Land Transport (Road Safety and Other Matters) Amendment Bill

8 September 2010

ATTORNEY-GENERAL

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
LAND TRANSPORT (ROAD SAFETY AND OTHER MATTERS) AMENDMENT BILL

1. We have considered whether the Land Transport (Road Safety and Other Matters) Amendment Bill (PCO 13006/16.0) (‘the Bill’) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (‘the Bill of Rights Act’). We understand that the Bill will be considered by the Cabinet Legislation Committee on Thursday, 9 September 2010.

2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered potential inconsistencies with s 19(1) (right to be free from discrimination), s 21 (right to be secure against unreasonable search and seizure), s 25(c) (right to be presumed innocent) and s 26(2) (prohibition against double jeopardy) of the Bill of Rights Act.

PURPOSE OF THE BILL

3. The broad purpose of the Bill is to promote road safety by introducing a range of measures to improve the safety of young drivers, provide tougher sanctions for serious or repeat driving offenders, and make improvements to the operation of the Land Transport Act 1998 (‘the Act’).

4. The Bill amends the Act, among other things, to:

- set the alcohol limit at zero for drivers aged under 20 and repeat drink-drivers
- raise the minimum driver licensing age from 15 to 16
- place limits on work time and specify rest periods
- provide for the use of alcohol interlock devices (which prevent a vehicle being operated when the driver is intoxicated) as a sentence for repeat drink-drivers or those who have a blood/breath alcohol level of more than double the alcohol limit
- enable a court to extend licence suspensions in certain circumstances
- double the maximum period of imprisonment from 5 to 10 years for drunk, drugged, or dangerous or reckless drivers who cause death, and
- allow Police to gather evidence of drivers involved in a fatal or serious injury crash, who have a breath alcohol reading between 250mcg/litre of breath (‘mcg/l’) and the current adult limit of 400mcg/l.

The Bill also repeals the Transport Act 1962 and transfers some parts of that Act into the Land Transport Act 1998.
CONSISTENCY WITH SECTION 19(1) OF THE BILL OF RIGHTS ACT

Section 19(1) of the Bill of Rights Act affirms that everyone has the right to be free from discrimination on the grounds of discrimination in the Human Rights Act 1993, which include age. A legislative provision may give rise to *prima facie* discrimination where:

a) it draws a distinction based on one of the prohibited grounds of discrimination, and

b) the distinction involves disadvantage to one or more classes of individuals.

**Application of s 19(1) to the Bill**

- The Act currently draws a distinction on the basis of age by setting different alcohol limits above which a person may not drive or attempt to drive a motor vehicle. If the person is aged 20 or over, the proportion of alcohol must not exceed 400 micrograms of alcohol per litre of breath or 80 milligrams of alcohol per 100 millilitres of blood (commonly referred to as a blood alcohol content (BAC) of 0.08). If the person is under 20 years old, the proportion of alcohol must not exceed 150 micrograms of alcohol per litre of breath or 30 milligrams of alcohol per 100 millilitres of blood (commonly referred to as a BAC of 0.03).
- Clause 6 of the Bill amends s 11 of the Act to set the alcohol limit at zero for drivers under 20. The Bill therefore continues the distinction on the basis of age because it sets different alcohol limits for drivers aged 20 or over and those under 20.
- The distinction creates a disadvantage for drivers under the age of 20 because they will be subject to a penalty in circumstances where a driver aged 20 or over would not be subject to a penalty. Clause 23 of the Bill amends s 57 of the Act to make it an infringement offence for a person under 20 to drive with a BAC between zero and the existing level of 0.03. The current penalties for drivers under 20 whose BAC is between 0.03 and 0.08 will continue to apply. The different penalties for drivers of different ages are set out in the table below:

<table>
<thead>
<tr>
<th>BAC</th>
<th>Driver Aged 20 Years or Over</th>
<th>Driver Under 20 Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 0.03</td>
<td>No offence</td>
<td>Infringement offence</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Penalty: 50 demerit points and $200 infringement fee.</td>
</tr>
<tr>
<td>0.03 - 0.08</td>
<td>No offence</td>
<td>Summary offence</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Penalty: Licence disqualification for at least 3 months, 50 demerit points, and either a fine of up to $2,250 or up to 3 months imprisonment.</td>
</tr>
<tr>
<td>Above 0.08</td>
<td>Summary offence</td>
<td>Summary offence</td>
</tr>
<tr>
<td></td>
<td>Penalty for a first or second offence: Licence disqualification for at least 6 months and either a fine of up to $4,500 or up to 3 months imprisonment. Penalty for a third or subsequent offence: Licence disqualification of more</td>
<td>Penalty for a first or second offence: Licence disqualification for at least 6 months and either a fine of up to $4,500 or up to 3 months imprisonment. Penalty for a third or subsequent offence: Licence disqualification of more</td>
</tr>
</tbody>
</table>
offence: Licence disqualification of more than 1 year, and either a fine of up to $6,000, or up to 2 years imprisonment.

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Justified limitations

- Where a legislative provision limits a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be justified under s 5 of that Act. Section 5 permits reasonable limitations, prescribed by law that are demonstrably justified in a free and democratic society.
- A particular limitation may be justified where: [3]
  a) the objective serves a purpose sufficiently important to justify some limitation of the right or freedom, and
  b) the limitation:
     (i) is rationally connected with the objective
     (ii) impairs the right or freedom no more than is reasonably necessary for sufficient achievement of the objective, and
     (iii) is in due proportion to the importance of the objective.
- The objective of the proposal is to lower the number of alcohol-related motor vehicle accidents causing death or serious injury. Clearly, this is a sufficiently important objective to justify some kind of limitation of the right.
- In our view, the proposal is rationally connected to that objective because young people are overrepresented in motor vehicle accidents. The Ministry of Transport has provided the following table, setting out the relative risk of being involved in a fatal accident by age and BAC:

<table>
<thead>
<tr>
<th>BAC</th>
<th>30+ years</th>
<th>20-29 years</th>
<th>15-19 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>1</td>
<td>3</td>
<td>5.3</td>
</tr>
<tr>
<td>0.03</td>
<td>2.9</td>
<td>8.7</td>
<td>15</td>
</tr>
<tr>
<td>0.05</td>
<td>5.8</td>
<td>17.5</td>
<td>30.3</td>
</tr>
<tr>
<td>0.08</td>
<td>16.6</td>
<td>50.2</td>
<td>86.6</td>
</tr>
</tbody>
</table>
- In setting the alcohol limit to zero for drivers under 20, the Bill seeks to remove one of the factors that contributes to their overrepresentation in accidents.
- We consider that the proposal impairs the right to freedom from discrimination no more than reasonably necessary to achieve the objective. The zero alcohol limit is narrowly targeted at the age group which is overrepresented in fatal motor vehicle accidents involving alcohol (15 to 19 year olds).
- The proposal is also in due proportion to the importance of the objective because driving with a BAC between zero and the limit of 0.03 is punishable by an infringement notice. It attracts a significantly lower penalty and no conviction can be recorded. [4] This is consistent with the safety focus of the new limit rather than the moral condemnation associated with a criminal conviction (and higher levels of intoxication).
Based on the analysis set out above, we have concluded that the zero alcohol limit for drivers under 20 appears to discriminate on the basis of age but that the discrimination can be justified under s 5 of the Bill of Rights Act.

CONSISTENCY OF THE BILL WITH SECTION 21 OF THE BILL OF RIGHTS ACT

- Section 21 of the Bill of Rights Act affirms the right to be free from unreasonable search and seizure.
- Section 96 of the Act provides for mandatory vehicle impoundment when a person is apprehended for certain offences. Clause 56 of the Bill amends s 96 so that the offences subject to mandatory vehicle impoundment include drink-driving by a person under 20, driving while under the influence of drugs (s 57A) and contravening a zero limit driving licence (new s 57AA).
- It is clear that the impounding of vehicles under s 96 constitutes a seizure for the purpose of s 21 of the Bill of Rights Act. In extending the provision to a new range of offences, cl 56 also engages s 21. The consistency of a provision with s 21 turns on whether the search or seizure can be considered reasonable. We have concluded that the seizure can be considered reasonable because:
  - the purpose of the seizure does not appear to be punitive but is concerned with road safety while police investigations take place
  - the seizure is limited to 28 days and can only be extended by the District Court
  - the seizure ends if charges are not brought or the driver is acquitted of the offence
  - the driver can appeal the impoundment, first to the Police (s 102) and then to the District Court (s 110).

CONSISTENCY OF THE BILL WITH SECTION 26(2) OF THE BILL OF RIGHTS ACT

- Section 26(2) of the Bill of Rights Act provides that no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.
- Section 95 of the Act provides for the mandatory 28-day suspension of a person’s driver licence in certain circumstances. Clause 55 of the Bill enables the Police to apply to the District Court for an extension of the driver licence suspension period. As discussed above, cl 56 of the Bill extends the range of situations in which a vehicle must be seized and impounded. Given that the person whose vehicle has been impounded or driver licence has been suspended may subsequently be prosecuted for an offence, we have considered whether the right to protection from double jeopardy, affirmed in s 26(2) of the Bill of Rights Act, is engaged.
- We note that the former Attorney General’s s 7 report on the Act considered whether those provisions for mandatory vehicle impoundment and mandatory suspension of driver licences infringed the right against double jeopardy. The report concluded that, to the extent that impoundment extended beyond adjudication and sentencing, it was punitive in nature and limited the prohibition against double jeopardy affirmed in s 26(2) of the Bill of Rights Act. However, the report noted that the exact scope of s 26(2) was not yet settled in New Zealand law. There was some
authority to suggest that a short period of licence suspension was remedial rather than punitive.

• Since the date of that report, there has been further case law on the scope of s 26(2). In particular, the Court of Appeal in Daniels v Thompson held that: [5]

In our view it would be erroneous to treat the word “punished” in section 26(2) as embracing punishment outside the ambit of the criminal process and its associated enforcement of the public law.

• We have taken into account the conclusion reached in the s 7 report on the Act and subsequent case law. We have concluded that the provisions in the Bill for mandatory vehicle impoundment and the extension of mandatory licence suspensions are not punitive sanctions and therefore do not engage the right against double jeopardy. Rather, we consider the provisions to be regulatory measures which have the purpose of ensuring public safety rather than punishment.

• We also note that there are procedural safeguards around vehicle impoundment and mandatory licence suspension. Clause 55 of the Bill provides that in order to extend the mandatory licence suspension period, the Police must make an application to a District Court Judge setting out the circumstances which require an extension. If the extension is granted, the driver has the right to appeal to the High Court. The Act states that the vehicle impoundment or licence suspension ends if the person is acquitted or not charged (ss 95(7) and 96(6)).

• We have therefore concluded that cls 55 and 56 do not unreasonably limit the right against double jeopardy affirmed in s 26(2) of the Bill of Rights Act.

CONSISTENCY OF THE BILL WITH SECTION 25(C) OF THE BILL OF RIGHTS ACT

• 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. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof. [6]

• Clause 70 of the Bill inserts a new s 133A into the Act, which enables proceedings for a stationary vehicle offence to be taken against the registered owner or the person lawfully entitled to the possession of the vehicle, whether or not that person was in charge of the vehicle at the time. Stationary vehicle offences include those relating to parking, vehicle registration, licensing and warrant of fitness, and vehicle standards compliance such as tyre condition. In the absence of proof to the contrary, it is conclusively presumed that the registered owner or person lawfully entitled to vehicle possession was the person in charge of the vehicle.

• In order to escape liability, the person who is presumed to be in charge of the vehicle must prove (on the balance of probabilities) that:
  o another person has become liable for the offence by virtue of an order under the Summary Proceedings Act 1957, or
  o he or she was not lawfully entitled to possession of the vehicle, or
  o another person was unlawfully in charge of the vehicle.

• The relevant offences are essentially strict liability because once the Crown has proved the act took place, it does not have to prove intent. In order to escape
liability, the defendant must prove the defence (or disprove a presumption) on the balance of probabilities. In other criminal proceedings, a defendant must merely raise a defence in an effort to create reasonable doubt. Therefore we consider that s 25(c) is engaged.

- We consider the following factors are relevant in assessing whether a limitation on the right to presumption of innocence can be justified under s 5 of the Bill of Rights Act:
  
  a) the nature and context of the conduct to be regulated
  b) the ability of the defendant to exonerate themselves, and
  c) the penalty level.

- The offences can all be described as public welfare regulatory offences and are, therefore, of less concern than truly criminal offences. We also note that, in respect of some offences, such as those related to registration, warrants of fitness and vehicle condition, it will be more appropriate to hold the registered owner to account than the current driver.

- Strict liability offences can be more easily justified where the offence turns on a particular matter that is peculiarly within the knowledge of the defendant. In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a particular course of action than it is for the Crown to prove the opposite. The nature of stationary vehicle offences means that frequently the driver will not be present when the offence is observed. This makes it extremely difficult to identify the responsible party. The defendant will often be better placed to explain the circumstances that led to the offence in question.

- Finally, we note that the offences attract relatively low penalties. The relevant offences are all infringement offences, meaning that an infringement fee can be imposed but conviction cannot be recorded for the offence. The registered owner, or person lawfully entitled to use the vehicle, may have to pay the infringement fee but will not suffer the disproportionate effect of a criminal conviction.

- For these reasons, to the extent that cl 70 may limit the presumption of innocence affirmed in s 25(c) of the Bill of Rights Act, it appears to be justified.

**CONCLUSION**

We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

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Footnotes:

2. Section 11.

3. See for example, *Hansen v R* [2007] NZSC 7, at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J.


7. Section 78A Summary Proceedings Act 1957.

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