the result of a positive evidential breath test is not admissible in evidence. One such condition is if a person elects to undergo a blood test within 10 minutes of being advised of a positive evidential breath test result.
3. Clause 4(2) of the Bill would amend the Act so that s 77(3)(b) would not apply “if a blood sample was not able to be taken from the defendant for any reason”. The effect of the Bill would therefore be that the results of some positive evidential breath tests, that would not otherwise be admissible in evidence, would then become admissible.

### **Section 25 (c) of the Bill of Rights (presumption of innocence)**

4. Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proved guilty according to law. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists. The prosecution in criminal proceedings must therefore prove, beyond reasonable doubt, that the accused is guilty.
5. Section 77(1) of the Act creates a conclusive presumption that the proportion of alcohol in the defendant’s breath at the time of an alleged offence is the same as the proportion of alcohol indicated by an evidential breath test. In other words, the results of an evidential breath test, once admitted as evidence, cannot be challenged in criminal proceedings.
6. Section 70A of the Act provides that a motorist who undergoes an evidential breath test, and is advised by an enforcement officer that the results of the test are positive, can elect to have a blood test. If the motorist elects to have a blood test, the results of the evidential breath test become inadmissible as evidence in proceedings for certain offences under the Act. In *Aylwin v Police*,<sup>1</sup> the Supreme Court identified the purpose of the right to elect to have a blood test:

*The right of election to have a blood test and the right to be advised of that right, conferred by s 70A, must be regarded as providing effective protection against the consequences of an error in a breath screening test or an evidential breath test.*

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<sup>1</sup> [2009] 2 NZLR 1 at [11]

7. The Bill expands the circumstances in which an evidential breath test is admissible as evidence to include cases where a person has elected to have a blood test but blood is not able to be taken for any reason. In so doing, it narrows the safeguard against error identified by the Supreme Court in *Aylwin*. This amendment, combined with the conclusive presumption created by s 77(1) of the Act, means that the Bill appears to limit the right to be presumed innocent affirmed in s 25(c) of the Bill of Rights Act.

### **Possible Justifications**

8. 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*,<sup>2</sup> the s 5 inquiry may be summarised as:
- a) does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
  - b) If so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?

### *Purpose of the Bill*

9. The objective of the Bill appears to be to ensure that motorists who drive while exceeding the allowed breath alcohol limit are held accountable under the criminal law. The mischief it seeks to correct is motorists who are escaping criminal responsibility for technical reasons that lack substantive merit.
10. This purpose appears to be broadly consistent with the purpose of the Act identified by the Supreme Court in *Aylwin v Police*. After noting that only a small minority of drivers don't comply with their obligations, the Court stated that:<sup>3</sup>
- Parliament has legislated to ensure that these drivers do not escape responsibility through technical and unmeritorious defences. The Courts must give full effect to that clear Parliamentary indication.*
11. If the purpose of the Bill is to hold responsible those motorists who are escaping criminal responsibility for technical reasons that lack substantive merit, then I consider this is sufficiently important to justify some limitation of the right to be presumed innocent.

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<sup>2</sup> [2007] NZSC 7

<sup>3</sup> [2009] 2 NZLR 1 at [17]

*Rational and Proportionate Objective*

12. Clause 4(2) appears to be rationally connected to the objective because it would enable a prosecution to proceed against a person who has exceeded the legal breath alcohol limit, but by virtue of them having elected a blood test (whether or not the blood test has been successfully carried out) the results of their evidential breath test are no longer admissible as evidence.
13. However, in my view, the provisions of the Bill are too broad and are not in proportion to the objective. I have no evidence that the number of motorists who now escape responsibility for offending, but would be captured by the proposed amendment, is significant.
14. The Bill captures motorists who could otherwise escape criminal responsibility for exceeding the breath alcohol limit for technical reasons, but it would also apply to situations where a blood specimen was not able to be taken for any reason whatsoever, including situations beyond the control of the person concerned. For example, a person could simply be physiologically incapable of providing blood at the time or a health professional may not be available to administer the test.
15. As a result, I consider that the Bill limits accused persons' right to be presumed innocent by expanding the circumstances in which the results of an evidential breath test are admissible in evidence in proceedings against them, when the results of a blood test that could prove their guilt (or exonerate them) is not available through no fault of their own.
16. It is important to note that the Act already addresses circumstances in which a person elects a blood test but is not cooperative. Section 72(2) of the Act requires a person who has elected to have a blood test to permit the taking of a blood specimen without delay after being requested to do so by a medical practitioner or medical officer.
17. The Courts have considered what being cooperative means in cases where a defendant elected to have a blood test but the health professional tasked with obtaining blood is unable to do so. In *Police v Childs*,<sup>4</sup> the District Court at Rotorua concluded that a person would not be deemed cooperative if that person elected to take a blood test knowing that it would be impossible for blood to be taken.

**Conclusion**

18. For the above reasons, I have concluded that the Bill appears to be inconsistent with the right to be presumed innocent affirmed in s 25(c) of the Bill of Rights Act and this cannot be justified under s 5 of that Act.



Hon Christopher Finlayson  
**Attorney-General**

<sup>4</sup> DC ROT CRI-2012-0630006512008 (23 August 2012)