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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on  
the Liquor Advertising (Television and Radio) Bill

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*Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990  
and Standing Order 261 of the Standing Orders of the  
House of Representatives*

1. I have considered the Liquor Advertising (Television and Radio) Bill (the “Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (the “Bill of Rights Act”). I have concluded that cl 5 of the Bill (advertising of liquor products) appears to be inconsistent with s 14 of the Bill of Rights Act, and does not appear – on the information provided in the Bill and the publicly available material I have considered – to be a justified limitation under s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 266, I draw this to the attention of the House of Representatives.

#### **Purpose and effect of the Bill**

2. The stated purpose of the Bill is to reduce the social approval of liquor use, particularly among young people, by imposing controls on marketing, advertising, or promotion of liquor products through broadcast media (cl 3). The Explanatory Note indicates that the Bill is more broadly concerned with addressing the role of aggressive promotion of alcohol in contributing to a widespread culture of binge drinking in New Zealand and, further, reducing the relative role of advertising as the primary source of information for users of alcohol. The Explanatory Note notes that it is apparent the problem of alcohol abuse is not specifically a ‘youth’ problem.
3. The Explanatory Note argues that the aggressive promotion of alcohol prevalent in New Zealand cannot help but exacerbate the problems of alcohol abuse. It also observes that the primary source of information for most people about alcohol and how to use it comes from alcohol advertising and that advertising in broadcast media is characterised by the association of alcohol brands with desired lifestyle images.
4. Clause 5 of the Bill provides that no person may broadcast, or arrange for any other person to broadcast, any liquor advertisement in New Zealand, except in the limited circumstances set out in cl 6. The scope of the prohibition of liquor advertising appears to be very wide. For instance, the definition of “liquor” is identical to the broad definition of “liquor” in s 2 of the Sale of Liquor Act 1989 and includes all fermented, distilled or spirituous liquor products which contain 1.15% or more alcohol. Further, “liquor advertisement” is defined as “any broadcasts used to encourage the use, or notify the availability or promote the sale and consumption, of any liquor product”.

#### **Section 14 of the Bill of Rights Act (Freedom of Expression)**

5. Clause 5 of the Bill restricts the ability of the liquor industry to advertise their products and the ability of consumers to receive that information. This clause therefore raises an issue of inconsistency with s 14 of the Bill of Rights Act which provides:

“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.”

6. The right to freedom of expression extends to all forms of communication which attempt to express an idea or meaning,<sup>1</sup> including commercial speech such as advertising.<sup>2</sup> Overseas case law suggests that not all forms of expression are equally deserving of protection and commercial expression does not reside at the core of the right.<sup>3</sup> Courts in similar jurisdictions to New Zealand have held that commercial expression is less important than political or artistic expression. Consequently, limitations on the right in this context are easier to justify.<sup>4</sup>

### **Justification under Section 5 of the Bill of Rights Act**

7. Where a Bill is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if the inconsistency is considered to be a reasonable limit which is justifiable under s 5 of that Act. The inquiry under this section is essentially two-fold: does the provision serve an important and significant objective; and is there a rational and proportionate connection between that objective and the provision?<sup>5</sup>

#### ***What is the significant and important objective?***

8. Clause 5 seeks to limit the exposure of persons of all ages to broadcast liquor advertising, with the aim of reducing social approval of liquor and reducing problems associated with liquor advertising such as the level of consumption of liquor products. The reduction of harm caused by high levels of alcohol consumption is a significant objective.

#### ***Whether there is a rational connection***

9. The Bill refers to increases in alcohol-related harm which have followed the decrease in the legal drinking age and to the substantial increase in advertising expenditure following the introduction of brand advertising into television and radio in 1992.
10. The Bill does not set out an evidential basis for the contention that a ban on liquor advertising will bring about a change in social approval of drinking liquor products or reduce the level of alcohol-related harm. Accordingly, and to the extent appropriate in assessing this Bill, I have identified some publicly available material concerning this point. For example, the Report of the Review Team on Liquor Advertising on Radio and Television (July

<sup>1</sup> *R v Keegstra* [1990] 3 SCR 697 (SCC).

<sup>2</sup> *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 (SCC).

<sup>3</sup> *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 (SCC); see on this point the dissenting judgment of La Forest J.

<sup>4</sup> Richard Claydon and Hugh Tomlinson *The Law of Human Rights* (Oxford University Press, Oxford, 2000), Vol.1, 15.171 – 15.176. An example is the European Court of Human Rights' decision in *Markt Intern Verlag GMBH and Klaus Beermann v Germany* (1989) 12 EHRR 161, para. 32.

<sup>5</sup> In assessing the Bill under s 5 of the Bill of Rights Act I have considered the guidelines provided in *Ministry of Transport (MOT) v Noort* [1992] 3 NZLR 260 and *R v Hansen* [2007] 3 NZLR 1 (SC).

1998) stated that “[a]dvertising may have some affect on alcohol use, but it is only one factor along with price, disposable income, and social factors”.<sup>6</sup>

11. Subsequently, the Steering Group for the Review of the Regulation of Alcohol Advertising concluded in its final report that “the evidence suggests a small but statistically significant association between the level of exposure to alcohol advertising and the level and patterns of alcohol consumption.”<sup>7</sup> However, the Steering Group also noted that research showed alcohol advertising is but one determinant of drinking behaviour.
12. Despite concluding that other factors also impact on the level of alcohol use, these reviews identify a sufficient connection between the level of exposure to alcohol advertising and the level and patterns of alcohol consumption. I therefore consider the measure satisfies the “rationality” aspect of this limb of the s 5 test.

*Whether there is a proportionate connection*

13. In considering whether the proposed limitation on liquor advertising is proportionate to its objectives, it is necessary to assess whether:
  - the limitation is a minimal impairment: that is, it impairs the right as little as reasonably possible while remaining effective in meeting its objective, and
  - the adverse effect on the right, and the importance of that right, is proportionate to the importance of the objective.
14. The principal issue is minimal impairment. If that requirement can be satisfied, and in light of the relatively limited value to be accorded to commercial speech and the importance of addressing alcohol-related harm, the second step is readily met.

*Minimal impairment*

15. There are a variety of approaches to regulation of broadcast alcohol advertising internationally, including:<sup>8</sup>
  - Complete bans on liquor advertising – including broadcast, print and billboard advertisements for all forms of alcohol.
  - Bans on broadcast advertising of all forms of alcohol.
  - Partial restrictions on broadcast liquor advertising. These restrictions generally cover certain forms of alcohol (most commonly beer) and specific times (for instance, prohibiting advertising other than after 9pm).
  - No restrictions on liquor advertising.

<sup>6</sup> Report of the Review Team on Liquor Advertising on Radio and Television, July 1998, p 15.

<sup>7</sup> Report of the Steering Group for the Review of the Regulation of Alcohol Advertising, March 2007, p 44.

<sup>8</sup> See, for instance, World Health Organization, *Global Status Report: Alcohol Policy* (2004), 59ff.

16. The current New Zealand approach is governed by the Code for Advertising Liquor of the Advertising Standards Authority. It is a voluntary self-regulatory system which partially restricts liquor advertising.<sup>9</sup> Amongst other things, liquor advertising may not be targeted or have a strong or evident appeal to minors, is limited to certain hours of the day and is restricted in length and number.
17. The question in respect of the proportionality of the Bill is therefore whether, in terms of its aim of reduction of harm caused by high levels of alcohol consumption, a comprehensive ban on broadcasting advertising (subject to the narrow exceptions set out in cl 6) is more effective than less restrictive measures.
18. Two recent reviews of literature conducted for the European Commission indicated respectively that an advertising ban would result in a substantial estimated reduction in alcohol-related harm and that evidence indicated that “consideration should be given to the prohibition of advertising of alcohol products on television and radio”.<sup>10</sup> However, other studies have concluded that a total ban on broadcast liquor advertising has no measurable effects on alcohol consumption.<sup>11</sup>
19. This, in turn, raises the question of the applicable evidential standard.
20. The regulation of advertising on grounds of public health and safety has been considered by the Supreme Court of Canada, albeit in respect of restrictions on tobacco advertising.
21. *RJR-MacDonald v Canada*<sup>12</sup> is the leading Canadian case regarding total advertising bans imposed for public health reasons. It concerned a challenge to the Tobacco Products Control Act (which prohibited all advertising of tobacco products) on freedom of expression grounds. In a 5:4 decision the Court upheld the challenge. Two of the majority (McLachlin J, with whom Sopinka J concurred) held that while even a small reduction in tobacco use may justify a properly proportioned limit on the right of free expression,<sup>13</sup> the total ban was unjustified because the government had adduced no evidence to show that less intrusive regulation would not be as effective in reducing tobacco consumption.<sup>14</sup>

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<sup>9</sup> Section 4(1)(e) Broadcasting Act 1989 establishes the responsibility of every broadcaster to make sure that its programmes and their presentation are consistent with any approved code of broadcasting practice applying to these programmes. The relevant code for the present advice is the Code for Advertising Liquor of the Advertising Standards Authority.

<sup>10</sup> See Peter Anderson and Ben Baumberg *Alcohol in Europe: A public health perspective*, June 2006, UK: Institute of Alcohol Studies (Health & Consumer Protection Directorate-General report for the European Commission), p 287; *The Impact of Alcohol Advertising: ELSA project report on the evidence to strengthen regulation to protect young people*, 2007, Utrecht (The Netherlands): National Foundation for Alcohol Prevention, p 50.

<sup>11</sup> *The Impact of Alcohol Advertising*, *ibid*, p 49.

<sup>12</sup> *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199.

<sup>13</sup> At [146].

<sup>14</sup> At [152], [168].

22. The *RJR-MacDonald* case stands for the following in terms of governments' obligations to justify rights breaches involving matters of social policy:
- The general approach to justification must be applied flexibly having regard to the factual and social context.<sup>15</sup>
  - The degree of deference accorded by courts to Parliament will vary according to the social context. While deference to Parliament's solution to difficult social problems is appropriate, the government must nevertheless demonstrate that the means by which it seeks to achieve its goals are reasonable and proportionate;<sup>16</sup>
  - It is not necessary to have direct evidence or scientific proof that the rights infringing measure is rationally connected to its objective;<sup>17</sup> and
  - It is not necessary to demonstrate that the least rights intruding measure has been adopted, but rather that right has been impaired as little as is reasonably possible. Provided the law falls within the range of reasonable alternatives it will not breach the right in question simply because it is possible to conceive an alternative which might be less intrusive.<sup>18</sup>
23. The methodology applied in *RJR Macdonald* was recently endorsed in *Canada v JTI-MacDonald*,<sup>19</sup> which concerned a partial ban on tobacco advertising. The Supreme Court unanimously held the law was a reasonable limit on freedom of expression. In essence, its judgment endorses that of McLachlin J in *RJR-MacDonald*.<sup>20</sup>

#### *Assessment*

24. The assessment of proportionality in this instance is not straightforward as:
- The restriction under the Bill is very broad in its effects;
  - The Bill does not prohibit print, billboard or point of sale advertising, which lessens the impact of the ban;
  - As noted above there is conflicting evidence as to whether broadcast advertising bans are more effective in reducing alcohol-related harm than narrower restrictions. It is unclear whether a restriction that targets advertising promoting alcohol as enhancing one's lifestyle would be less effective than the ban proposed; and

<sup>15</sup> At [132].

<sup>16</sup> At [129], [136].

<sup>17</sup> At [154]-[159].

<sup>18</sup> At [68]-[69], [160]. Note the caveat from McLachlin J that the law may breach the Charter if the government failed to explain why a significantly less intrusive and equally effective measure was not chosen.

<sup>19</sup> *Canada (Attorney-General) v JTI-MacDonald Corp* [2007] 2 SCR 610.

<sup>20</sup> With reference to *RJR-MacDonald*, the Court said while justification did not require scientifically precise proof, the near absence of any proof in the *RJR-MacDonald* case was fatal to the government's case – at [6].

- In social policy decision-making, particularly in relation to the prevention of serious threats to health, evidence cannot always be held to a standard of outright proof.
25. The question of proportionality in respect of cl 5 is finely balanced. On the one hand, given the loss of life, risk to safety and other substantial adverse effects of alcohol abuse, further reduction of such abuse would be of substantial social benefit. The various studies cited here indicate that alcohol abuse is complex to research and to regulate.
26. Conversely, prohibition of broadcast advertising is not without economic and social cost. There is limited, and conflicting evidence as to whether prohibition would have a significant additional positive effect. It has not been possible here to determine whether the proposed ban is or is likely to be more effective than restrictions that target particular content.
27. On the basis of the very limited information provided in the Bill itself and the limited evidential analysis which has been possible within the scope of this advice, I do not think it is possible to establish that the restriction in cl 5 is demonstrably proportionate in terms of s 5 of the Bill of Rights Act.

**Conclusion: Section 14**

28. I cannot conclude there is a proportionate connection between the objectives of cl 5 of the Bill and the limitation on the freedom of expression in s 14 of the Bill of Rights Act. The Bill therefore appears to be inconsistent with the rights and freedoms contained in that Act.



Hon Christopher Finlayson  
**Attorney-General**