
Land Transport (Road Safety) Amendment Bill

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1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Land Transport (Road Safety) Amendment Bill (the **Bill**).
- 1.2 This submission has been prepared with input from the Law Society's Criminal Law Committee and Human Rights and Privacy Committee.¹
- 1.3 The Law Society supports the overarching purpose of this Bill, which appears to be to address the safety risks associated with high-speed, dangerous police chases. There are competing interests at stake: the interests and safety of road users need to be weighed against the need for Police to be able to respond effectively to criminal behaviour. The Bill would likely benefit from further consideration as to whether the additional sanctions provided for by the Bill will ultimately disincentivise fleeing drivers from stopping for Police.²
- 1.4 In the Law Society's view, it is unfortunate this Bill is being considered by the Select Committee under tight timeframes. The Bill raises concerns that could have benefitted from further consideration and consultation. In light of the truncated submission period, this submission is focussed on what the Law Society considers to be the most significant issues with the Bill.
- 1.5 The Law Society wishes to be heard on the Bill.

2 Extending period of impoundment for vehicles used in fleeing driver offences

- 2.1 Proposed new s 96AAA would allow police to impound a vehicle for a period of 6 months, if an officer believes on 'reasonable grounds' that the vehicle has been used by a driver who has failed to stop for police. This is a significant extension to existing powers under the Land Transport Act 1998 (the **LTA**) that allow for vehicles to be impounded for up to 28 days in certain circumstances.
- 2.2 The Law Society has significant concerns with the extent of this new power and considers it is inconsistent with the New Zealand Bill of Rights Act 1990 (Bill of Rights). Specifically, the proposed section is inconsistent with the principles of natural justice,³ the right to a fair hearing by an independent and impartial court,⁴ and the presumption of innocence,⁵ and is likely to amount to an unreasonable seizure of property.⁶
- 2.3 There are a number of existing laws which grant Police the power to seize private property. However, the underlying justification and purpose for these powers are generally closely

¹ More information regarding these committees is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

² A point acknowledged in the Regulatory Impact Statement at p 21. The Executive Summary to the RIS also notes that the timeframes imposed by Cabinet have restricted the Ministry's ability to undertake a full review of potential legislative and non-legislative responses, as well as consultation with the Ministry of Justice and Police.

³ NZBORA, s 27(1).

⁴ NZBORA, s 25(a).

⁵ NZBORA, s 25(c).

⁶ NZBORA, s 21.

linked to Police's role in the investigation of suspected criminal offending and the maintenance of public safety. For example, this can be seen in:

- (a) Sections 123B-123E of the Search and Surveillance Act 2012, which allows Police to seize cash of \$10,000 or more found on execution of a search where an officer has reasonable grounds to suspect that it is of illegitimate origin and where an unsatisfactory explanation has been given by the holder. The purpose of this power is to allow Police to investigate the origins of the cash.⁷
- (b) Section 60B of the Arms Act 1983 which allows Police to seize any firearms and ammunition in the possession of a person who has had their firearms license temporarily suspended. The purpose of this is in part to protect public safety by removing firearms while a licence-holder's fitness to possess these weapons is determined.⁸

Of note, these powers are exercised by Police without requiring prior approval by an independent body (such as an issuing officer under the Search and Surveillance Act 2012), and as such are relatively restricted in their reach. In situations where property must be seized for more extended periods of time, it is common for this to be done on application to a court.⁹

- 2.4 The existing impoundment powers provided under the LTA have been said to be focussed towards ensuring public safety. When the Land Transport (Road Safety and Other Matters) Amendment Act 2011 made its way through Parliament, the Crown Law Office noted in its Bill of Rights consistency advice in relation to the expansion of the 28-day impoundment powers under s 96:¹⁰

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.

- 2.5 That advice also suggested that the 28-day impoundment power had an additional investigatory purpose:

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.... We have concluded that the seizure can be considered reasonable because:

⁷ See s 123C(1), which allows Police to apply to the District Court to "to hold any cash seized for a further period to enable investigations to continue to establish the origin of the cash or its intended use."

⁸ See s 60A(1).

⁹ For example, where a restraining order is sought under part 2, subpart 2 of the Criminal Proceeds (Recovery) Act 2009 for property that is intended to be the subject of forfeiture proceedings. Restraining orders are granted by the Court, and generally expire after 1 year (unless extended by the Court or the forfeiture proceedings are determined earlier).

¹⁰ *Consistency with the New Zealand Bill of Rights Act 1990: Land Transport (Road Safety and Other Matters) Amendment Bill*, Crown Law Office, 8 September 2010

- the purpose of the seizure does not appear to be punitive but is concerned with road safety while police investigations take place...
- 2.6 The existing seizure powers provide by the LTA are relatively limited in terms of the length of time Police can hold the property. That is an appropriate limitation, given the underlying purposes of allowing Police to investigate offending and respond to imminent risks to public safety.
- 2.7 However, it is apparent that the underlying purpose of the six-month impoundment power proposed in the Bill is punitive in nature. The explanatory note to the Bill states that the Bill's broad purpose is to reduce unsafe behaviour on New Zealand's roads by increasing the speed and *severity* of enforcement. The regulatory impact statement lists the proposed power under the heading 'Increasing penalties for fleeing drivers' and describes it as "a swift and significant sanction." A press release announcing the Bill by the Minister of Justice and Minister for Police also repeatedly refers to the Bill as implementing 'increased and serious consequences' for fleeing drivers.¹¹
- 2.8 The length of time for the impoundment does not appear to have a rational connection to either the investigation of offending or responding to an imminent risk to public safety. In regard to the current 28-day impoundment power, the then-Attorney-General noted in 2017 that, while this may not prevent or deter further offending, it may reduce a driver's opportunities to offend while Police consider whether to lay charges.¹²
- 2.9 The proposed new s 96AAA effectively allows Police to impose a penalty on the basis of a reasonable belief of offending, placing the officer in the role of both prosecutor and judge. This is inconsistent with the vehicle owner's right to natural justice, as the decision-maker in this situation lacks impartiality. The clause does not include provisions to ensure an owner's right to be heard can be exercised. The penalty is imposed at a far lower standard (being a reasonable belief) than would apply in either criminal or civil proceedings before a court. The vehicle owner will potentially be liable for far greater costs associated with storage fees. Given these departures from the minimum standards of criminal procedure, the Law Society considers that any seizure would be inherently unreasonable. The clause also raises concerns about the presumption of innocence, in that a penalty is applied before there is any finding of guilt by a court, and potentially in the face of a later acquittal or decision by Police not to file any charges at all. It is in effect a pre-emptive punishment imposed by the Police.
- 2.10 While the LTA provides for a quasi-appeal process (in the first instance to Police under s 102, before appealing to the District Court under s 110) we do not consider this rectifies the issues identified, given impoundment has immediate effect on the vehicle's owner, that any appeal is likely to take significant time to be determined, and that the vehicle owner would likely be ineligible for a grant of legal aid in respect of the first appeal to Police.¹³ Given the current pressures in the justice system, it is questionable whether any such appeal would be determined within the six-month period.

¹¹ <https://www.beehive.govt.nz/release/flee-police-lose-your-ride-new-law-crack-down-fleeing-drivers>

¹² Report of the Transport and Industrial Relations Committee on the Land Transport Amendment Bill (173-2), <https://selectcommittees.parliament.nz/v/SelectCommitteeReport/952eee65-07cd-4875-a76a-45a2cb78d659>

¹³ Legal Services Act 2011, ss 6-7.

- 2.11 A more rights-consistent option to achieve this policy objective would be requiring Police to apply to the District Court before the extended impoundment can be carried out. This could potentially fit alongside the existing 28-day impoundment power, with Police being able to apply to extend this to six-months at first appearance if a charge is filed. However, there are a number of factors that should be considered if this approach is taken, including the capacity for the District Court to hear such applications in light of the current backlog and workload issues in the justice system, whether there is sufficient capacity for legal representation and the availability of legal aid funding, and how the application would be heard (for example: whether it would be heard alongside any criminal charges or in a separate civil proceeding; whether the application would be on or without notice; the standard of proof that is to be applied; and what appeal rights would be provided). Given these uncertainties, the Law Society recommends this aspect of the Bill be referred back to the Ministry of Justice for further advice.
- 2.12 The Law Society also questions whether there is a rational connection between the behaviours this clause is intended to address, and the actions that would trigger a six-month impoundment. As noted in the explanatory note, the Bill is intended to address unsafe behaviours on New Zealand roads. The regulatory impact statement also highlights that individuals who try to flee from Police generally engage in other offending, such as speeding and dangerous driving. However, under proposed s 96AAA a motor vehicle can be impounded where an officer believes on reasonable grounds that the driver has failed to stop as required under section 114 – this would include individuals who fail to stop, but who do not otherwise engage in driving that poses a risk to the safety of other road users.
- 2.13 If this clause is to be retained, the Select Committee may wish to consider whether this provision would be better targeted to drivers that, while failing to stop, also exceed the speed limit and/or drive in a dangerous manner. The aggravated form of the failing to stop offence under s 52A(3) could be adapted for this purpose.

3 Impoundment power for failures to give information about fleeing drivers

- 3.1 Proposed new s 96AAB provides a new power allowing police to impound a vehicle that has been involved in a failure to stop offence, where a driver or owner fails or refuses to provide information, or provides misleading information, in response to a request under ss 114(3)(b) or 118(4) of the LTA. This impoundment is for 28 days.
- 3.2 The Law Society notes that a similar amendment was proposed when what became the Land Transport Amendment Act 2017 was going through Parliament, but this aspect was eventually removed at the Select Committee stage in part due to concerns raised in the Attorney-General's Bill of Rights consistency advice. The Transport and Industrial Relations Committee stated:

The Attorney-General, in his report under section 7 of the New Zealand Bill of Rights Act, concluded that this clause was inconsistent with section 21 of the Act. This is the right to be secure against unreasonable search or seizure of the person, their property, correspondence, or otherwise.

...

The Attorney-General considers that the new power to seize and impound a vehicle for failing or refusing to provide information is not rationally or proportionately connected to its purpose of deterring people from committing an offence under the Land Transport Act.

To address the inconsistency with the Bill of Rights Act, we recommend amending clause 35 to delete new section 96(1AB)(b). The Police could still rely on the existing power under section 96(1AB) of the Land Transport Act. Section 96(1AB) gives the Police the power to seize and impound a vehicle for 28 days if they reasonably believe that the driver has been involved in a failing-to-stop incident. There is also already an offence under section 52 of the Land Transport Act to fail or refuse to provide information, or to give false information.

- 3.3 The proposed new s 96AAB appears to address the Attorney-General's concerns about the lack of rational connection by including a requirement that the officer believe that impounding the vehicle is necessary to prevent a serious threat to road safety.
- 3.4 However, the Law Society questions whether there is any need for this power, given the overlap with existing powers under the LTA. In particular, s 96(1AB) already allows an officer to impound a vehicle that has failed to stop when required for 28 days. It is not clear what situations the proposed new s 96AAB would cover that s 96(1AB) does not already apply to.

4 Evidential presumptions for point-to-point average speed offences

- 4.1 There is a potential inconsistency in the provision that provides for point-to-point average speed offences:
- (a) Proposed s 146A(1) creates a presumption that the speed calculated by a point-to-point average speed system is the actual speed of a vehicle for the purposes of determining whether a speeding offence has been committed. The section does not include any provision for this presumption to be rebutted by a defendant;
 - (b) However, proposed s 146C(2) provides that the data produced by point-to-point average speed system is sufficient evidence as to its own accuracy, *in the absence of proof to the contrary*.
- 4.2 Given this, it is not clear whether a defendant is able to dispute the accuracy of a point-to-point average speed system, where they have some evidence to the contrary (for example, GPS data from a personal device). The Law Society recommends this be clarified.

5 Forfeiture of vehicle at sentencing

- 5.1 Proposed new s 142AAB of the Sentencing Act 2002 would allow a court to order "forfeiture" of the motor vehicle for an offence under ss 52A(1)(a) or (b), irrespective of the nature of the offending. This could be a first offence that is fineable only under s 52A(2), or one where a driver did not stop quickly enough as opposed to fleeing during a high-speed pursuit or being engaged in offending like dangerous driving.
- 5.2 Section 142AAB is broadly drafted and the Law Society suggests consideration be given to stating that forfeiture does not apply to less serious offences of these type, such as those that do not involve excessive speed or the "fleeing driver" scenario. Alternatively, an exception such as that contained within s 129(4) of the Sentencing Act could be included, to

provide that a court must not make such an order if extreme hardship would be caused to the offender, or undue hardship to any other person.

A handwritten signature in dark ink that reads "David Campbell". The signature is written in a cursive style with a large initial "D" and "C".

David Campbell
Vice-President