New Zealand Law Society
Te Kāhui Ture o Aotearoa

Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill

24/08/2022

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1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill (the **Bill**).

1.2 The Law Society offers the following reflections on the proposal to make it unlawful to supply tobacco to those born on or after 1 January 2009 and thereby limit smoked tobacco products to those born prior to this date. We also suggest an improvement to clarify that a number of the offences included in the Bill are intended to have strict liability.

1.3 This submission has been prepared with input from the Law Society's Criminal Law Committee and Human Rights & Privacy Committee.[1]

1.4 The Law Society does not wish to be heard.

2 Consistency with rights in the New Zealand Bill of Rights Act 1990

2.1 The Ministry of Justice (**the Ministry**) in its "consistency advice" to the Attorney-General considered that the Bill implicated the right against discrimination on the grounds of age – protected by section 19 of the New Zealand Bill of Rights Act 1990 (**NZBORA**).[2] It went on to conclude that the right was subjected to no more than a reasonable limit (in terms of section 5 of NZBORA) and so there was overall consistency.

2.2 The possible discrimination identified by the Ministry was the age "cut-off" – a person born on 31 December 2008 will be able to lawfully smoke tobacco products for the remainder of their life whereas persons born on or after 1 January 2009 (those who are currently approximately 13 years old or under) will not. The Ministry concluded this arbitrariness did not detract from the reasonableness of the measure, which was justified by reason of the health risks of tobacco.

2.3 The Law Society does not disagree with that advice. Age limits are often used to denote thresholds at which persons become entitled to a certain status or privilege – such as driver licences, eligibility to vote and purchase alcohol, and pension eligibility. While age may be a proxy for maturity or competence, sometimes it is simply intrinsic to a legislative regime, as with pensions.

2.4 This Bill is in the latter category. Upon the eventual death of the last person born before 1 January 2009, all persons will be in the unable to purchase tobacco to smoke. Until then, the Bill if enacted will preserve the liberty of those presently living to continue to use tobacco, so long as they were born before that date.

2.5 While the Ministry's advice focused on potential age discrimination in this scheme, the larger point is that the Bill is essentially designed to end the practice of smoking tobacco

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1 More information regarding these committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2 *Consistency with the New Zealand Bill of Rights Act 1990: Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill* (3 June 2022).

products for all, over time. It ought to be examined not just from the perspective of its discriminatory impact but its impact on individual liberty for all.

2.6 No right in NZBORA speaks to this directly. The NZBORA includes no general right to "liberty", nor does it affirm (as the European Convention on Human Rights (**ECHR**) does in its article 8) a right to a "private life", which in the United Kingdom has been held to embrace a right (subject to the possibilities of justified limits) to engage in personal habits such as smoking.[3]

2.7 The question whether a "right to smoke" is *indirectly* protected by the NZBORA has arisen in two New Zealand cases. The significance of any finding that such a right is implicit in NZBORA would be that the Bill would need to be scrutinised to see if its abrogation of the right is demonstrably justified as being no more than "reasonable". But in fact neither of the cases goes so far as to hold that smoking is a right affirmed in NZBORA.

2.8 In the first case, a ban on smoking in prisons (introduced as a prison policy) was held to be unlawful because it was inconsistent with the Smoke Free Environments Act 1990 which, the High Court held, envisaged a continuing liberty for prisoners to smoke.[4] The applicant in that case had also sought a declaration from the High Court that such anti-smoking regulations were unlawfully discriminatory and did not give necessary respect for the inherent dignity of the person protected by ss 19 and 23(5) of the NZBORA. However, having found that the smoking ban was not lawfully enacted, the Court declined to make any finding on the applicant's NZBORA arguments.[5] So this case is not authority for the proposition that the NZBORA indirectly protects a right to smoke.

2.9 The second case arose out of a smoke free policy operated by Waitematā District Health Board (WDHB) under which persons compulsorily detained pursuant to orders under mental health legislation were unable to smoke during their confinement.[6] That case involved an argument that the smokefree policy subjected the appellant to nicotine withdrawal symptoms which were inhumane, deprived him of dignity, and therefore breached section 23(5) of the NZBORA (which applies to those deprived of liberty).[7] The Supreme Court found that the considerations that underpinned the WDHB's decision to adopt a smoke-free policy, and the support it provided to help patients quit smoking and manage nicotine withdrawal, meant that the policy was consistent with section 23(5).[8]

2.10 An alternative claim was that WDHB's smokefree policy breached the right to a "private" life. That claim was essentially based on the wording of article 8 of ECHR, coupled with the recognition (in section 28 of NZBORA) that there may well be rights and freedoms operating in New Zealand that are not explicitly affirmed in NZBORA and which are not to be regarded as abrogated by reason of their non-inclusion. This claim failed. The Supreme Court observed that while section 28 recognises that rights and freedoms may exist in New Zealand despite

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3 See, for example *McCann v The State Hospitals Board for Scotland* [2017] UKSC 31.

4 *Taylor v Attorney-General* [2013] NZHC 1659. Subsequently the law was changed to provide by statute that there was to be no smoking in prisons. There was no suggestion that this was inconsistent with any right in the Bill of Rights.

5 At [37]-[38].

6 *B v Waitemata District Health Board* [2017] NZSC 88.

7 The "liberty" to which s 23(5) is physical liberty, for the context is all about persons who are detained.

8 At [87].

not being mentioned in the NZBORA, this did not elevate non-included rights to the status of affirmed rights. In particular, non-included rights did not demand the standard for limitation that section 5 of NZBORA sets for included rights (that limits be "prescribed by law" , "reasonable" and "demonstrably justified in a free and democratic society").

2.11 The Supreme Court left open the question of whether there was, nonetheless, a right to smoke tobacco outside of the NZBORA, but noted that even if there were such a right the restrictions in the case resulted from being detained only for short period for legitimate mental health reasons and would have been no more than a justified limitation under section 5.[9]

2.12 In summary, the New Zealand Courts have not held there to be a "right to smoke" protected by the NZBORA.

3 Consistency with a general liberty in the common law

3.1 As noted, the Supreme Court recognised the possibility that a right to engage in smoking was an aspect of a general liberty, not affirmed in NZBORA but operating in New Zealand nonetheless. It observed that article 9(1) of the International Covenant on Civil and Political Rights (to which New Zealand is party) affirms a right to "liberty and security". That, it said, could be seen as analogous to article 8 of the ECHR, including a liberty to engage in even harmful activities. But even on that assumption, the Court suggested it may have been no more than a reasonable limit in the circumstances of that case (a brief period of inability to smoke while detained in the institution).

3.2 This Bill raises different considerations in that it does not simply "limit" the liberty to purchase smoking tobacco but ultimately will abrogate that liberty altogether.

3.3 The question whether this is justified is one of public policy, weighing the proven health risks of smoking and their associated costs against the individual liberty to smoke. The Law Society does not express any view on this, but notes the factors the Ministry considered when finding the Bill to be consistent with section 19 are also relevant when considering whether the Bill is a justified abrogation of the liberty of future generations to smoke.

4 Offence provisions

4.1 The Bill proposes several new offence provisions, including offences targeted towards enforcing the restrictions on sale or supply of tobacco products and the requirements for testing and regulation of constituent parts. Some of these offences appear to be intended to be strict liability offences (that is, offences for which a prosecuting agency is not required to prove the presence of a mental element to the offending such as intent or knowledge). These can be identified by the offences which require a lack of 'reasonable excuse', and which do not require that the offender acts 'knowingly or recklessly'.

4.2 Historically, Courts have taken the starting point that a mental element is required for any offending, unless there is sufficient reason to the contrary.[10] Strict liability is more readily

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9 At [113] and [135].

10 Simon France (ed), *Adams on Criminal Law — Offences and Defences* (online looseleaf ed, Thomson Reuters) at CA20.13.

accepted where the offence has a public welfare or regulatory focus.[11] Though it is not always a consistent indicator, the presence of a significant maximum penalty has also been taken by Courts to support the view that a mental element is required. The Law Society notes that some of the offences included in the Bill (particularly the proposed s 20G) have large maximum fines. This point was also addressed in the Ministry's NZBORA consistency advice.

4.3 The Legislation Guidelines 2021 note that "[i]f legislation is silent as to the mental element or the defences available, the courts will generally infer a mental element, but that can create uncertainty. This is undesirable because a person is entitled to know before engaging in conduct whether it is prohibited and, if so, in what circumstances."[12] In the Law Society's view, it follows that a person should also be entitled to know whether they can be liable for an offence without requiring some kind of 'guilty mind'.

4.4 In recent times, Parliament has inserted into regulatory-focussed legislation provisions to provide further guidance as to the burden of proof that applies to strict liability offences. This can be seen, for example, in section 65AA of the Civil Aviation Act 1990, which notes that for the strict liability offences in that Act, the burden of proving that the defendant had a reasonable excuse for the offending lies on the defendant.

4.5 The Law Society suggests that a similar provision could be added into the Bill to ensure that the intent for these offences to be ones of strict liability is clearly reflected.

5 Drafting issues

5.1 The Select Committee may wish to consider the drafting of clause 103, which currently refers to section 79 of the Principal Act. However, clause 38 of the Bill repeals section 79, the result being that clause 103(1) refers to the continuance of a committee established under a repealed provision.[13] For ease of reference, and to avoid this conflict, it may be preferable for clause 103(1) to be redrafted or removed.

Caroline Silk
Vice-President

11 *Civil Aviation Department v MacKenzie* [1983] NZLR 78.

12 Legislation Design and Advisory Committee, *Legislation Guidelines* (2021 Edition), page 125.

13 The substance of section 79 (importantly, section 79(1)) will therefore not be visible when reading the current version of the Act.