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Report of the

*ATTORNEY-GENERAL*

under the New Zealand Bill of Rights Act 1990 on the  
Freedom Camping (Infringement Offences and Other  
Matters) 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 269  
of the Standing Orders of the House of Representatives

1. I have considered whether the Freedom Camping (Infringement Offences and Other Matters) 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).
2. I have concluded the Bill appears to be inconsistent with the right to be secure from unreasonable search and seizure and the right to be presumed innocent until proven guilty. I have also concluded that the limitations on these rights cannot be justified under s 5 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 269, I draw this to the attention of the House of Representatives.

### **The Bill**

4. The Bill amends the Freedom Camping Act 2011 (the Act), which sets out a regime for freedom camping in order to protect the environment, health and safety, and access to public places and sites of significance for public enjoyment. It allows for camping to be generally permitted unless restricted or prohibited and creates an infringement regime for prohibited behaviours.
5. The Act's purpose is to target the negative effects of freedom camping, such as littering, and the inappropriate disposal of human waste and effluent – which causes environmental degradation and poses risk to public health. The explanatory note states that the Bill's purpose is to make it easier to address these negative behaviours and to make the rules more consistent and easier for people to follow.
6. The Bill broadens the Act's regime to include land administered by Land Information New Zealand (LINZ) and the New Zealand Transport Agency (NZTA) and provide that the chief executive of LINZ and NZTA may issue notices defining the land where freedom camping is restricted and where it is prohibited.
7. The Bill further amends the Act to:
  - 7.1 restrict freedom camping in non-self-contained<sup>1</sup> vehicles to areas within 200 metres of public toilet facilities;
  - 7.2 provide for an accelerated infringement notice procedure for the infringement offences under the principal Act, reducing the time to pay or request a hearing to 7 days;

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<sup>1</sup> The Bill defines a 'self-contained vehicle' as a vehicle designed and built for the purpose of camping which has the capability of meeting the ablutionary and sanitary needs of occupants of that vehicle for a minimum of three days without requiring any external services or discharging any waste and is certified that it complies with New Zealand Standard 5465:2001.

- 7.3 require an enforcement officer to issue a new infringement notice to the rental company and revoke the infringement notice served on the hirer of a vehicle if the hirer does not pay the fee immediately; and
- 7.4 give enforcement officers the power to enter and inspect a vehicle that the officer has reasonable grounds to believe is being used for non-self-contained freedom camping in an area that is within 200 metres from a public toilet, to determine whether the vehicle is self-contained.

### **Consistency of the Bill with the Bill of Rights Act**

#### ***Section 21 – Freedom from unreasonable search and seizure***

8. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.<sup>2</sup> The touchstone of this section is a reasonable expectation of privacy.<sup>3</sup>
9. New section 36A provides that an enforcement officer who believes on reasonable grounds that a person has been or is camping in a non-self-contained vehicle not within 200 metres of a public toilet, can, at any reasonable time, enter and inspect the vehicle to determine whether that vehicle is self-contained. This is a warrantless search.
10. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be reasonably justified and therefore the inquiry does not need to be undertaken.<sup>4</sup>
11. Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure was reasonable. In assessing whether the search power in the Bill is reasonable, I have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.<sup>5</sup>

#### ***The place of search and degree of intrusiveness***

12. The reasonable expectation of privacy underpinning s 21 is held by the community at large, and this expectation will vary according to where the search is conducted or the nature of the search. For example, the Court of Appeal has held that reasonable expectation of privacy will be lower for public places than on private property, and higher for the home, than for the surrounding property.<sup>6</sup>
13. There is an expectation of privacy in relation to vehicle searches, albeit significantly less than for the search of a house.<sup>7</sup> However, I consider that a camping vehicle, which is for all intents

<sup>2</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

<sup>3</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161].

<sup>4</sup> *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

<sup>5</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

<sup>6</sup> *R v Grayson & Taylor* [1997] 1 NZLR 399, (1996) 3 HRNZ 250 (CA) at 407, 260.

<sup>7</sup> *R v Moreton* [2009] NZCA 121 at [39(a)].

and purposes the camper's dwelling house for the duration of the camping trip, is likely to have an increased expectation of privacy.<sup>8</sup> The degree of intrusiveness is therefore higher than in respect of standard vehicle searches.

*Is the search power necessary?*

14. The rationale for the search power is to determine whether freedom camping is being undertaken using a self-contained vehicle. Under the Bill, a self-contained vehicle is defined as:

a vehicle designed and built for the purpose of camping which has the capability of meeting the ablutionary and sanitary needs of occupants of that vehicle for a minimum of three days without requiring any external services or discharging any waste and is certified that it complies with New Zealand Standard 5465:2001.

15. Under the New Zealand Standard for Self-Containment of Motor Caravans and Caravans, it is a requirement for a certified self-contained (CSC) vehicle to display a warrant card in the front windscreen and keep the certificate inside the vehicle so that it may be provided to an enforcement officer upon request.
16. Both of these documents would contain information about whether the vehicle is self-contained, and the warrant card is visible from the outside of the vehicle. Further, there is a CSC sticker, which, while not a verifying certification, was designed to assist enforcement officers to more easily identify vehicles with a CSC status.<sup>9</sup> In this context, a search power appears to be unnecessary as there are less intrusive ways of achieving the objective of checking the vehicle's CSC status.
17. Even without a mechanism to check a vehicle's CSC status from the outside, I would not consider that the rationale for the search power is sufficiently important to justify a warrantless search of an individual's vehicle to ascertain information in the regulatory context. In reaching this conclusion, I have taken into account the intrusiveness of the warrantless search and the fact that it relates to the investigation of low-level infringement offending.
18. For the reasons set out above, I consider that new s 36A constitutes an unreasonable search under s 21 of the Bill of Rights Act.

***Section 25(c) - Right to be presumed innocent until proven guilty according to law***

19. Section 25(c) affirms the right to be presumed innocent until proven guilty. 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.<sup>10</sup>

<sup>8</sup> See for example *Cunningham v Police* (1997) 4 HRNZ 241 (HC), where caravans used as dwelling houses were regarded as dwelling houses for the purposes of determining who had authority to permit police to enter it.

<sup>9</sup> The New Zealand Motor Caravan Association, available at <https://www.nzmea.org.nz/certified-self-containment-csc>

<sup>10</sup> *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

20. In order to give full recognition to this right, 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.
21. Clause 12 of the Bill creates new strict liability infringement offences in respect of contravening proposed new ss 10A, 15A, 19B and 19F by freedom camping in a local authority area, on conservation land, on Crown-managed land or on NZTA managed land in a non-self-contained vehicle and not within 200 metres of a public toilet. Clause 12 also extends a number of infringement offences already contained in the principal Act to conservation land, Crown-managed land and NZTA-managed land.
22. Clause 15 of the Bill adds a proposed new s 28A, which provides for a special procedure where an infringement notice is served on the hirer of a vehicle by delivering it to the person. In those circumstances, if the person does not pay immediately, an enforcement officer must serve a new infringement notice on the rental company with which the hirer has or had a rental service agreement. The infringement notice served on the individual is then deemed to have been revoked.

#### *The strict liability offences*

23. Strict liability offences *prima facie* limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.
24. Strict liability offences have been considered more justifiable where:
  - 24.1 the offence is in the nature of a public welfare regulatory offence;
  - 24.2 the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
  - 24.3 the penalty for the offence is proportionate to the importance of the Bill's objective.
25. Although infringement offences do not result in a criminal conviction,<sup>11</sup> the Court of Appeal in *Henderson v Director, Land Transport New Zealand* held that the rights in ss 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.<sup>12</sup>
26. In terms of the new or extended strict liability offences created by the Bill, I consider that these can be justified under s 5 of the Bill of Rights Act in circumstances where the infringement notice is issued to the individual. This is because:

<sup>11</sup> s 375(1)(a) of the Criminal Procedure Act 2011.

<sup>12</sup> [2006] NZAR 629 (CA).

- 26.1 the offence is in the nature of a public welfare regulatory offence and does not result in a criminal conviction;
- 26.2 the maximum penalty will be between \$200 and \$1,000;
- 26.3 the principal Act allows for a number of statutory defences; and
- 26.4 the alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.

#### *Liability on rental companies*

- 27. However, I do not consider that creating liability on rental companies in respect of alleged contraventions of the Act by hirers of vehicles is a justifiable limit on s 25(c). This is because the rental company has not committed the *actus reus* and will lack the knowledge to justify the apparent failure of the individual hirer to comply with the law. This means that the rental company is likely to be unable to prove a defence and could be convicted even where reasonable doubt about their guilt exists. Furthermore, the Bill does not explain why it is necessary to create liability on rental companies and therefore I have no information to assess whether this is a proportionate limit on section 25(c).
- 28. Therefore, I consider that, in respect of liability on rental companies, the limit on s 25(c) of the Bill of Rights Act appears to be unjustifiable.

#### **Conclusion**

- 29. For the above reasons, I have concluded the Bill appears to limit ss 21 and 25(c) of the Bill of Rights Act and the limitations on these rights cannot be justified under s 5 of that Act.



Hon David Parker

**Attorney-General**

*August 2021*