

30 April 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Bill

Purpose

1. We have considered whether the Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) 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 21815/9.0). We will provide you with further advice if the final version of the Bill 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 s 21 (right to be free from unreasonable search and seizure), s 14 (right to freedom of expression) and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. The Bill amends the Smoke-free Environments Act 1990 to create an infringement offence of smoking in a motor vehicle carrying a child occupant (under 18 years of age) and sets out regulations around the penalties and enforcement of this offence. The Bill includes minor amendments to the Summary Proceedings Act 1957 to allow for the enforcement of the offence.

Consistency of the Bill with the Bill of Rights Act

Section 21 – unreasonable search or seizure

5. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹
6. Section 20E of the Bill empowers a constable to stop a vehicle if they suspect that someone within the vehicle is smoking and that the vehicle contains a child occupant. The constable may require the driver to remain stopped for as long as

¹ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

is reasonably necessary to make enquiries, and may require both the person smoking and any person who appears to be under 18 years old to provide the constable with their full name, full address, date of birth, occupation and telephone number. We consider that the application of these powers constitutes a search under s 21 of the Bill of Rights Act.

7. 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 that Act. However, the Supreme Court has held that an unreasonable search logically cannot be reasonably justified and therefore the inquiry does not need to be undertaken.² Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure was reasonable. In assessing whether the extension of the search and seizure powers in the Bill are reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.³
8. The purpose of the search is to enable the detection and confirmation of the offence in the Bill, which is ultimately intended to protect children and young people from the harms associated with second hand smoke. The search is of the occupants of a motor vehicle on a road and extends only to the stopping of that vehicle while limited information is collected about the occupants. We consider that the search involves a minimal intrusion into privacy and is for a reasonable purpose connected to the objective of the Bill.
9. On this basis, we regard searches under the Bill as being reasonable, and thus not in conflict with s 21 of the Bill of Rights Act.

Section 14 – Right to freedom of expression

10. 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 and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.⁴
11. The powers given to constables under s 20E to compel information *prima facie* limit the right to freedom of expression. However, under s 5 of the Bill of Rights Act, a limit of a right may be justifiable where the limit serves an important objective, and where the limits on the right are rationally connected to achieving that objective and proportional to its importance.
12. We consider the objective of the Bill, to protect children and young people from the harm associated with second-hand smoke, to be sufficiently important to justify some limitations on the right to freedom of expression. The information able to be compelled by constables is rationally connected to this objective, as it is connected to evidence collection and enabling the prosecution of the offence under the Bill.

² Above n1 at [162].

³ At [172].

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

13. On balance, we consider that the limits on the right to freedom of expression within the Bill are proportionate to the importance of the Bill's objective and justifiable under s 5 of the Bill of Rights Act.
14. While, as stated, we do consider the limits on s 14 within the Bill to be justified under s 5 of the Bill of Rights Act, we also consider that the impact of these limits could be lessened. As noted above, a constable may require both the person smoking and any person who appears to be under 18 years old within the vehicle stopped to provide the constable with their full name, full address, date of birth, occupation and telephone number. For the person smoking, these details are consistent with the requirements of the infringement and reminder notices set out within the Smoke-free Environments Regulations 2017, and are therefore necessary for the prosecution of the offence. However, no such notices are required to be issued to the persons under 18 years old, and we understand from Police that they are unlikely to require all details from these persons in practice (in particular, their occupation and telephone number). There is therefore some ambiguity as to whether it is in fact necessary to obtain the full range of information from persons under 18 years old. Restricting the information collection requirements to ensure that only the information strictly necessary for the purposes of the Bill is compelled from under 18-year olds would lessen the impact of the Bill on the right to freedom of expression.

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

15. 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.
16. The Bill provides for the offence of smoking in a motor vehicle containing a child occupant to be a strict liability offence processed through the serving of an infringement notice. 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.
17. We consider that this limit to the right under s 25(c) of the Bill of Rights Act is justified in the circumstances. Encouraging compliance, and efficiently penalising non-compliance, by way of a strict liability offence is rationally connected to the objectives of the Act. Strict liability offences have been considered more justifiable where, as is the case here:
 - a. the offence is in the nature of a public welfare regulatory offence and does not result in a criminal conviction, which limits its impact;
 - b. the offender (here a person found smoking in a vehicle with a child occupant) 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, here an infringement fee of \$50 or a fine imposed by the court of not more than \$100, is at the lowest end of the scale and proportionate to the importance of the Bill's objective.

18. On this basis we regard the limit on s 25(c) to be justifiable under s 5 of the Bill of Rights Act.

Conclusion

19. 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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