

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 262 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'). 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 the inconsistency 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 create a new infringement offence at lower levels of breath and blood-alcohol than for the existing offences in the Act. A person whose breath alcohol is over 250 but does not exceed 400 micrograms, or whose blood alcohol is over 50 but does not exceed 80 milligrams, will be caught by the new limit.

Inconsistency with the right to be presumed innocent

3. 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.
4. Clause 9 of the Bill repeals and replaces s 70A of the Act. New s 70A provides for a right for a driver whose breath test exceeds 400 micrograms to elect a blood test within 10 minutes of being advised of the result. New s 70A does not extend that right to drivers whose breath test exceeds 250 but does not exceed 400 micrograms. An exception is provided for a driver who is apparently younger than 20 or who holds an alcohol interlock licence or a zero alcohol licence (to preserve the existing position in the Act).
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 a breath test. In other words, the results of an evidential breath test, once admitted as evidence, cannot be challenged in criminal proceedings. The Bill does not amend s 77(1) so the conclusive presumption will apply to drivers whose breath test result is above 250 but does not exceed 400 micrograms.
6. The Courts have identified the right to elect a blood test in s 70A as an important safeguard against errors that may arise from breath tests. In *Aylwin v Police*,¹ the Supreme Court identified the purpose of the right to elect to have a blood test:

¹ [2009] 2 NZLR 1 at [11]

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.

7. The Court of Appeal in *R v Aylwin*² provided a broader perspective on the right to elect a blood test:

It may at first blush seem unfair that the defence of error in the result of breath tests has been removed. However, at the same time as s 64(4) was amended, Parliament introduced safeguards. The main safeguard was that the right to elect to undergo a blood test (and to be informed of that right) was extended to all those who returned a positive evidential breath test, whereas previously this was reserved for those with readings under 600.

8. The Court of Appeal went on to note that, in *Livingston v Institute of Environmental Science and Research Ltd*,³ it had recognised that, although defendants' rights were limited by the removal of the error defence, the introduction of a universal right to elect a blood test was seen by Parliament as a sufficient safeguard:

These amendments were fully debated and Parliament added a new safeguard by providing the possibility of blood tests in cases where the result is over 600 as well as where it is under 600. That can be regarded as a quid pro quo for the removal of the ability to challenge the reliability of a breath testing device on a particular occasion.

9. Failing to provide the recognised safeguard of being able to elect a blood sample, 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

10. 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*,⁴ 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:

² (2008) 24 CRNZ 87 at [49]

³ [2003] NZCA 114

⁴ [2007] NZSC 7

- 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?

Sufficiently important objective

11. The purpose of the Bill is to reduce the number of road fatalities and injuries due to alcohol and reduce the cost to society of these fatalities and injuries. The objective of denying drivers the option to elect a blood test for the infringement offence appears to be to make the road safety regime more effective and efficient. In this area of law enforcement that has high volumes, effectiveness and efficiency gains may be sufficiently important to justify some limitation on the right to be presumed innocent.

Rational connection

12. Blood tests take significant time to perform, add complexity to the road safety regime at the point where the Police determine a driver's alcohol levels, and impose additional costs. The additional costs have been quantified in financial terms. The Ministry of Transport has estimated that giving drivers the option to elect a blood test could result in an additional 3000 to 4000 blood tests a year. Each blood test adds about \$100.00 to the cost of processing the infringement offence. The total extra financial cost of the right to elect a blood test is therefore expected to be between \$300,000 and \$400,000 a year.
13. However, the Ministry of Transport also expects that removing the right to elect a blood test in the case of the infringement offence may come with associated costs for the justice system because it could lead to more litigation and defended hearings. These costs may be high enough to more than offset cost saving for Police. In analysing a proposal to completely remove the blood test option across the entire regime, the Regulatory Impact Statement estimated that cost savings for Police would be more than offset by associated cost increases to other government agencies. There is a real risk that the justice system as a whole may see no efficiency gains from removing the right to elect a blood test in relation to the new lower limit. It therefore appears doubtful that the limitation on the right to be presumed innocent is rationally connected to the Bill's objective.

Limiting the right no more than is reasonably necessary

14. The Bill appears to impair the right more than is reasonably necessary because there are reasonable alternatives that impair the right to a lesser degree. The Regulatory Impact Statement considered retaining the right to elect a blood test but with cost recovery through a higher infringement fee if a person elects the blood test (this is similar to the current situation for people who are convicted for the existing blood alcohol offence). This option still limits the presumption of innocence by creating a disincentive to elect a blood test. Nevertheless, it is

preferable to removing the blood test altogether and may be a justified limitation under s 5 of the Bill of Rights, especially if, as is likely, the cost recovered would be a modest amount around \$100.00.

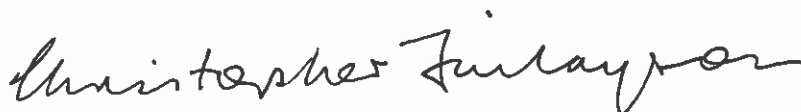
15. Canadian law may also provide a reasonable alternative. The Canadian Criminal Code treats the breath alcohol test result as presumptively, rather than conclusively, valid. The presumption can be rebutted but only by evidence indicating that the testing apparatus had not functioned properly. Other evidence, such as bystander accounts, is explicitly excluded. This leaves scope for an accused person to raise a meaningful defence while excluding spurious defences. This is a less severe limitation on the presumption of innocence and is likely to be a justified limitation under s 5 of the Bill of Rights.
16. It would be useful for the select committee to examine the Canadian approach, insofar as it could be applicable in New Zealand.

Proportionate to the objective

17. The denial of the right to elect a blood test could be seen as proportionate because it is restricted to an infringement offence, which does not carry a criminal conviction. The right to elect a blood test remains in place for drivers facing the possibility of a criminal conviction and a more serious penalty.
18. However, the limitation on the presumption of innocence does not appear to be proportionate because the road safety regime would still be able to operate reasonably effectively while retaining the right to elect a blood test. Any efficiency gains would not be sufficient to outweigh the right to be presumed innocent. I also consider that, although infringement offences do not result in convictions, a person may still face significant consequences such as the imposition of demerit points through the infringement process.

Conclusion

19. For these 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 that the inconsistency cannot be justified under s 5 of that Act.



Hon Christopher Finlayson
Attorney-General