

3 June 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill

Purpose

1. We have considered whether the Smokefree Environments and Regulated Products (Smoked Tobacco) 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. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23444/3.5). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with sections 19, 14 and 25(c). Our analysis is set out below.

The Bill

4. The Bill amends the Smokefree Environments and Regulated Products Act 1990 (the principal Act), and the Customs and Excise Act 2018.
5. The Smokefree Aotearoa 2025 Action Plan sets out several measures to achieve the Government's goal of reducing daily smoking prevalence to less than 5% across all population groups by 2025. Legislative change is required to achieve this smokefree goal and address the gaps remaining in New Zealand's comprehensive regulation of tobacco products.
6. The Bill amends the principal Act in order to:
 - a. significantly reduce retail availability by restricting sales of smoked tobacco products to retail outlets approved by the Director-General of Health,
 - b. restrict access to and availability of smoked tobacco products by amending the age limits for sale of smoked tobacco products (i.e. introducing a Smokefree Generation policy by prohibiting the sale of smoked tobacco products to anyone born after 1 January 2009), and
 - c. reduce the appeal and addictiveness of smoked tobacco products by extending the regulatory powers over their composition (e.g. reducing nicotine levels).

Consistency of the Bill with the Bill of Rights Act

Section 19 – freedom from discrimination

7. Section 19 (1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act).

8. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:
 - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under section 21 of the Human Rights Act; and if so,
 - b. does the distinction involve disadvantage to one or more classes of individuals?
9. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Age is a prohibited ground of discrimination under section 21 of the Human Rights Act, which is defined as any age commencing with the age of 16 years. Whether disadvantage arises is a factual determination¹.
10. New section 40 (A) of the Bill prevents the sale or delivery of smoked tobacco products to a person born on or after 1 January 2009. New section 40 (B) prevents the supply of a smoked tobacco product to a person born on or after 1 January 2009 in a public place.
11. The Bill distinguishes between those born on or after 1 January 2009 and those born before that date. We acknowledge that this will not be discriminatory at the date that the provisions come into effect, as the distinction will not impact those in the population aged 16 and over. However, the 1 January 2009 date will, in the future, draw a distinction on the basis of age which is prima facie discriminatory.
12. This distinction could be said to disadvantage individuals born after 1 January 2009, as they will never be able to purchase a smoked tobacco product in their lifetime, regardless of their age.

Can the limitation be considered reasonably justified?

13. A provision that is found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified under section 5 of that Act.
14. The section 5 inquiry may be approached as follows:²
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

Does the provision serve a sufficiently important objective?

15. The intent of the Smokefree Generation policy, as implemented through sections 40 (A) and (B) of the Bill is to prevent young people, and successive generations, from ever taking up smoking. Combined with the Bill's other measures, this policy is aimed at achieving a daily smoking prevalence of less than 5% for all population groups.

¹ See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123]

16. It is well established that smoking is highly addictive and has detrimental and long-term effects on physiological, psychological, and social wellbeing. Evidence provided by the Ministry of Health shows that smoking tobacco products kills one-half to two-thirds of people who use these products. Evidence also shows tobacco consumption disproportionately impacts people living in lower socioeconomic areas, disabled people, people with mental health needs, and Māori and Pacific peoples. The Smokefree Generation policy is aimed at reducing these harms and disparities. Reducing inequalities caused by smoking is an essential step towards meeting the Crown's obligations under Te Tiriti o Waitangi to achieve equitable health outcomes for Māori.
17. We consider that preventing young people and successive generations from taking up smoking, and therefore minimising the future harm caused by smoking, is a sufficiently important objective to justify a limitation on the right to freedom from discrimination.

Is the limit on the right rationally connected with the objective?

18. The establishment of a Smokefree Generation could be said to be rationally connected to the objective of preventing young people, and successive generations, from ever taking up smoking. The proposal would stop the legal supply of tobacco and related goods to anyone born after 1 January 2009.
19. The intent of the Bill in particular is to prevent the initiation of smoking. Research utilised by the Ministry of Health suggests 80 percent of people who smoke start by the age of 18, while 96.8 percent start before the age of 25.³ Individuals initiating smoking before the age of 25 are likely to be less informed about the health risks and addictiveness of smoking. Individuals who begin smoking at a young age are more likely to become addicted, progress to daily smoking, become heavier tobacco users as adults, and have difficulty quitting.⁴
20. This Bill will support reduced smoking prevalence by decreasing the likelihood of the initiation of smoking, which we consider is rationally connected to the objective of reducing harm caused by smoking.

Do the limits impair the rights or freedoms no more than is reasonably necessary for sufficient achievement of the objective?

21. Other measures that have the potential to reduce the harm caused by smoking, such as setting a new purchase age, were not considered as effective as those measures may only partially reduce social supply (from peers or family members) to young people, and will not sufficiently de-normalise smoking. The Regulatory Impact Statement identifies that in New Zealand social supply plays a much greater role than commercial supply in youth access to tobacco. Advice from the Ministry of Health indicates that a straight increase in the purchase age to 25 is unlikely to substantially prevent people younger than 25 from taking up smoking. The current legal purchase

³ Bonnie RJ, Stratton K, Kwan LY, editors. *Public health implications of raising the minimum age of legal access to tobacco products*. Washington (DC): National Academies Press; 2015. Available: <https://www.ncbi.nlm.nih.gov/books/NBK310412/> (accessed 2017 Jan. 25).

⁴ Taioli E, Wynder EL. *Effect of the age at which smoking begins on frequency of smoking in adulthood*. N Engl J Med. 1991;325(13):968–969 ; US Department of Health and Human Services. Preventing tobacco use among youth and young adults: a report of the Surgeon General, 2012. Available at: <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/#Full%20Report>.

age of 18 has not been effective in preventing most smoking initiation occurring between ages 13-18, mostly due to the issue of social supply.

22. A straight age increase would also retrospectively outlaw the legal purchase of tobacco by a cohort of young people who could previously purchase tobacco. As well as preventing the initiation of smoking, a key objective of the policy is to also not unfairly punish those who currently smoke.
23. We consider that the limit on the freedom from discrimination is no more than reasonably necessary to achieve the objective. The Bill helps prevent the initiation of smoking in young people without unfairly punishing those who currently smoke.

Is the limit in due proportion to the importance of the objective?

24. Considering proportionality requires weighing attainment of the objective against the impact of the limit on the right.
25. The potential benefits of decreasing tobacco use and preventing young people from becoming addicted to tobacco products are high. It is well established that smoking is harmful, highly addictive, and a major contributor to non-communicable diseases such as cardiovascular diseases, cancer, diabetes, and respiratory diseases. Transitioning to a smokefree society will have short-term benefits in preventing young people from starting to smoke and encouraging them to remain smokefree over the course of their lifetime. In the long-term it will reduce health inequities caused by tobacco consumption, which disproportionately impact people living in lower socioeconomic areas, disabled people, people with mental health needs, and Māori and Pacific peoples.
26. While modelling by the Ministry of Health of the impacts of the Smokefree Generation policy shows only relatively modest impacts within the first few years of implementation, the benefits would become quite substantive in subsequent years. If well enforced, a Smokefree Generation policy could halve smoking rates within 10 to 15 years of implementation. Given higher smoking rates and a younger population, the health gains per person would be five times larger for Māori than for non-Māori.
27. The Bill creates differential treatment between those born after and before 1 January 2009. Any age limit is inherently arbitrary, and the age cohorts where those who can and those who cannot be legally sold tobacco products are different by only one day. However, we consider that on balance the discrimination on the basis of age is justified, given the clear short and long-term public health benefits of reducing harm caused by smoking and decreasing inequities between different populations.

Section 14 – freedom of expression

28. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information⁵.
29. The Bill inserts a new section 100 (2A) which requires distributors of smoked tobacco products and general vape retailers to provide reporting information to the Director-General in compliance with regulations. Failure to do so is an offence.

⁵ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

30. New section 101 specifies record keeping requirements for any person who manufactures, imports, exports, buys, sells, or supplies a regulated product. New sections 101A (4) and (5) specify that an enforcement officer may require a person to provide a copy of the records kept under this section by notice in writing within 10 working days of receiving the notice. A failure to comply with these requirements is an offence.
31. Section 14 is engaged in both instances because the Crown is compelling people to provide information.
32. As outlined above, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of section 5 of that Act. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective⁶.
33. The immediate objective that section 101 serves is to facilitate the accurate record-keeping of products being regulated by the principal Act. This supports the wider objective of significantly reducing retail availability by restricting sales of smoked tobacco products to retail outlets approved by the Director-General. The objective of section 100 (2A) is to improve monitoring and oversight of all actors regulated by the Act. We consider these to be sufficiently important objectives.
34. The requirement to provide information is rationally connected to the objective of regulating the sale of regulated products. The regulatory scheme could not operate effectively without accurate information about the manufacture and trade of regulated products.
35. We consider that the limit on the right is no more than is reasonably necessary and proportionate to achieve the Bill's objective. The reporting requirements in section 100 (2A) are in line with reporting requirements which already exist for other actors regulated by the principal Act (for example, manufacturers and importers). The record keeping requirements in section 101 only include information related to regulated products that are being manufactured, imported, exported, bought, sold or supplied, and for a manufacturer, the constituents that the manufacturer uses or intends to use in the manufacture of each regulated product.
36. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under section 5 of the Bill of Rights Act.

Section 25 (c) – right to be presumed innocent

37. Section 25 (c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the Crown to prove an accused person's guilt beyond reasonable doubt.
38. The Bill contains a number of strict liability offences. These give rise to a prima facie issue of inconsistency with section 25 (c) because a strict liability offence may be proved by a finding that certain facts occurred without proof of mens rea. The accused is then required to prove (on the

⁶ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.

39. The Bill contains the following strict liability offences:
- a. sale of smoked tobacco products by someone other than an approved smoked tobacco retailer (new section 20G (2));
 - b. providing false or misleading information in an application for approval as a smoked tobacco retailer (new section 20H (2)) or specialist vape retailer (new section 20O (6));
 - c. providing false or misleading information in an application for approval of a smoked tobacco product intended for sale, manufacture, import or supply in New Zealand (new section 57B (8));
 - d. failure by a manufacturer/importer to conduct yearly testing of smoked tobacco products to ensure compliance with constituent limits or prohibitions as set out in regulations (new section 57F (4));
 - e. failure by a manufacturer/importer of a smoked tobacco product (new section 57G (6)) or notifiable product (new section 69B (7)) to conduct any additional testing required by the Director-General;
 - f. failure by a person who manufactures, imports, exports, buys, sells or supplies a regulated product to keep accurate records or to provide such records to an enforcement officer when requested (section 101 (6));
 - g. failure by a distributor of smoked tobacco products or a general vape retailer to report to the Director-General on their distribution and retail activities in accordance with regulations (new section 100 (2A)).
40. Strict liability offences may nevertheless be justifiable limits on rights under section 5 of the Bill of Rights Act. They have been considered more justifiable where:
- a. the offence is in the nature of a public welfare regulatory offence;
 - b. 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
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
41. The strict liability offences in the Bill operate as part of a scheme to regulate the tobacco products retail sector by only allowing limited numbers of retailers to sell approved products under strict conditions. The scheme therefore is of a public welfare nature, in that these measures will fulfil the purpose of the Bill, which is to improve public health by reducing the use of, and exposure to, smoked tobacco products. Achieving these outcomes will have massive health benefits to New Zealanders and reduce smoking related illnesses and deaths.
42. All of the strict liability offences in the Bill (with the exception of the offence in section 100 (2A)) provide the defendant with a defence of reasonable excuse (which must be proven by the defendant on a balance of probabilities). This defence is broader than the common law defence of total absence of fault.

43. In circumstances where a person is charged for providing false information in an application, failing to keep records, or failing to conduct required testing, it is likely that the defendant will be in a better position than the prosecution to provide a justification for their application containing false information or their failure to keep records or carry out testing.
44. Where a person is charged for selling or offering for sale at retail a smoked tobacco product where they are not an approved retailer, it is also likely that the defendant will be in a better position than the prosecution to provide a justification for illegally selling smoked tobacco products.
45. The new section 100 (2A) does not contain the defence of reasonable excuse. This however is consistent with the offences already set out in the principal Act for failure by manufacturers, importers and specialist vape retailers to provide annual reporting in accordance with regulations. Ensuring compliance with regular reporting reflects the importance of having full oversight of all market participants dealing in regulated products.
46. It is a general principle that strict liability offences are associated with penalties at the lower end of the scale. The majority of strict liability offences in the Bill contain low level penalties and none of them involve imprisonment.
47. The exceptions to the low level penalties are the penalties for:
 - a. sale or offer of sale at retail of smoked tobacco products by a person who is not an approved retailer (new section 20G (2)), which carries a maximum penalty of \$400,000; and
 - b. providing false or misleading information in an application for approval of a smoked tobacco product intended for sale, manufacture, import or supply in New Zealand (new section 57B (8)) which carries a maximum penalty of \$50,000.
48. The Bill will result in the tobacco product retail sector becoming highly regulated. The measures taken may increase the size of the illicit market. The Regulatory Impact Statement indicates that Customs advises that import of illicit smoked tobacco products has been growing and organised crime is now involved. New Zealand has, by comparison with most of the world, very high retail prices for legitimate tobacco products largely driven by a high rate of tobacco taxation. Any additional actions that will reduce the supply, availability, appeal and addictiveness of smoked tobacco products could add to the incentives to import, manufacture and sell illicit tobacco products.
49. The new offences and penalties in the Bill therefore need to reflect the highly regulated nature of the market post amendment, especially considering the anticipated rise in the illicit market.
50. Clause 20G will be the primary offence to prevent illicit sales of tobacco. Advice from the Ministry of Health indicates that this high penalty takes into account both the aggressive and law-stretching history of the tobacco industry and the risk of growing involvement in illicit tobacco sale by organised criminal groups. Although the maximum penalty is high, the intent is that penalties at the higher end would only be used for the most serious offending, for example, organised crime situations.
51. Currently the illicit market provides the same product that can otherwise be bought legally, but at a lower price. Introducing restrictions on supply and tighter regulations on the constituents of smoked tobacco products may result in a higher price being charged on the illicit market for those products that cannot be purchased legally. The potential for the price of illicit tobacco to increase also helps justify a high penalty as a deterrent to engaging in illicit activity. The maximum penalty is

also in step with offences currently in the principal Act relating to the sale of notifiable products (sections 60 (2), 65 (6) and 75 (4)).

52. The higher maximum penalty in new section 57B reflects the greater harm which could arise if an application for approval for a new smoked tobacco product is incorrect. False or misleading information about the content of a smoked tobacco product, particularly if it concerns the nicotine content or other harmful constituents, risks undermining the entire low-nicotine scheme, which aims to make an extremely harmful product less appealing and addictive and help people to quit. Incorrect information on an application could also result in a harmful product being allowed onto the market. This maximum penalty is consistent with the penalty for failure to provide similar information for notifiable products in section 63(2).
53. On balance we consider that the maximum penalties in new sections 20G and 57B do not make the relevant offences inconsistent with section 25 (c) of the Bill of Rights Act. In reaching that conclusion we have taken into account that:
 - a. a court retains the discretion to impose a lower penalty than the maximum described in the Bill;
 - b. an offender would be liable upon conviction to monetary penalties only, there is no custodial sentence;
 - c. the offences address significant potential harm which would have the effect of undermining the policy intent and health objectives introduced by the Bill.
54. We are satisfied that the strict liability offences set out above place a justifiable limit on the right to be presumed innocent until proven guilty.

Infringement offences

55. The Bill also contains four infringement offences:
 - a. New section 20 Q (3) of the Bill specifies that a general vape retailer who fails to notify the Director-General that they are selling a vaping product commits an infringement offence and is liable to an infringement fee of \$500 or a fine not exceeding \$5,000.
 - b. New section 20 R (3) specifies that a distributor of smoked tobacco products in New Zealand who fails to notify the Director-General that they are distributing a smoked tobacco product commits an infringement offence and is liable to an infringement fee of \$500 or a fine not exceeding \$5,000.
 - c. New section 43 (4) specifies that a person who fails to comply with regulations requiring point-of-sale prohibition information or warnings, commits an offence and is liable to an infringement fee of \$200 or a fine not exceeding \$2,000.
 - d. New section 44 (4) specifies that a person who fails to comply with the regulations governing information to be contained on their website, commits an offence and is liable to an infringement fee of \$200 or a fine not exceeding \$2,000.
56. The infringement offences are strict liability offences, and accordingly they prima facie limit section 25 (c) of the Bill of Rights Act.
57. Requiring general vape retailers and distributors of smoked tobacco products to notify the Director-General of the sale/distribution of vaping and tobacco products is rationally connected to the

important objectives of increasing the number of people who successfully stop smoking and supporting tamariki and young people to remain smokefree. Effective regulation of the sale of harmful tobacco products is not possible without the ability to track the sale and distribution of those products. As the offences seek to deter retailers from circumventing the requirements in the principal Act, we consider that they are rationally connected to the objectives of the Bill.

58. The infringement offences in sections 43(4) and 44(4) already exist in the principal Act. However, as the relevant sections are being replaced, and the provisions of those sections re-enacted, we consider it prudent to consider the provisions for consistency with the Bill of Rights Act.
59. Sections 43 and 44 require compliance with regulations which govern the information that can or must be provided by retailers of regulated products. A purpose of the principal Act is to regulate and control the marketing, advertising and promotion of regulated products in order to improve public health by discouraging smoking and vaping. The provisions in these sections are consistent with this purpose and we consider rationally connect to the objectives of the Bill.
60. The infringement fees in the Bill are consistent with the low fee levels expected of an infringement regime. They also all contain a defence of reasonable excuse.
61. We consider that, as the infringement offences in the Bill relate to public welfare regulatory matters and result only in a monetary penalty and not a criminal conviction, the limit on the right can be justified under section 5 of the Bill of Rights Act.

Conclusion

62. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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