

Report of the

Attorney-General

On the Animal Welfare Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 260 (2) of the Standing Orders of
the House of Representatives.*

VETTING FOR CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: ANIMAL WELFARE BILL

- 1 The Animal Welfare Bill, a Member's bill introduced by Mr Pete Hodgson MP, has been vetted for consistency with the New Zealand Bill of Rights Act 1990. I have concluded that, for the reasons set out below, clauses 24(1), 29 and 30 of the Bill prima facie breach section 21 of the New Zealand Bill of Rights Act 1990 and that such breaches are not saved as a reasonable limit by recourse to section 5 of the 1990 Act. I have further concluded that, for the reasons set out below, clause 33 of the Bill prima facie breaches sections 18 and 22 of the New Zealand Bill of Rights Act 1990 although that breach is a reasonable limit in terms of section 5 of that Act.

Scope of the Section 21 Right

- 2 Section 21 of the Bill of Rights provides:
"Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property or correspondence or otherwise."
- 3 In determining whether a provision contravenes section 21 of the Bill of Rights two tests must be satisfied. First, it must be shown that the activity in question constitutes a search or seizure and second, that such search or seizure is unreasonable. Essentially, an activity will constitute a search where that activity encroaches upon a reasonable expectation of privacy. It is not wholly settled whether the term "seizure" in section 21 extends to any taking of property by a public authority without the consent of the owner or other person having lawful possession of that property or is limited to the seizure of items in the course of a search undertaken for evidentiary or investigatory purposes. The majority judgment in *R v Colarusso* (1994) 26 CR (4th) 289 and that of the Court in *Alwen Industries v Controller of Customs*, High Court, Auckland, 18 August 1993, Blanchard J, M 1105/93 provide some authority for the former proposition. However the more convincing approach is that taken by Professor Hogg (*Constitutional Law of Canada*, Third Edition, p 1054) who takes the view that the word "seizure" in section 21 is coloured by its association with the word "search" and that seizure must be for evidentiary or investigatory purposes. In other words, section 21 is not a general guarantee of property rights. (See also *Adams on Criminal Law* (Robertson, ed, 1992-1995) Vol 2, Ch 10.8.04(d) where the learned author disapproves of the notion that section 21 protects a broad based concept of property.) In any event the provisions of this Bill discussed below arise in

connection with searches undertaken for evidentiary and investigative purposes.

4 The New Zealand Court of Appeal in *R v Jefferies* [1994] 1 NZLR 290 went on to emphasize that section 21 is intended to protect an amalgam of values aside from expectations of privacy. These additional values included property rights, individual liberty and the dignity of the person (see Richardson J page 302).

5 Section 21 of the Bill of Rights only protects against unreasonable searches and seizures. Determining what constitutes "reasonableness" essentially entails a balancing exercise. As Richardson J in the case of *R v Jefferies* stated at page 302:

"[A] s21 inquiry is an exercise in balancing legitimate state interests against intrusions on individual interests. Whether the intrusion is "unreasonable" involves weighing all relevant policy considerations and their application in the particular case."

6 In the later Court of Appeal decision of *R v Davis* (1993) 10 CRNZ 327 Richardson J again asserted at page 335:

"The expectation of privacy is always important but it is not the only consideration in determining whether a search and seizure is unreasonable. Legitimate state interests, including those of law enforcement are also relevant."

7 While the Canadian Supreme Court has used different words in determining whether a search is unreasonable, the test established in *Hunter v Southam* (1984) 11 DLR (4th) 641 is very like that adopted by the New Zealand Court of Appeal in *Jefferies*. The recent Court of Appeal decision in *R v Grayson and another* [1997] 1 NZLR 399 emphasizes that a section 21 inquiry is an exercise in balancing legitimate State interests against any intrusion on individual interests.

8 In assessing the substantive reasonableness of any search power, (as opposed to a procedural review of the exercise of that power), the view has been taken that there is in general no need to consider whether a prima facie unreasonable search can constitute a justified limitation in terms of section 5 of the Bill of Rights Act. Anything which is demonstrably justified in a free and democratic society as a reasonable limit is unlikely to be "unreasonable". The same general approach as in the "justified limitation" test has, however, been used in making assessments as to the substantive "reasonableness" of the search and

seizure provisions in this Bill. In the event that the view that has been adopted (i.e., that in assessing any search power there is in general no need to consider whether a prima facie unreasonable search can constitute a justified limitation in terms of section 5 of the Bill of Rights Act) is wrong, nothing turns on this issue with respect to this particular Bill. This is because clauses 24, 29 and 30 would not, for the reasoning set out in paragraphs 12 to 17 below, constitute a justified limitation in terms of section 5 of the Bill of Rights Act.

Clauses 24(1), 29 and 30 of the Bill

- 9 Clause 24 (1) provides that any "inspector has power to enter at any reasonable time, by force if necessary, into or upon any vehicle, aircraft, or vessel, or upon or into any land or premises, for the purpose of inspecting any animal, where he or she is satisfied on reasonable grounds that an offence against this Act is being, or has been, committed in respect of any animal". There is a proviso to this clause to the effect that no inspector may enter any dwelling house or marae unless authorised to do so by a Justice pursuant to clause 27 of the Bill. (Clause 27 provides for the issue by a Justice of a "warrant to enter" a dwellinghouse or marae.)
- 10 Clause 29(1) provides that any inspector has the right to obtain and to maintain possession, by force if necessary, of any animal in respect of which he or she has reasonable cause to believe an offence "against this Act" is being or has been committed. The clause goes on to provide that any such animal may then be conveyed to a place of safety and held there until forfeited to the Crown or a compliance body or until a District Court Judge orders its return. Clause 29(2) provides that where an animal has been seized under clause 29(1) and the owner is unknown or cannot be located after reasonable inquiries then the animal is forfeited to the compliance body employing the inspector and can be sold or otherwise disposed of. (In terms of the Bill a compliance body is an approved organization with the ability to nominate persons as inspectors or assistant inspectors for the purposes of the Bill.)
- 11 Clause 30 provides that an inspector may, by force if necessary, obtain and maintain possession of any object or document that may in the opinion of the inspector afford evidence of "the offence". The clause also provides that an inspector may by force if necessary inspect, or exhume for inspection, the carcass of any animal in respect of which he or she believes an offence has been committed and remove the carcass for post mortem examination or require a post mortem

examination to be performed at the place where the carcass was inspected or exhumed. While the drafting is less than clear it would seem the intention is for the inspector to have the right to maintain possession of the object, document or carcass in question until the hearing of any offence to which such object, document or carcass relates and the making by a District Court Judge of an order for its disposition or return to the owner or person charged.

Weighing clauses 24(1), 29 and 30

- 12 There is a rational connection between the provisions in clauses 24(1), 29 and 30 and the objectives of the Bill viz the welfare of animals and their protection from ill treatment and neglect. Society has a substantive interest in the furtherance of these objectives. These objectives would be furthered by the ability to enter premises and, in appropriate cases, seize animals in respect of which there is reasonable cause to believe an offence has been or is being committed and documents or other items. Clauses 24(1), 29 and 30 as they stand are considered to breach the prohibition in section 21 of the Bill of Rights against unreasonable search and seizure in that these provisions impair more than is reasonably necessary individual privacy and property rights. In other words, the interference with individual rights provided for in clauses 24(1), 29 and 30, as currently drafted, are disproportionate to the requirements of the interests being protected.
- 13 I have reached my conclusion in respect of clause 24(1) having regard to the provision in that clause that entry may be effected "by force if necessary" and where there is reasonable cause to believe that "an offence against this Act" is being or has been committed. In terms of clause 24(1) entry may be effected by force regardless of the kind or seriousness of the offence. The Bill provides for a number of offences ranging from failing to supply particulars of identification to an inspector or failure to render assistance to an injured animal on a road to aggravated cruelty or ill treatment or neglect causing death or disablement. Some of the offences provided for (for example, failing to supply particulars of identification to an inspector or failure to render assistance to an injured animal on a road) are "infringement offences". There is provision for a fine not exceeding \$1,000 "on conviction" where persons are proceeded against summarily for infringement offences. Where persons are proceeded against by way of infringement notice, for infringement offences, the infringement fee for each such offence is \$500 only. It is not considered appropriate that

there be a general provision for forced entry without warrant in respect of infringement offences although there may perhaps be justification for such provision in emergency situations. In assessing the seriousness of infringement offences it may be noted that they do not lead to the entry of a criminal conviction where a defendant is found guilty or pleads guilty to an infringement offence. (See section 78A of the Summary Proceedings Act 1957.) In such circumstances the Court is not to enter a conviction but may order the defendant to pay such fine and costs, and make such other orders, as the Court would be authorised to make on convicting the defendant of the offence. While noting that the rights of entry provided for in clause 24(1) do not apply in respect of dwellinghouses and marae I remain of the view that the interference with individual rights provided for in clause 24(1), as currently drafted, is disproportionate to the requirements of the interests being protected.

- 14 I have reached my conclusion in respect of clause 29 having regard to the provision in that clause that an "inspector may obtain and maintain possession, by force if necessary, of any animal in respect of which he or she has reasonable cause to believe that an offence against this Act" is being or has been committed. In terms of clause 29 obtaining possession and the maintenance of such possession may be effected by force regardless of the kind or seriousness of the offence. The Bill provides for a range of offences some of which are "infringement offences" for which persons may be proceeded against summarily or by way of infringement notice with infringement fees of \$500 only. It is not considered appropriate that there be a general provision for the seizure of animals by force without warrant in respect of infringement offences although there may perhaps be justification for such provision in emergency situations.
- 15 It is somewhat unclear whether the provisions of clause 29 are intended to operate as an adjunct to the powers of entry provided for in clause 24 or as a self contained seizure mechanism with rights of entry implied. It is not considered necessary to reach a firm view on this point as the provisions of the clause breach section 21 of the Bill of Rights in either event.
- 16 I have reached my conclusion in respect of clause 30 having regard to the provision in that clause that an "inspector may, by force if necessary," obtain and maintain possession of any object or document that may in the opinion of the inspector afford evidence of the offence and inspect, or exhume for

inspection, the carcass of any animal in respect of which he or she believes an offence has been committed and remove the carcass for post mortem examination or require a post mortem examination to be performed at the place where the carcass was inspected or exhumed. As drafted the clause 30 powers may be exercised by force regardless of the kind or seriousness of the offence in relation to which they are being exercised. As is noted above the Bill provides for a range of offences some of which are "infringement offences" for which persons may be proceeded against summarily or by way of infringement notice with infringement fees of \$500 only. It is noted also that there is no requirement in the clause as drafted for the opinion of the inspector necessary for the exercise of the powers provided for to have been formed or reached on "reasonable" grounds. It is not considered appropriate that there be a general provision for powers of the kind and scope provided for in clause 30 to be exercised by force and without warrant in respect of "infringement offences" particularly where there is no requirement in the clause, as drafted, for the opinion of the inspector necessary for the exercise of such powers to have been formed or reached on "reasonable" grounds.

- 17 It is somewhat unclear whether the provisions of clause 30 are intended to operate as an adjunct to the powers of entry provided for in clause 24 or as a self contained seizure mechanism with rights of entry implied. I do not consider it necessary to reach a firm view on this point as the provisions of the clause breach section 21 of the Bill of Rights in either event.
- 18 It is noted in passing that clauses 29 and 30 do not address the situation that might arise were animals or other property to be seized and criminal charges not to eventuate from that seizure. There is, for example, no provision for the owner of such items to apply for and be granted their return.

Clause 33 of the Bill

- 19 Clause 33(1) of the Bill provides that any inspector who has reasonable grounds for believing that any animal contained in a vehicle, vessel or aircraft is suffering or is not being contained in reasonably comfortable, or secure accommodation, may stop and detain the vehicle, vessel or aircraft for a reasonable period while the inspector inspects the animal and, if necessary, any suffering is mitigated.

Weighing Clause 33

20 Section 18(1) of the Bill of Rights provides that "everyone lawfully in New Zealand has the right of freedom of movement and to residence in New Zealand." It is not wholly settled whether the "freedom of movement" referred to in this section encompasses more than the right to move about the country, reside where one wishes and pursue one's livelihood without recourse to geographical location. In *Kerr v Attorney-General* [1996] DCR 951 the Court found that the right to move down the highway had been infringed and was not inclined to find that the reference to "residence in New Zealand" in section 18 limited the scope of that section in relation to freedom of movement.

21 Section 22 of the Bill of Rights provides as follows:

"Everyone has the right not to be arbitrarily arrested or detained."

Section 22 is considered in *R v Goodwin* (No 2) [1993] 2 NZLR 390. At page 393, Cooke P considered "arbitrary" as a somewhat elastic word including elements such as "discretionary" and "without fair, solid and substantial cause; that is, without cause based on law". The New Zealand Courts have, in general, in the context of section 23 of the Bill of Rights, not found there to be "detention" in circumstances of a brief interruption of a person's movement, for example, for initial inquiries (see *Temese v Police* (1992) 9 CRNZ 425 and *Police v Herewini* [1994] 2 NZLR 306). The stopping by Police of a driver was, however, held to be "detention" in the context of section 22 of the Bill of Rights in *Johnston v Police* (1995) 2 HRNZ 291. I am prepared to assume that for the purposes of this report the powers exercisable in terms of clause 33 would constitute a power of "detention" in terms of section 22 of the Bill of Rights.

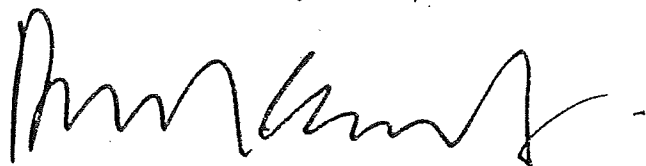
22 Given that the powers exercisable in terms of clause 33 are dependent on an inspector having "reasonable grounds" and that any vehicle, vessel or aircraft may be detained for a "reasonable period" only there are good reasons for considering that any detention authorised by the provision cannot be properly categorized as "arbitrary" and hence not in breach of section 22 of the Bill of Rights. To the extent that the powers exercisable in terms of clause 33 constitute "detention" in terms of section 22 of the Bill of Rights and that such detention may properly be seen as "arbitrary" and in breach of that section it is considered that the provision can be treated as a reasonable limit in terms of section 5 of the Bill of

Rights Act. For similar reasons (namely the powers exercisable in terms of clause 33 are dependent on an inspector having "reasonable grounds" and any vehicle, vessel or aircraft may only be detained for a "reasonable period") I consider that any infringement by that clause of the right to freedom of movement would constitute a reasonable limit in terms of section 5 of the Bill of Rights Act.

Conclusion

- 23 Clauses 24(1), 29 and 30, as drafted, breach the prohibition in section 21 of the Bill of Rights Act against unreasonable search and seizure in that these provisions impair more than is reasonably necessary individual privacy and property rights. The interference with individual rights provided for in clauses 24(1), 29 and 30, as currently drafted, is disproportionate to the requirements of the interests being protected. The breaches of section 21 contained in clauses 24(1), 29 and 30 are not saved as a reasonable limit by recourse to section 5 of the Bill of Rights Act.
- 24 The powers exercisable in terms of clause 33 are dependent on an inspector having "reasonable grounds" and any vehicle, vessel or aircraft may only be detained pursuant to that clause for a "reasonable period". I consider therefore that, to the extent that the powers exercisable in terms of clause 33 constitute "detention" in terms of section 22 of the Bill of Rights and that such detention may properly be seen as "arbitrary" and in breach of that section, the provision can be treated as a reasonable limit in terms of section 5 of the Bill of Rights Act. For similar reasons I consider that any infringement by clause 33 of the right to freedom of movement constitutes a reasonable limit in terms of section 5 of the Bill of Rights Act.

Dated this 9th day of September 1997.



Attorney-General