

21 November 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Racing Industry Bill

Purpose

1. We have considered whether the Racing Industry 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 21819/4.2). 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:
 - a. s 21 (right to be free from unreasonable search and seizure);
 - b. s 19 (freedom from discrimination);
 - c. s 25(c) (right to be presumed innocent until proven guilty); and
 - d. s 14 (freedom of expression).
4. Our analysis is set out below.

The Bill

5. The purpose of the Bill is to revitalise the racing industry and minimise harm from gambling and will replace the Racing Act 2003.
6. The Bill makes key changes in the following areas:
 - a. governance of the racing industry;
 - b. property of racing clubs; and
 - c. betting.

Governance of the racing industry

7. The Bill devolves the current betting and race organising functions of the New Zealand Racing Board and:
 - a. creates TAB NZ as the sole betting provider for racing and sports, and
 - b. empowers the existing 3 racing codes to effectively govern their respective industries and networks of clubs and venues.

8. The Bill establishes the Racing Integrity Board as an entity independent from the racing codes, that is responsible for all integrity functions, and oversees an investigative arm and an adjudicative arm that operate independently of each other.
9. These changes are intended to provide the industry with independence from government, however the Bill includes the ability for the Minister for Racing to intervene if required.

Property of racing clubs

10. The Bill provides for a process whereby the racing codes can determine that a racing club is no longer racing. The racing code would then advise the Registrar of Incorporated Societies that the racing club should be dissolved. The Minister for Racing would have the power to recommend an Order in Council to transfer the assets from the racing club that is no longer racing to vest in the relevant racing code.

Betting

11. The Bill introduces an approval mechanism to enable consideration of new gambling products, which to date has required legislative change. TAB NZ will be able to seek agreement by an independent body to new betting rules, requiring that harm minimisation is prioritised in any application for a new betting rule.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Unreasonable Search and Seizure

12. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹

Clause 21(2) - Transfer of assets by Order in Council

13. Clause 21(2) provides for the assets of a racing club to vest in the racing code to which the club was registered following dissolution of that club.
14. While initially there was some uncertainty by the New Zealand courts, it now appears to have been clearly established that s 21 of the Bills of Rights Act does not provide a general protection for property rights on their own. Section 21 is grounded in privacy, and therefore expectations of privacy will need to be engaged for property rights to be protected by the section.²
15. The process for dissolution of a racing club by a racing code is done with notice and full knowledge of the racing club in question. Clause 21(2) poses no intrusion into a racing club's privacy in the transfer of assets and accordingly we do not consider s 21 of the Act to be engaged.

Clause 40 – Powers of inspector to enter premises

16. Clause 40 enables inspectors appointed by the chief executive of the Department of Internal Affairs, to enter any racecourse or premises of TAB NZ, and demand information

¹ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

² See *R v Williams* [2007] NZCA 52

or examine documents or things, for the purposes of ascertaining whether betting rules and licenses are being complied with.

17. Clause 40 constitutes search and seizure powers for the purposes of s 21 of the Bill of Rights Act. Ordinarily, 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 s 5 of the Bill of Rights Act. However, the Supreme Court has held that, logically, unreasonable search or seizure cannot be demonstrably justified with reference to s 5 of the Bill of Rights Act.³
18. In assessing whether the search and seizure powers in the Bill are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective. Overall, we consider cl 40) does not authorise unreasonable searches and seizures as per s 21 of the Bill of Rights Act. This is because—
 - a. the purpose of the inspector is to ascertain whether betting licenses and rules are being complied with. This is an important objective because there are real harms that come from unregulated gambling, and the Bill recognises those harms and aims to mitigate them;
 - b. the powers in cl 40 are rationally connected to the objective of preventing harm from gambling as betting rules and licenses need to be enforced in order for them to be effective;
 - c. inspections can only be done at reasonable times;
 - d. the powers of the inspector are limited to those directly related to betting matters for example, examining books, accounts and machines or equipment used for the purposes of racing betting or sports betting; and
 - e. the clause does not place any limits or effects on the privilege against self-incrimination.
19. We consider that the search powers under this Bill are therefore not unreasonable for the purpose of s 21 of the Bill of Rights Act.

Section 19 – Freedom from Discrimination

20. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the basis of age, commencing at the age of 16 years.⁴ While age limits of any kind are likely to involve a degree of arbitrariness, Parliament has chosen 16 as the starting point for discrimination on this basis.
21. The key question in assessing whether there is a limit on (breach of) the right to freedom from discrimination are:⁵
 - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act, and if so,

³ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

⁴ Section 19(1) Bill of Rights Act and s 21(1)(i) Human Rights Act 1993.

⁵ See, for example *McAlister v Air New Zealand* [2009] NZSC 78 [2010] 1 NZLR 153; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

- b. does the distinction involve disadvantage in one or more classes of individuals?
22. Clause 79(1) of the Bill makes it an offence for a person under 18 years old to make a bet, or for a person to make a bet on behalf of a person under 18 years old. This *prima facie* limits the right to freedom from discrimination on the basis of age in respect of 16 and 17 year-olds. Put another way, 16 and 17 year-olds are disadvantaged *vis-à-vis* those aged 18 and over because they are ineligible to make a bet.
23. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable under s 5 of that Act.
24. The s 5 inquiry may be approached as follows:⁶
- 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?
25. One of the main objectives of the Bill is to minimise harm from gambling. The Bill's age restrictions reflect the likely greater vulnerability of young people to problem gambling. Due to their earlier stages of mental development, young people may be more susceptible to addiction and more likely to engage in problem gambling. Age-based distinctions necessarily involve a degree of generalisation without regard for the maturity or other qualities of individuals in that age group. It is legitimate in these circumstances to use a 'bright line', imposing age restrictions which are rationally connected and proportionate to an important objective.
26. The exclusion of 16 and 17 year olds from gambling is rationally connected to the minimisation of harm from gambling as those people would not have the opportunity to incur harm through their inability to place bets.
27. Comparatively, the age restriction for pokie machines is 20 years old, and for lotto tickets there is no legal age limit. The nature of horse racing is that the speed of play is lower than for example a pokie machine because there is space between each race before making a bet. However, the results are only delayed until the end of the race, and then there is another race to bet on, which is more repetitive than for example lotto.
28. The speed of play, intensity, and repetition of the gambling in comparison to other forms of gambling and their age restrictions, is likely to justify the age limit of 18. We accept that such limit is no more than reasonably necessary and in due proportion to the objective of minimising harm form gambling.
29. For these reasons, we conclude that any limits to be free from discrimination imposed by the Bill are justified under s 5 of the Bill of Rights Act.

⁶ *Hansen v R* [2007] NZSC 7 at [123]

Section 25(c) – Right to be presumed innocent until proved guilty

30. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to the law. The right to be presumed innocent requires the prosecution to prove an accused person's guilt beyond reasonable doubt.
31. Clauses 79(2)(a) and 79(2)(b) of the Bill provide for strict liability offences if a member, officer, agent or employee of a racing club, or of TAB NZ, receives or permits to receive a bet by a person under 18 years, whether the bet is made by that person on their own behalf or on behalf of any other person. A person guilty for either offence is liable on conviction to a fine not exceeding \$5,000.
32. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence, or disprove a presumption, in order to avoid liability.
33. We consider that this limit to the right under s 25(c) of the Bill of Rights Act is justified in the circumstances. In reaching this conclusion we have taken into account the nature and context of the conduct being regulated, the ability of the defendants to exonerate themselves and the penalty levels.
 - a. Strict liability offences have been considered more justifiable where the offender (here a person found to receive or permit to receive a bet by a person under the age of 18 years old) is in the best position to justify their apparent failure to comply with the law rather than requiring the Crown to prove the opposite.
 - b. Clause 79(3) provides for a defence where the defendant had reasonable grounds to believe that the person to whom the charge relates was 18 years old or over. Clause 79(4) further adds that reasonable grounds can include and are not limited to seeing an evidence of age document indicating that the person was 18 years old or over.
 - c. The penalty for the offence is at the lower end of the scale and proportionate to the importance of the Bill's objective.

Section 14 – Freedom of Expression

34. Various provisions of the Bill require the provision of information. These include a statement of intent and business plan which must be provided by each racing code, the Racing Integrity Board and TAB NZ to the Minister prior to the start of a racing year (clauses 9, 37-38 and 49-50 respectively).
35. These provisions engage the right to freedom of expression. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive and impart information. The right has been interpreted as including the right not to be compelled to say certain things or provide certain information.
36. The racing codes, the Racing Integrity Board and TAB NZ all have statutory functions set out in the Bill which form part of the overall objective of the Bill. The provision of operational information in specified contexts is necessary to ensure effective oversight of these bodies and ensure compliance with these functions.

37. The Bill contains a number of other clauses which *prima facie* limit the right of freedom of expression, such as requirements to: publish and make copies of rules available; prepare and provide budgets, financial statement and annual reports; provide specified requested information if an offshore betting operator. These provisions are necessary for the efficient and effective operation of the racing industry and clearly justified.
38. The provisions identified in paragraph 34 and 37 are also proportionate and go no further than reasonably necessary to achieve their purpose. The instance where information can be requested is limited to those circumstances prescribed in the relevant clauses.
39. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

40. 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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