Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Land Transport (Random Oral Fluid Testing) 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 Representatives
1. I have considered whether the Land Transport (Random Oral Fluid Testing) Amendment Bill (‘the Bill’) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act :990 (‘the Bill of Rights Act’).

2. I have concluded the Bill limits 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. The limitations cannot be justified under s 5 of that 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 (‘the Act’). Its stated purpose is to introduce a more effective regime for detecting drug driving in relation to THC, MDMA, and methamphetamine, by allowing for random oral fluid testing by enforcement officers.

5. The key provision of the Bill is cl 12, which introduces a power for an enforcement officer to require a driver to undergo a compulsory oral fluid test. The Bill also amends a number of existing offences to make them applicable to oral fluid testing situations, making it an offence to:

   a) drive or attempt to drive a motor vehicle while that person’s oral fluid contains evidence of the use of a specified drug;

   b) fail or refuse to remain at a specified place or accompany an enforcement officer;

   c) fail or refuse to undergo an oral fluid test;

   d) cause bodily injury to or the death of a person, if in charge of a motor vehicle, if the person’s oral fluid contains evidence of the use of a specified drug; and

   e) cause bodily injury to or the death of a person by carelessly driving a motor vehicle, if the driver’s oral fluid contains evidence of the use of a specified drug.

Inconsistency with s 21 – right to be secure against unreasonable search and seizure

6. 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.

7. 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. 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.¹

8. Clause 12 of the Bill provides that an enforcement officer may require a person to undergo one or more compulsory random oral fluid tests. ‘Oral fluid test’ and ‘approved oral fluid testing device’ are not defined in the Bill, but rather are left to be notified in the Gazette. It is therefore not clear how the test will be carried out, how invasive the test will be, what safeguards will apply, or how reliable the results will be. Regardless, I consider undergoing the test will constitute a physical search of a person and seizure of a bodily sample for the purposes of s 21.

9. The Bill’s stated objective is to introduce a more effective regime for detecting drug driving by allowing for random oral fluid testing, though I note the Bill’s general policy statement does not address how effective the current drug driving detection regime is, or whether random oral fluid testing will in fact introduce a more effective regime. I have also inferred a more general public policy objective of reducing the road safety risk posed by drivers who have consumed psychotropic drugs. I consider that, together, these are sufficiently important public policy objectives to justify search and seizure powers in this context, provided those powers are reasonable.

10. In my view, there are inadequate procedural safeguards to ensure those powers are exercised in a reasonable manner. The Bill does not require an officer to have any cause to suspect a driver has consumed a drug, before an oral fluid test can be required. By contrast, under the current regime an enforcement officer may require a driver of a motor vehicle to undergo a compulsory impairment test only if there is “good cause to suspect” that the driver has consumed a drug or drugs. If the driver does not satisfactorily complete the test, the officer may then require the driver to provide a blood specimen.

11. The Bill provides that an oral fluid specimen obtained through a compulsory oral fluid test will be evidence of the use of a specified drug. It does not require that a second oral fluid test or a blood test be undertaken to confirm the use of a specified drug, or even whether an oral fluid sample will be tested in a forensic laboratory to confirm an initial roadside test. Without statutory safeguards or any other guidelines, the oral fluid test provided for by the Bill does not appear fit for this evidential purpose. Indeed, I understand that current oral fluid specimen tests that can be done at the roadside are unlikely to meet a sufficient evidential standard to prove drug consumption, and there is a risk of false positives. The absence of subsequent testing leads to reliance (for evidential purposes) on a potentially unreliable test.

12. For the above reasons, I consider the requirement to undergo one or more compulsory random oral fluid tests as provided for in the Bill is inconsistent with s 21 of the Bill of Rights Act.

13. I note that, in principle, testing for drug use could be undertaken as per the breath testing scheme used for alcohol. An initial roadside breath test may be conducted randomly as a screening tool, with the test taking less than a minute. If this results in a positive reading (giving an enforcement officer good cause to suspect that a driver

¹ Cropp v Judicial Committee [2008] 3 NZLR 744 at [33]; Hamed v R [2012] 2 NZLR 305 at [162].

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has consumed alcohol), an evidential breath or blood test or compulsory impairment test may then be conducted. In my view, a similar staged process for detecting drug driving through oral fluid testing would be less likely to constitute an unreasonable search and seizure.

**Inconsistency with s 22 – right not to be arbitrarily detained**

14. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained.

15. A person will be regarded as detained within the meaning of s 22 if, amongst other things, there are statutory restraints on a person’s movements (accompanied by penalties for non-compliance).²

16. 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”.³

17. Clause 12 provides that an enforcement officer may require a person to:

   a) remain in the place where stopped, for a reasonable period of time, to undergo the compulsory oral fluid test;

   b) accompany an officer to another place to undergo the compulsory oral fluid test if it would enhance road safety, personal safety, the person’s privacy, or the giving or taking of the test; and

   c) remain at the place where the person underwent the test until after the result of the test is ascertained.

18. If the person refuses or fails to comply with the above requirements, an officer may arrest the person without warrant.

19. The existing breath-screening test (in relation to alcohol) is considered by the courts to amount to a detention.⁴ In my view, the oral fluid screening test can similarly be considered to amount to a detention as it places a statutory restraint on a person’s movement to undergo the test, and is accompanied by penalties for non-compliance.

20. As I have noted above, an enforcement officer may use this power in cl 12 without having good, or any, cause to suspect that a person has consumed a specified drug. Once detained, I understand the test could take up to five minutes if undertaken at the roadside or significantly longer if the person is required to accompany the officer to another place to undergo the test. In my view, such detention is arbitrary because it can be enforced without reasonable cause. The exercise of that power to detain

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appears particularly disproportionate because it may lead to a warrantless arrest if a person fails to comply. Such an arrest would, by extension, also be arbitrary.

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

22. As I have indicated in relation to s 21, if an appropriate oral fluid test could be conducted as a step in an established process, for example, as a screening test at the roadside with subsequent testing if good cause has been established, a temporary restriction on movement may be less likely to give rise to an inconsistency with the right to be free from arbitrary detention.

Inconsistency with s 25(c) – right to be presumed innocent until proved guilty

23. 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 law.

24. 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.

25. Clauses 6 – 10 of the Bill introduces new strict liability offences in relation to drivers with oral fluid containing evidence of the use of the specified drugs, and refusing or failing to undergo the test. These shift the onus of proof onto the defendant, by requiring him or her to prove a statutory defence (available in s 64 of the Act) or an absence of fault – for example, a reasonable mistake of fact – in order to escape criminal liability.

26. As strict liability offences raise a prima facie issue of inconsistency with s 25(c) of the Bill of Rights Act, I have considered whether the limitation on the right is nevertheless demonstrably justified under s 5 of that Act.

27. As I have indicated, absent adequate procedural safeguards and any requirement for due cause, I consider the process of conducting the oral fluid test constitutes both an unreasonable search and seizure and an arbitrary detention. It follows from this conclusion that the strict liability offences arising from a positive oral fluid test, or a failure to comply with the testing regime, constitute an unjustified limitation on the right in s 25(c). I note further that, given the uncertain evidential reliability of the testing regime, it is unclear that there is a proper basis to justify imposing criminal liability to begin with.

28. Accordingly, I have concluded the Bill is inconsistent with 25(c) of the Bill of Rights Act and the inconsistency cannot be justified under s 5 of the Bill of Rights Act.
Conclusion

29. For the above reasons, I have concluded the Bill appears to be inconsistent with ss 21, 22 and 25(c) of the Bill of Rights Act and that the inconsistencies cannot be justified under s 5 of that Act.

Hon David Parker
Attorney-General
12 May 2018