

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Sale of Liquor (Health
Warnings) Amendment 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*

I have considered the Sale of Liquor (Health Warnings) Amendment Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 4 of the Bill appears to be inconsistent with section 14 of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act (and Standing Order 260) I draw this to the attention of the House of Representatives.

I wish to stress that in finding this provision to be inconsistent with the Bill of Rights Act, it is not the concept of messages *per se* that constitutes an unjustified limit on freedom of expression, but rather the particular message in this provision which appears to be broader in its wording and application than strictly necessary.

The Bill

Clause 4 of the Bill (by inserting a proposed new section 150A into the Sale of Liquor Act 1989) would make the following health warning mandatory on all sealed containers in which liquor is sold or offered for sale to any person:

"Ministry of Health Warning

- (1) Women should not drink liquor during pregnancy because of the risk of birth defects.
- (2) Consumption of liquor impairs your ability to drive a car or operate machinery, and may cause health problems."

The Bill would also make it an offence for a manufacturer, importer, distributor, or retailer to sell, or offer for sale, liquor in sealed containers that do not display this health warning.

***Prima Facie* Breach of Section 14**

The initial question is whether the health warning requirement in the Bill constitutes a *prima facie* inconsistency with section 14 of the Bill of Rights Act. Section 14 provides that:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

The Supreme Court of Canada has held on a number of occasions that "commercial expression" or advertising is protected by the guarantee of freedom of expression in the Canadian Charter of Rights and Freedoms. The High Court appears to have also accepted this proposition (see *Solicitor-General v Radio New Zealand Limited* [1994] 1 NZLR 48).

Canadian case law has also held that the right to freedom of expression carries with it a corresponding right not to be compelled to say certain things. While there is no New Zealand case law on point, I consider that the position in New Zealand is the same and that the rights affirmed by section 14 include the right to say nothing and the right not to say certain things.

That being so, because the Bill requires health warnings to be placed on all sealed containers in which liquor is to be sold or offered for sale, it is a *prima facie* limit on the

right to freedom of expression affirmed by section 14 of the Bill of Rights Act. The more important question is whether that limit can be said to be "reasonable and justified" in terms of section 5 of the Bill of Rights Act (as applied by the Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9).

Is the Bill a justified limitation in terms of section 5?

The Bill's explanatory note states that during the passage of the Sale of Liquor Amendment Bill (No. 2) in 1999, recommendations were made for more public education regarding liquor consumption. Accordingly, the broad objective of the Bill appears to be to educate those purchasing liquor about the possible risks of drinking. I have concluded that this broad aim is "important and significant" and that it substantively justifies some limits on freedom of expression.

However, in terms of section 5 of the Bill of Rights Act, I must also consider whether there is a rational and proportionate connection between the Bill's objective and the measures proposed to effect that objective. In the case of this Bill, the inquiry is whether the proposed new section 150A implements the objective of educating those purchasing liquor about the possible risks of drinking in a rational and proportionate manner that impairs the right to freedom of expression as little as possible.

The effectiveness of alcohol health warnings is very directly related to the issue of whether there is a rational relationship between the requirement in Bill and the objective. On balance, I consider that it can be reasonably said that there is a rational relationship between health warnings and the objective of educating purchasers of liquor of the possible risks of drinking.

However, I am of the view that there are difficulties in saying that the requirement in proposed new section 150A is proportionate to the objective. The wording of the message in proposed new section 150A states the possible risks more strongly than the evidence suggests is warranted. For example, the part of the message which refers to possible health problems does not reflect evidence which suggests that alcohol-related health problems generally result from excessive consumption, and nor does it reflect the fact that low to moderate alcohol consumption is thought to have health benefits for some groups.

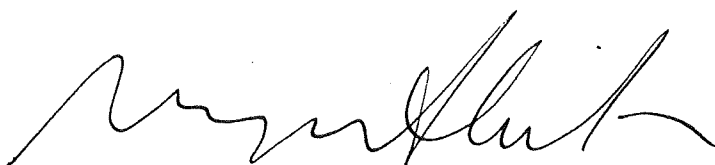
Proposed new section 150A is also overly broad in the parties to which it applies, and the circumstances in which it requires a health message to be affixed. For example, the Bill would require labelling of liquor containers that will not be purchased or even seen by consumers (such as kegs sold to bars for service of tap beers), or purchased by New Zealand consumers.

In assessing the rationality and proportionality of new section 150A, I have had regard to the fact that the message required by new section 150A is attributed to the Ministry of Health. The attribution of the message to the Ministry may be seen as mitigating the extent to which the message impairs the right to freedom of expression. I have also had regard to the Supreme Court of Canada's view that restrictions on commercial expression may be easier to justify than other infringements of freedom of expression. However, even after taking these factors into account, it is not clear to me that the labelling requirement in proposed new section 150A overall is necessarily proportionate to the objective of the Bill.

As Attorney-General, I consider that I should err on the side of caution in advising the House of the possible inconsistency of this Bill with the Bill of Rights Act. I emphasise that this is a judgement call, which a select committee may wish to examine further on the basis of submissions and evidence.

Conclusion

I conclude that clause 4 of the Sale of Liquor (Health Warnings) Amendment Bill appears to be inconsistent with section 14 of the New Zealand Bill of Rights Act 1990, and does not appear to be justified in terms of section 5 of the Bill of Rights Act.

A handwritten signature in black ink, appearing to read 'Margaret Wilson', written in a cursive style.

Hon Margaret Wilson
Attorney-General