



18 November 2022

Attorney-General

**Sale and Supply of Alcohol (Community Participation) Amendment Bill 24505/7.0 –
Consistency with the New Zealand Bill of Rights Act 1990**
Our Ref: ATT395/375

1. We have considered the Sale and Supply of Alcohol (Community Participation) Amendment Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**).
2. We consider the Bill is not inconsistent with the New Zealand Bill of Rights Act 1990.

The Bill

3. This Bill will amend the Sale and Supply of Alcohol Act 2012 (**the principal Act**). It aims “to improve communities’ ability to influence alcohol regulation in their area, and thereby ensure that the sale, supply, and consumption of alcohol is undertaken safely and responsibly, and the harm caused by excessive or inappropriate consumption of alcohol is minimised”.¹
4. The Bill intends to do this by making targeted changes to the alcohol licensing process (a first tranche of intended reforms for the principal Act). It proposes to make it easier for territorial authorities to develop and implement local alcohol policies and strengthen the ability of local alcohol policies to reduce harm in the community. It proposes to improve communities’ ability to influence licensing decisions by making it easier and fairer for people to object to licence applications and participate in hearings.
5. The Bill will abolish the right to appeal to the licensing authority against any element of

¹ Explanatory Note to the Sale and Supply of Alcohol (Community Participation) Amendment Bill.

local alcohol polices,² remove restrictions on the persons who may object to the grant of a licence and its renewal,³ give licensing committees powers to refuse to renew a license or impose conditions on renewal of a licence, if renewal would be inconsistent with the local alcohol policy,⁴ and give licensing committees and the licensing authority enhanced procedural powers to regulate their proceedings.⁵

Removal of local alcohol policy appeal process

6. Under the principal Act, territorial authorities may develop and adopt local alcohol polices relating to the sale, supply, and consumption of alcohol in their area.⁶ Local alcohol policies may include policies on matters such as, for example, the location of licensed premises, maximum trading hours and the issue of licences.⁷ The objective of local alcohol polices is to empower communities to address local issues concerning alcohol.⁸
7. Sections 80 to 88 of the principal Act provide for a person or an agency to appeal to a licensing authority against any element of a local alcohol policy. These provisions are considered anomalous, cutting across the role of territorial authorities to adopt local alcohol polices, if they choose to do so.
8. Clause 6 of the Bill proposes the repeal of the appeals process. Sections 80 to 88 will be replaced with provisions for a draft local alcohol policy to be finalised following a special consultative procedure, and for the final local alcohol policy to be adopted 30 days after its public notification.
9. The proposed repeal of the appeals process is almost identical to the amendments proposed earlier this year by the Sale and Supply of Alcohol (Harm Minimisation) Amendment Bill 147-1 (2022). We provided you with advice in relation to this aspect of the latter Bill on 27 July 2022 which you endorsed on 30 July 2022.⁹

² Sale and Supply of Alcohol (Community Participation) Amendment Bill, cl 6.

³ Sale and Supply of Alcohol (Community Participation) Amendment Bill, cl 9 and cl 10.

⁴ Sale and Supply of Alcohol (Community Participation) Amendment Bill, cl 11. Currently, licensing committees must not take any inconsistency into account between local alcohol policies and the renewal of licences when deciding whether to approve applications. This means that licensing decisions may not reflect the relevant local alcohol policy.

⁵ Sale and Supply of Alcohol (Community Participation) Amendment Bill, cl 12 to 15 inclusive.

⁶ Section 75 of the principal Act.

⁷ Section 77 of the principal Act.

⁸ Territorial authorities must have regard to matters such as the District Plan, the demography of its residents and the overall health indicators of its residents when developing its local alcohol policy: s 78 of the principal Act.

⁹ The Sale and Supply of Alcohol (Harm Minimisation) Amendment Bill seeks in Part 2 to introduce prohibitions on alcohol advertising and sponsorship. These proposals are not repeated in this Bill.

10. There is no change to our previous advice in relation to the proposed repeal of the appeals process, which we repeat below for your convenience.

“The principal Act provides for a process whereby territorial authorities can design local alcohol policies relating to the sale, supply, or consumption of alcohol within its district.¹⁰ Currently, the principal Act requires a territorial authority that wishes to have a local alcohol policy to produce a draft policy,¹¹ and to consult on it (via a special consultative procedure)¹² before producing and giving notice of a provisional policy.¹³ A person or agency that made submissions as part of the special consultative procedure may, within 30 days of that notice, appeal to the licensing authority against any element of that provisional local alcohol policy if they believe an element to be unreasonable in light of the object of the Act.¹⁴ The licensing authority must consider any appeal and can ask the territorial authority to reconsider an element of a provisional local alcohol policy.¹⁵ Following reconsideration, the territorial authority must either resubmit the policy to the licensing authority with the element deleted or amended, appeal to the High Court or abandon the provisional policy.¹⁶ The adoption of a local alcohol policy is delayed depending on the status of any appeals.¹⁷ Clause 6 of the present Bill repeals the appeals process, providing for a draft local alcohol policy to become a final local alcohol policy following the special consultative procedure, for the final local alcohol policy to be adopted 30 days after its public notification.

Clause 6 of the Bill repeals the appeals process, providing for a draft local alcohol policy to become a final local alcohol policy following the special consultative procedure, and for the final local alcohol policy to be adopted 30 days after its public notification.

Removal of the right of appeal is focused on giving local authorities greater control over alcohol regulation. The concern is that local alcohol policies have failed because large companies have used their appeal rights to block the development of local alcohol policies, and that policies adopted have only rarely included regulations over the location and density of stores selling alcohol, meaning “communities have not been able to develop public health approaches to the provision of alcohol in their areas.”¹⁸

We consider that s 27 of the Bill of Rights Act is not engaged by the proposed removal of this right of appeal. Any person has the right to be heard during the special consultative procedure meaning the principles of natural justice are observed during that process. The special consultative procedure requires the territorial authority to provide an opportunity for persons to present their views “in a manner that enables spoken interaction or sign language between the person and the local authority” or its representatives, and to ensure that any person who wishes to present their views is

¹⁰ Sale and Supply of Alcohol Act 2012, s 75(1). See also ss 75(3) and 77(1). A local alcohol policy must be produced, adopted and brought into force in accordance with subpart 2 of Part 2 of the Act. Local alcohol policies may include policies on the location of licensed premises, whether further licences should be issued for premises in the district concerned, maximum trading hours, the issue of licences subject to discretionary conditions and one-way door restrictions.

¹¹ Section 78(1).

¹² Section 79(1). The special consultative procedure has the meaning given by Local Government Act 2002, s 5(1).

¹³ Section 80(1).

¹⁴ Sections 81(1) and 81(5). The Police or a Medical Officer of Health may also appeal within 30 days of the public notification against any element of the provisional local alcohol policy, whether or not they submitted as part of the special consultative procedure: ss 81(2) and 81(3).

¹⁵ Section 83(2).

¹⁶ Section 84(1).

¹⁷ Section 87.

¹⁸ Sale and Supply of Alcohol Act (Harm Minimisation) Amendment Bill 2022 (147-1) (explanatory note).

given a reasonable opportunity to do so.¹⁹ Additionally, access to judicial review is not affected by the Bill.”

Standing to object and procedural directions

11. Applications for a licence are filed with the licensing committee for the district in which the premises concerned are situated.²⁰ The principal Act provides currently that a person may only object to the grant of a licence or its renewal if they have a greater interest in the application for the licence than the public generally.²¹ A person’s standing to raise an objection is therefore often a barrier for them to be able to do so.
12. If an objection is filed by a person with standing, a licensing committee or the licensing authority must convene a public licensing hearing, subject to certain exceptions.²² At a hearing, the applicant, objectors, an inspector, a constable, and a Medical Officer of Health may appear and be heard, and call, examine, or cross-examine witnesses. There is a discretion for leave to be extended to other persons to appear and be heard. The persons appearing may be represented by counsel.²³
13. It is understood that licensing committee hearings have become overly formal and adversarial. Participants report that the experience can be intimidating and disempowering, and data shows that only a fraction of applications for licences are refused, suggesting communities are struggling to impact decision-making.
14. The Bill proposes various procedural amendments to correct these effects. Clauses 9 and 10 of the Bill will amend the principal Act to allow *any person* to object to the grant of a licence or the renewal of a licence, whether as an individual or as a representative of a group or organisation.²⁴ However, a person who is *a trade competitor of the applicant* may only object if the person is directly affected by the application in a way that does not relate to trade competition or the effects of trade competition. The Bill therefore enlarges rights of objection to the grant or renewal of a licence *unless* commercial interests are engaged.

¹⁹ Local Government Act 2002, ss 83(1)(d) and 83(1)(e).

²⁰ If it is an application for an on-licence for a conveyance which must be filed with the licensing committee for the district in which the applicant’s principal place of business is situated: Sale and Supply of Alcohol Act 2012, s 99.

²¹ Sections 102(1) and 128 of the principal Act.

²² Section 202 of the principal Act.

²³ Section 204 of the principal Act.

²⁴ Clauses 9 and 10 of the Bill propose to replace s 102(1) with new section 102(1) and (1A) and to replace s 128(1) with new section 128(1) and (1A).

15. Clauses 12 to 15 of the Bill will introduce new or amended powers for licensing committees and the licensing authority to control their hearings through the regulation of procedure. These include amendments for matters such as the conduct of remote hearings, the persons who may appear and be heard, directions for the management of evidence, the ability to strike out evidence, an inquisitorial ability for a licensing committee or the licensing authority to commission further information, and limitations on parties' ability to speak or call evidence in support if a chairperson considers that repetition is likely to be excessive.
16. The following proposal is more notable. Clause 13 will introduce new s 203A requiring a *licensing committee* to establish appropriate procedures that:
 - 16.1 avoid unnecessary formality;
 - 16.2 do not permit parties or their representatives to question other parties or their witnesses; and
 - 16.3 do not permit cross examination.
17. The proposals in clauses 9 and 10 (preventing a trade competitor of the applicant from objecting to the grant or renewal of a licence if that person is directly affected by the application in a way that relates to trade competition or the effects of trade competition) and 13 (removing people's ability at licensing committee hearings to ask questions of witnesses and cross-examine), are similar to provisions in the Resource Management Act 1991 which have been carried over to the Natural Built Environments Bill. Under the Resource Management Act, hearings for resource consents are heard at council level. They are informal and cross-examination is not allowed. Submissions on applications for publicly notified resource consents may be made by any interested party, except trade competitors of the applicant. Appeals of those decisions are heard by the Environment Court, which has a formal process and cross-examination is allowed.

Right to justice (s 27 Bill of Rights Act)

18. The procedural amendments proposed by this Bill engage the right to justice. Section 27(1) of the Bill of Rights Act affirms that "[e]very person has the right to the observance of the principles of natural justice by any tribunal or other public authority

which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law." Section 27 is therefore concerned with procedural fairness and this includes the opportunity to a fair hearing. Importantly, what will be required for natural justice to be met in any given case is always context specific.

19. The general objective of the procedural amendments is to ensure the efficient and effective conduct of licensing committee and licensing authority hearings. It is common and indeed appropriate for decision-making bodies such as a licensing committee or the licensing authority to be given powers to regulate their procedure. In this respect, the procedural powers proposed are orthodox and do not raise concern. It is also relevant that members of the relevant committee or authority will be required to act in a manner that is consistent with the Bill of Rights Act when making procedural directions and parties retain a right of objection if their submissions are struck out. Further, the intention to streamline hearing procedures is intended to assist with the expected increase in business for licencing committees and licensing authorities and is therefore a rational response.
20. The proposals in clauses 9, 10 and clause 13 are less orthodox and require closer examination.
21. As noted above in relation to the removal of appeal rights, the Act is intended to enable communities to influence the way alcohol is regulated for their locale, through the setting of local alcohol policy and participation in licensing decisions. The communities experiencing high levels of alcohol-related harm are understood to be struggling to influence the way alcohol is regulated. These issues are exacerbated in part by standing rules which mean that only a small number of those people who want to object are permitted to do so, but also by licensing committee hearings becoming overly formal and adversarial, and dominated by commercial interests. As a result, individuals have been discouraged from participation.
22. It is understood that the resulting reduction in community input has contributed to a proliferation of licenced premises in communities where they are not wanted. This effect has been particularly stark in some poorer communities that already have a high

density of outlets, late opening hours, and outlets situated close to sensitive areas.

23. Clauses 9, 10 and 13 may be seen to be a rational and proportionate response to the problems identified:

23.1 The exclusion of objections concerning trade competition will ensure that a licensing committee's business remains focused on the interests of the community, as the principal Act intended. Access to judicial review is also not affected by the Bill.

23.2 Removing people's ability at licensing committee hearings to ask questions and cross-examine witnesses is also ameliorated by the ability of the members of the licensing committees to ask questions and test evidence. The inquisitorial nature of licensing committee hearings should ensure that evidence is appropriately examined. The removal of this right is also balanced by the retention of the right to appeal to the licensing authority. Again, access to judicial review is not affected by the Bill.

24. We conclude that in the context of community-led decision making for local alcohol policies and community participation in licensing decisions, the proposals in clauses 9, 10 and 13 do not breach s 27.

Conclusion

25. We conclude the Bill is not inconsistent with the Bill of Rights Act. This advice has been peer reviewed by Austin Powell, Senior Crown Counsel.

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Encl.

~~Noted / Approved / Not Approved~~

Hon David Parker
Attorney-General

20/11 /2022