

CRIMINAL JUSTICE AMENDMENT BILL (NO. 2)

AS REPORTED FROM THE TRANSPORT COMMITTEE

COMMENTARY

Recommendation

The Transport Committee has examined the Criminal Justice Amendment Bill (No. 2) and recommends that it be passed with the amendments shown in the bill.

Introduction

The Criminal Justice Amendment Bill (No. 2) introduces additional vehicle confiscation provisions to the Criminal Justice Act 1985.

The bill, formerly clauses 17 and 18 of the Law Reform (Miscellaneous Provisions) Bill (No. 3), was referred to the Transport Committee for consideration on 6 December 1994 when the bill was reported to the House by the Justice and Law Reform Committee.

Seven submissions, received by the Justice and Law Reform Committee commenting on the clauses, were referred to the Transport Committee for consideration. The Transport Committee called for further submissions on the Criminal Justice Amendment Bill (No. 2) with a closing date of 15 February 1995. Four additional submissions were received. Advice was received from the Ministry of Justice, Ministry of Transport and the Land Transport Safety Authority.

Five submissions were heard orally for a total of 1 hour 21 minutes. We spent a further 8 hours and 28 minutes considering the issues, the evidence and the advice received on the bill.

This commentary sets out the details of our consideration of the bill, and the major issues we addressed.

Background

In considering the bill we examined the options for the removal of vehicles from recidivist serious traffic offenders. There are three levels of seizure available for the removal of a vehicle from an offender. These are:

- *Impoundment*—the temporary removal of a vehicle, or the withholding of access to it;

- *Confiscation*—the seizure of a vehicle and its sale by the Court following conviction for a traffic offence. The proceeds of the sale are applied with the offender receiving any money that may remain after specified payments are made; and
- *Forfeiture*—the post conviction order vesting in the Crown of property used in the commission of an offence (subject to any statutory protections for third parties).

Section 63 (a) of the Transport Act 1962 enables the Police to use a form of impoundment in cases where they have reasonable grounds to believe a driver does not have proper control of a vehicle. However, often the vehicle is not fully locked away and it may remain available to other legitimate drivers such as family members.

Powers to confiscate vehicles already exist within the Criminal Justice Act 1985. Sections 84 to 88 allow the confiscation of vehicles used in the commission of offences where:

- there exists a maximum penalty prescribed for the offence that is more than one year's imprisonment; or
- the offence is against a specified provision of the Transport Act 1962; either driving while impaired or causing injury or death through some type of culpable driving.

In either case, the Registrar is empowered to dispose of the vehicle at an auction or in such other manner as the Court directs, following an order for confiscation. Any person who has been subject to a confiscation order is prevented by law from having any financial interest in another vehicle for 12 months from the date of conviction (section 85 of the Criminal Justice Act 1985).

Notwithstanding the above, the courts have been reluctant to use their powers of confiscation. Although the High Court in *Vitolia v Police* (1994) has rejected the approach taken in earlier decisions, which suggested that there needed to be proof of special circumstances to support a confiscation order, courts have used the power to make confiscation orders sparingly.

There also has been a judicial reluctance to issue confiscation orders for driving while disqualified, as the principal Act does not specifically refer to the offence of driving while disqualified. The courts have generally taken the approach that proof is needed that the vehicle actually facilitated the commission of an offence. This was partially addressed by an amendment to the principal Act in 1993, clarifying that the confiscation provision applied to vehicles used to commit qualifying offences. However, confiscation remains a little used option for the sentencing of recidivist serious traffic offenders.

There is currently no provision under transport legislation for forfeiture by the Crown of vehicles.

Purpose of the bill

The bill is designed to address the limitations in existing legislation for using vehicle confiscation by the courts in cases of recidivist serious traffic offending. The provisions of section 38 (2) (a) of the Transport Act 1962, which limit eligibility to apply for a limited licence because of repeated serious offending, were used as a model for identifying the qualifying offences to which the presumption of confiscation relates.

A broader aim of the bill is to improve road safety by amending the existing penalty structure by enhancing confiscation provisions. We hope that this will

reduce the availability of the means of offending from those drivers most at risk of causing injury or death, as well as providing some deterrent factor.

While supportive of forfeiture as an option for dealing with the recidivist serious traffic offenders, we consider that any forfeiture regime needs to be accompanied by adequate protection to safeguard the property rights of innocent third parties who may have an interest in a vehicle used to commit an offence. Such an option would be best dealt with in a separate piece of legislation.

We consider that the approach reflected in the bill achieves the primary objective of promoting the greater use of vehicle confiscation in cases of recidivist serious traffic offences, while at the same time giving adequate recognition to the rights of innocent third parties who have an interest in a vehicle used to commit serious traffic offences.

Confiscation of motor vehicles

Clause 18 amends section 84 of the Criminal Justice Act 1985 by inserting a new subsection (2A) which relates to the power of courts to order the confiscation of motor vehicles owned by persons convicted of certain offences against the Transport Act 1962. The new provision provides that, except in cases where extreme hardship to the offender or undue hardship to another person will result, the Court is obliged to order confiscation where the owner of the vehicle has, within a 5 year period, been convicted for a second time for one of the following offences under the Transport Act 1962:

- applying for or obtaining a driver's licence while disqualified (section 34 or section 50);
- driving whilst disqualified or contrary to the terms of a limited licence (section 35);
- causing bodily injury or death through reckless or dangerous driving (section 55 (1));
- causing bodily injury or death through driving under the influence of alcohol or a drug or while the proportion of alcohol in the driver's breath or blood exceeds a specified amount (section 55 (2));
- causing injury or death through careless use of a motor vehicle (section 56 (1));
- causing bodily injury or death through careless driving in specified circumstances (section 56 (1) (a));
- reckless or dangerous driving (section 57);
- driving while the proportion of alcohol in the driver's breath or blood exceeds a specified amount or while under the influence of alcohol or a drug (section 58 (1) (a) to (e));
- refusing to supply a specimen of blood (section 58E);
- duties of a driver in the case of an accident where any other person is killed or injured (section 65 (4)); and
- duties of a driver in the case of an accident where no person is killed or injured (section 65 (5)).

Several submissions advocated the removal of a number of the offences for which a conviction would result in the confiscation of a motor vehicle. The New Zealand Automobile Association supported the removal of the offences of

- applying for or obtaining a driver's licence while disqualified (sections 34 and 50); and

— duties of a driver in the case of an accident where no person is killed or injured (section 65 (5)).

The association submitted that these offences are not sufficiently serious as to warrant a presumption of confiscation by the courts. The Chief District Court Judge also concurred with this argument.

We agree that applying for or obtaining a driver's licence while disqualified (sections 34 and 50) should not be included in the bill, as these offences are essentially licencing offences and as such fall outside the scope of the bill. Similarly, we think that the penalty provisions for breach of duties imposed on drivers in the case of a non-injury accident should be less than in cases where injury or death are involved. Removal of section 65 (5) from the bill is, therefore, consistent with the overall objectives of the bill.

Both the New Zealand Automobile Association and John Bailey advocated the removal of the offences of causing injury or death through careless use of a motor vehicle (section 56 (1)) and causing bodily injury or death through careless driving in specified circumstances (section 56 (1) (a)) as neither contain the element of "deliberateness" found in the other offences. We support the argument that these sections involve a lesser degree of culpability than the other offences listed in the provision and, therefore, recommend that they be omitted.

The New Zealand Automobile Association commented that the offence of driving whilst disqualified or contrary to the terms of a limited licence (section 35) could be considered less important on the basis that the target group captured by this offence is not the recidivist serious traffic offenders. We disagree. Repeated offences of disqualified driving are a significant feature of the statistics for accidents involving injury or death and we see the measure as necessary for those offenders who fail to comply with court orders for disqualification.

Timeframe within which qualifying offences should apply

The New Zealand Automobile Association submitted that a five year timeframe for two qualifying offences is too long on the grounds that while a second offence which may result in injury or death is of significant concern, the timeframe might well mitigate against the need for vehicle confiscation.

We concur. The Land Transport Safety Authority advised that research on a sample of section 30A of the Transport Act 1962 offenders indicated that 98 percent committed their second qualifying offence within four years from the first offence. While section 30A offenders are not identical to those targeted in the bill, they do form an important core component. We have recommended, therefore, that the timeframe for a second qualifying offence be four years to capture virtually all of recidivist serious traffic offenders.

Discretionary powers of the court

Several submissions raised the issue of whether exemptions to the presumption of confiscation, in the case of either extreme hardship to the offender or undue hardship to any other person, provide too little or too much discretionary power to the court. The Chief District Court Judge suggested that the powers provided for in the bill are, in fact, not wide enough to allow all relevant factors to be taken into account. By contrast, the New Zealand Automobile Association supported the removal of the exemption on the basis that stringent measures are necessary to deal with repeat offenders. The National Council of Women favoured an intermediate position of removing the exemption of extreme hardship to the offender while retaining the exemption in the case of hardship caused to the third party.

We believe that a strict definition of the circumstances in which confiscation applies will ensure that the consequences of recidivist offending are well known and will increase the deterrent effect of the provisions. However, in the interests of innocent third parties, we recommend that the bill reflect a recognition that the presumption of confiscation should be easier to refute where it will result in undue hardship to anyone other than the offender.

Retrospectivity

The Legislation Advisory Committee commented that the bill contained a retrospective provision contrary to section 26 of the New Zealand Bill of Rights Act 1990. While the first relevant conviction may occur only after the date upon which the amendment is brought into being, the first offence with which the person was charged may have taken place prior to that date. We agree and have recommended amendments which remove this retrospective element of the bill.

Inequalities of confiscation orders

Several submissions, including those made by the Chief District Court Judge and by the legal firm of Jefferies and Raizis, commented that the bill allows for inequality between offenders due to the different values of motor vehicles.

We do not see the bill as contributing to sentencing inequalities—the proceeds of the sale of a vehicle are applied in accordance with section 87 of the Criminal Justice Act 1985, with the offender receiving any money that may be left over. Accordingly, the only financial penalty that may exist is a reduction in the price of a vehicle resulting from a forced sale. We believe this is unlikely to result in any significant discrepancies. In any case, should significant inequalities become apparent, the court may take these into account when considering hardship grounds.

Proving ownership

The proposed confiscation provisions in the Criminal Justice Act 1985 apply only if an offender owns or has an interest in the motor vehicle used in the offence. It was drawn to our attention that it may be difficult for the court to ascertain who owns a motor vehicle used in an offence and whether the offender has an interest in the vehicle. To address this difficulty, we recommend the inclusion of a provision empowering the court to require an offender to complete a declaration of ownership of the vehicle, if it contemplates making a confiscation order.

Disposition of vehicles between the date of offence and conviction

Section 84 (3) of the Criminal Justice Act 1985 allows the court to make an order prohibiting the offender from acquiring an interest in a vehicle for one year, or to order the confiscation of any vehicle in which an offender acquires an interest subsequent to the commission of the offence, if a vehicle to which confiscation would otherwise attach is sold, and/or another vehicle purchased, between the date of the offence and the date of conviction.

We do not consider that the bill should go further in instituting a general rule prohibiting the sale of motor vehicles between the date of an offence and the date of conviction. Such an amendment would infringe the legal principle of the presumption of innocence and may infringe the New Zealand Bill of Rights Act 1990. Further, given that the primary objective of confiscation is the removal of a vehicle, a general rule prohibiting any vehicle sales may be seen as counter productive.

However, we recognise that not all vehicle sales occurring between the date of the offence and the date of conviction would necessarily be *bona fide*. Accordingly, we

recommend that the bill be amended to allow the court to set aside dispositions of vehicles if it is not satisfied that the circumstances are *bona fide*, and in such circumstances, treat the vehicle as if it were owned by the offender. We also recommend the declaration of ownership specify whether the defendant has disposed of his or her interest in the motor vehicle in the said period, and to whom the ownership or interest has been transferred to assist the court in making this assessment.

Future initiatives

We are satisfied that, if enacted, the measures contained within the Criminal Justice Amendment Bill (No. 2) will make vehicle confiscation a more effective means for the court to deal with cases of recidivist serious traffic offending. However, we believe that road safety in New Zealand would be further improved if impoundment and forfeiture powers are also introduced. We accept that these additional powers should not be included in this bill because the issues involved are complex and require further research. Our decision not to pursue the inclusion of impoundment and forfeiture powers is based on an undertaking that the Government is prepared to consider proposals on these issues at a later date.

KEY TO SYMBOLS USED IN REPRINTED BILL
AS REPORTED FROM A SELECT COMMITTEE

Struck Out (Unanimous)

Subject to this Act,

Text struck out unanimously

New (Unanimous)

Subject to this Act,

Text inserted unanimously

Struck Out (Majority)

Subject to this Act,

Text struck out by a majority

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

Hon. D. A. M. Graham

CRIMINAL JUSTICE AMENDMENT (NO. 2)

ANALYSIS

Title 1. Short Title	18. Court may order confiscation of motor vehicles
-------------------------	--

A BILL INTITULED

An Act to amend the Criminal Justice Act 1985

BE IT ENACTED by the Parliament of New Zealand as follows:

5 **1. Short Title**—This Act may be cited as the Criminal Justice Amendment Act (No. 2) 1994, and shall be read together and deemed part of the Criminal Justice Act 1985* (hereinafter referred to as the principal Act).

*1985, No. 120

Amendments: 1986, No. 83; 1987, No. 25; 1987, No. 95; 1987, No. 168; 1989, No. 20; 1989, No. 91; 1993, No. 43; 1993, No. 93; 1994, No. 28; 1995, No. 69

10 **18. Court may order confiscation of motor vehicles**—
(1) Section 84 of the principal Act is hereby amended by inserting, after subsection (2), the following (subsection) subsections:

15 **“(2A) Where a person (is convicted) commits on or after the commencement of the Criminal Justice Amendment Act (No. 2) 1994 (of) an offence (in this subsection referred to as the first offence) against any of the following provisions of the Transport Act 1962, namely,—**

Struck Out (Unanimous)

“(a) Section 34 or section 50 (which relate to applying for or obtaining a driver’s licence while disqualified); or

“(b) Section 35 (which relates to driving while disqualified or contrary to the terms of a limited licence); or

“(c) Section 55 (1) (which relates to causing bodily injury or death through reckless or dangerous driving); or

“(d) Section 55 (2) (which relates to causing bodily injury or death through driving while under the influence of drink or a drug or while the proportion of alcohol in the driver’s breath or blood exceeds a specified amount); or

Struck Out (Majority)

“(e) Section 56 (1) (which relates to causing bodily injury or death through careless use of a motor vehicle); or

“(f) Section 56 (1A) (which relates to causing bodily injury or death through careless driving in specified circumstances); or

“(g) Section 57 (which relates to reckless or dangerous driving); or

“(h) Paragraph (a) or paragraph (b) or paragraph (c) or paragraph (d) or paragraph (e) of section 58 (1) (which relate to driving while the proportion of alcohol in the driver’s breath or blood exceeds a specified amount or while under the influence of drink or a drug); or

“(i) Section 58E (which relates to refusing to supply a specimen of blood); or

“(j) Section 65 (4) (which relates to the duties of a driver in the case of an accident where any other person is killed or injured)(: or)—

Struck Out (Unanimous)

“(k) Section 65 (5) (which relates to the duties of a driver in the case of an accident where no other person is killed or injured),—

5 and, within (5) 4 years after the date of the commission of that offence, commits a further offence (in this subsection referred to as the second offence) against any of the provisions specified in any of paragraphs (a) to (k) of this subsection, whether or not the
 10 second offence is of the same kind as the first offence but being an offence that arises from a different incident than the one that gave rise to the first offence, then, the court by or before which the offender is convicted of the second offence, if satisfied that any motor vehicle owned by the offender (whether solely or as *joint tenant in common*) joint tenant or
 15 tenant in common with any other person or persons) or in which the offender has any interest (whether pursuant to a hire purchase agreement, leasing agreement, or otherwise) was being driven by, or in the charge of, or (in the case of a second
 20 offence against a provision specified in paragraph (a) of this subsection) in the possession of, the offender at the material time, shall order that the motor vehicle be confiscated unless the making of an order will result in extreme hardship to the offender or undue hardship to any other person.

New (Unanimous)

25 “(2B) Where a court is contemplating whether to order the confiscation of a motor vehicle under subsection (2) or subsection (2A) of this section, the court may order that the defendant complete a declaration of ownership before ordering the
 confiscation.

30 “(2c) The declaration of ownership shall specify—

“(a) Whether the offender owns, or has any interest in, the motor vehicle at the date of conviction; and

35 “(b) Whether any other person owns, or has any interest in, the motor vehicle at the date of conviction, and, if so, the name of that person and the nature of that interest; and

“(c) Whether the offender has ceased to be the owner of, or to have any interest in, the motor vehicle at any

New (Unanimous)

time subsequent to the commission of the offence but before the date of his or her conviction; and

“(d) If the offender has disposed of his or her interest in the motor vehicle during the period referred to in paragraph (c) of this subsection, to whom the ownership or interest in the motor vehicle was disposed, the relationship of that person to the offender, and the consideration received by the offender.

“(2D) For the purposes of having any declaration of ownership completed by the offender a court may direct that the offender be detained in the custody of the court for such time, not exceeding 2 hours, as may be necessary to complete the declaration of ownership.

“(2E) Where a court does not make an order under subsection (2B) of this section, that shall not affect the validity of any other order of the court.”

Struck Out (Unanimous)

(2) Section 84 (3) of the principal Act is hereby amended by inserting after the expression “subsection (2)”, the expression “or subsection (2A)”.

New (Unanimous)

(2) Section 84 of the principal Act is hereby further amended by repealing subsection (3), and substituting the following subsections:

“(3) Notwithstanding anything in subsection (2) or subsection (2A) of this section, but subject to subsection (3A) of this section, if, in any case to which subsection (2) or subsection (2A) of this section would otherwise apply, the offender has, before the date of his or her conviction, ceased to be the owner of the motor vehicle or to have any interest in it, the court may—

“(a) Make an order prohibiting the offender from acquiring any interest in any motor vehicle within 12 months after the date of the order, in which case the

New (Unanimous)

provisions of section 85 (2) of this Act, so far as they are applicable and with any necessary modifications, shall apply; and

5 “(b) If the offender has, at any time subsequent to the commission of the offence but before the date of his or her conviction, become the owner of any motor vehicle (whether solely or as joint tenant or tenant in common with any other person or persons) or
10 acquired any interest in any motor vehicle (whether pursuant to a hire purchase agreement, leasing agreement, or otherwise), order that that motor vehicle be confiscated.

15 “(3A) Subject to **subsection (3B)** of this section, where the offender has ceased to be the owner of the motor vehicle or to have any interest in it, but the court is not satisfied that the disposition of the motor vehicle was made by the offender with a *bona fide* intention to dispose permanently of his or her ownership or interest in the vehicle, the court may, if it thinks
20 fit, set the disposition aside and the provisions of **subsection (2)** or **subsection (2A)** of this section, as the case may be, shall apply as if the disposition by the offender had not occurred.

25 “(3B) Before making an order under **subsection (3A)** of this section, the court shall give any person to whom the disposition of the motor vehicle was made an opportunity to be heard.”