

## **Alcohol advertising and the New Zealand Bill of Rights Act: Basic principles to assist the Alcohol Advertising Steering Group**

### **The right to freedom of expression**

Section 14 of the New Zealand Bill of Rights Act 1990:

*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.*

### **Alcohol advertising**

- Advertising is a form of expression which involves imparting information. Legislation or practices that regulate the content of any publication, broadcast, display or promotion will involve some level of interference with the right to freedom of expression.
- In addition to regulation of content of advertising, restrictions on the time, placement and manner of advertising are restrictions on the right to freedom of expression.

### **Freedom of commercial expression**

- Internationally, “freedom of commercial expression” – that is freedom of expression in the course of carrying out commercial activities has received some recognition. Includes advertising, but has also come up in other areas, such as electoral campaign contributions.
- However, recognised as less important than political and artistic expression, which means that limitations on the right are easier to justify.

### **Limitations on the right to freedom of expression**

- Bill of Rights: rights can be subject to such reasonable limits prescribed by law as can be justified in a free and democratic society.
- Certain categories of expression (including advertising) are more likely to be subject to reasonable limits than others (such as political and social speech – which relate to participation in democratic processes).
- In some cases, it is recognised that risks to public safety may allow complete prohibitions on advertising (i.e. tobacco advertising). May involve situations where it would be illegal for a person to act on information directed at them (i.e. such as encouraging a minor to purchase alcohol from licensed premises).

- In New Zealand, there are existing limits on alcohol advertising which are accepted as reasonable limitations on the right to freedom of expression, being:
  - Limits on content;
  - Limits on timing;
  - Limits on placement.

### **Harm-based restrictions**

- Harm needs to be based on the form of expression – i.e. harm should be linked to the advertising. Where this relates to use of a harmful product, needs to take into account what effect the advertising may have.
- In some cases, the advertising may be more likely to mislead or deceive than inform members of the public. Tobacco was recognised as being potentially lethal when used exactly as intended by the manufacturer, diminishing the effect of health warnings and supporting prohibition.
- Questions in considering restrictions include:
  - What is the harmful activity?
  - What is the harm arising from that activity?
  - What link is there between the activity (advertising) and harm caused?
  - What restrictions are proposed to limit that harm? Review range of options: prohibition; restrictions of content, timing and placement; inclusion of additional content.
  - Are the proposed restrictions proportionate -balancing the right to freedom of expression and the prevention of harm?

## **APPENDIX ONE: BILL OF RIGHTS ADVICE OF SALE OF LIQUOR (YOUTH ALCOHOL HARM REDUCTION) BILL**

10 May 2005

Attorney-General

### **LEGAL ADVICE**

#### **CONSISTENCY WITH NEW ZEALAND BILL OF RIGHTS ACT 1990:**

##### **Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill**

1. We have considered whether the Sale of Liquor (Youth Alcohol Harm Reduction) Bill (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). The Bill is a Member's Bill in the name of Hon Matt Robson, and was drawn from the ballot on Wednesday, 4 May 2005. We understand that it may receive its First Reading on the next Member's Day which is scheduled for Wednesday, 11 May 2005.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with sections 14 and 19(1) of the Bill of Rights Act. Our analysis of these issues is set out below.
3. The Bill proposes to amend the Sale of Liquor Act 1989 to:
  - raise the drinking age to 20 years of age;
  - remove the ability for someone other than parents or guardians to supply those under the legal age with alcohol; and
  - designate stand alone bottle stores as areas that minors cannot access without a parent or guardian.

Further, the Bill proposes to insert a new part to the Sale of Liquor Act restricting broadcasting of liquor advertising programmes to after 10:00pm on any day, and give the Broadcasting Standards Authority "sole jurisdiction" over all matters that may arise in relation to any liquor advertising programme.

4. We have consulted the Crown Law Office in the preparation of this advice, and it agrees with the conclusions we have reached.

### **ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT**

#### **SECTION 14: RIGHT TO FREEDOM OF EXPRESSION**

5. Clause 10 of the Bill introduces a new Part 8A into the principal Act. The new Part would prevent the broadcasting of any liquor advertising programme before 10:00pm on any day and impose a fine of up to \$100,000 on anyone who breached the restriction on advertising. In other words, liquor advertising would only be allowed between the hours of 10:00pm and 12:00am. [1](#)
6. The Bill imports the definition of 'advertising programme' from section 2 of the Broadcasting Act 1989. An advertising programme includes a programme or part

- of a programme that is primarily intended to promote a product or service for commercial advantage and for which payment is made (in money or otherwise). [2](#) It also includes a sponsorship credit that is intended to promote a product or service. [3](#) New Part 8A would therefore apply to regular television programmes that are sponsored by the liquor industry as well as regular liquor advertising. However, the Bill would not affect advertisements or promotional messages designed to reduce the harm caused by alcohol (e.g. drink-driving advertisements).
7. As Clause 10 of the Bill restricts the ability of the liquor industry to advertise their product (and the ability of consumers to receive that information), we have considered whether Clause 10 is inconsistent with section 14 of the Bill of Rights Act.
  8. Under section 14 of the Bill of Rights Act, every person has the right to freedom of expression:

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.
  9. The right to freedom of expression in section 14 of the Bill of Rights Act extends to all forms of communication that attempt to express an idea or meaning, [4](#) and extends to commercial speech (such as advertising). [5](#) Overseas case law suggests that not all forms of expression are equally deserving of the protection and commercial expression that is considered to reside within the periphery of the right. [6](#) The Courts have held the view that commercial expression is of less importance than political or artistic expression and consequently limitations on the right in this context are easier to justify. [7](#)
  10. We consider that a limit on a right can be justified in terms of section 5 of the Bill of Rights Act where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective.

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

11. The purpose of this provision appears to be to limit the exposure of young persons to alcohol advertising, thereby reducing their consumption of alcohol. We consider that this is a sufficiently important and significant objective for the purposes of this advice.

#### **Is the restriction a proportionate response?**

12. The Bill significantly changes the way in which alcohol advertising is regulated. Currently the Advertising Standards Authority's Code for Advertising Liquor [8](#) governs the way in which, the manner in which, and the extent to which alcohol may be advertised. The most significant change to alcohol advertising is that the Bill reduces the period in which liquor advertising is permissible from nine and a half hours down to just two hours (new section 184C(1)).
13. Currently, Principle 4 of the Code requires liquor advertisements not to be shown between 6:00am and 8:30 pm. It also requires broadcasters to take care to avoid the impression that liquor promotion is dominating the viewing or listening period

when broadcasting liquor advertisements. The associated guideline [9](#) states that television liquor advertising shall not exceed six minutes per hour, and there shall be no more than two advertisements for liquor in a single commercial break. These principles already provide for a reasonable limitation on the right to freedom of expression, thereby raising the question as to whether the further changes are disproportionate.

14. We consider that the new restrictions on advertising of alcohol in this Bill are reasonable because they extend only to broadcasting, and do not extend to other forms of liquor advertising and sponsorship. This would allow the liquor industry to continue to advertise through a number of other media such as newspapers, billboards, and flyers, as well as allowing consumers to access that information.
15. We consider that, on balance, the proposed amendment appears to be consistent with the Bill of Rights Act. In reaching this conclusion we have taken into account the objective of the Bill as well as the appropriate standard of protection to provide to commercial expression under section 14 of the Bill of Rights Act.

#### **SECTION 19: RIGHT TO BE FREE FROM DISCRIMINATION**

16. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include age, which means any age commencing with the age of 16 years.
17. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:
  - i. Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
  - ii. Does the distinction involve disadvantage to one or more classes of individuals?
18. If these questions are answered in the affirmative, we consider that the legislation gives rise to a prima facie issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act. We consider that a limit on a right can be justified in terms of section 5 of the Bill of Rights Act where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective. [10](#)

*Clause 4 (Sale and supply of liquor to minors), Clause 5 (Exemptions in respect of other parts of licensed premises), Clause 6 (Purchasing liquor for minors), and Clause 7 (Purchasing liquor by minors)*

19. The Bill proposes raising the legal drinking age from 18 years to 20 years of age by amending sections 155, 157, 160, and 162 of the Sale of Liquor Act. [11](#) This proposal draws a distinction between 18 and 19 year olds, and those over 20 years of age. [12](#) The effect of this distinction is that 18 and 19 year olds will no longer be able to purchase alcohol, a product which is currently legally available to them. [13](#) Therefore, the proposed amendment gives rise to a prima facie issue of age discrimination under section 19(1) of the Bill of Rights Act.

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

20. The Explanatory Note to the Bill focuses on decreasing alcohol related harm for young people. Specifically, it appears the objectives behind the amendment to increase the legal drinking age from 18 to 20 years old are to:
- reduce the ability for minors (under 18 year olds) to access alcohol (i.e: to prevent peers and siblings (likely to be 18 and 19 year olds) from purchasing alcohol for minors);
  - reduce disorderly behaviour incidents of young people; and
  - reduce the occurrence of traffic related incidents in which alcohol is a factor.
21. The Explanatory Note sets out arguments for raising the legal drinking age to 20 years of age, including reference to the findings of the *Young People and Alcohol: Some Statistics to 2002 on Possible Effects of Lowering the Drinking Age* (Ministry of Justice, 2004 Update). It is worth noting that this report concluded that the statistics show a mixed picture of the possible impact from lowering the drinking age in 1999 and that:
- there is robust evidence that, while the number of young people drinking alcohol may not be increasing, those who do drink appear to be drinking more frequently and consume higher volumes of alcohol (for 14 – 15 year olds, 16 – 17 year olds, and 18 – 19 year olds); and
  - while the change in legislation appears to have had a detrimental effect on young people’s drinking behaviour, for many of the indicators, the changes appear to be a continuation of trends established before the law was changed. In addition, improvements in law enforcement practices may have influenced the findings.
- We also note that other areas, more difficult to measure, such as the short and long term effects of youth drinking may influence whether the proposed amendments are justifiable.
22. The objectives have been assessed within this context, and we consider that reducing alcohol related harm for all people, especially young people, is an important and significant objective.

### **Is the restriction a proportionate response?**

#### Access to alcohol for minors

23. The *Young People and Alcohol* report observes an increase in alcohol-related offending by minors against the Sale of Liquor Act (from 834 incidents in 1994 to 2597 in 2002). In addition, it notes that many Police districts felt that it was easier for those under 18 to access alcohol than before the Act lowered the drinking age, and that often these young people were accessing alcohol through older friends or siblings.
24. The Sale of Liquor Act contains an offence (section 160) to punish parties who purchase alcohol for minors. While increasing the legal drinking age may prevent 18 and 19 year olds from purchasing alcohol for their younger peers and siblings, the problem remains that people are purchasing alcohol for minors. As noted

above, the number of young people drinking is not increasing, therefore it seems that the problem of adults purchasing alcohol for minors pre-dates the original law change to lower the drinking age.

25. In addition, international studies of the effects of a minimum legal drinking age observe that the laws prohibiting the sale and provision of alcohol to minors are not well enforced, [14](#) and suggest that this is an ongoing problem, regardless of where the minimum legal drinking age is set.
26. There is insufficient information available to the Ministry at this time to ascertain whether raising the legal drinking age will best achieve this objective; arguably, mechanisms to assist the Police to better enforce the existing law may also be beneficial.

#### Disorderly behaviour incidents

27. The Explanatory Note states that Police have had to deal with rising numbers of drunk and disorderly teenagers since the drinking age was lowered in 1999. The Young People and Alcohol report finds that there has been an increase in the apprehension of minors (14 – 17 year olds) for disorderly behaviour, and convictions of 18 and 19 year olds continued to increase after the law change but had levelled off in 2002. Both of these trends reflect an increase over the same period for people of all ages for disorderly behaviour offences. Better law enforcement practices by the Police may have influenced these increases (eg: enforcing liquor bans etc).
28. Therefore, it appears that while the occurrence of underage minors' drinking continues to be problematic, it is difficult to assess whether 18 and 19 year olds are causing more problems than other legal drinkers 20 years of age and over. There is insufficient information available to the Ministry at this time to assess if 18 and 19 year olds pose more of a problem than other legal drinkers (20 years of age and over) or suffer more alcohol related harm, and, therefore, whether the proposed amendment is a proportionate response to this problem.

#### Teenage drivers and alcohol-related offending

29. The Young People and Alcohol report observes, in relation to teenage drivers and alcohol-related offending that:

Teenage drivers between the ages of 14 – 17 years, and 18 and 19 years prosecuted for driving with excess breath or blood alcohol showed an increasing trend. In each of the years after the law change the number of such prosecutions for 18 or 19 year olds increased, and at 2546 in 2002 was higher than for any year since 1993.

Both the number and percentage of 15-19 year old drivers involved in crashes who had alcohol recorded as a factor that contributed to the crash decreased between 1993 and 1999. Following the law change, the numbers and percentages continued to decrease in 2000, but increased slightly in 2001 and 2002. However, the 2002 figures were still lower than the 1993 figures.

30. In addition, studies in the United States have found that there is evidence that lowering the legal drinking age was associated with an increase in traffic crashes and traffic deaths among youths. [15](#) Further, two cases from the United States in 1998 and 2000 found that setting a minimum legal drinking age in such a way as to improve highway safety, as based on empirical evidence that the law saved lives, was not unconstitutional (i.e: unreasonable age discrimination). [16](#)
31. Despite the percentage of crashes in which alcohol is recorded as a factor still being below the 1993 level, the indication in the Young People and Alcohol report of the increasing number of teenage drivers involved in crashes which had alcohol recorded as a factor since 2000 is of concern. Again, there is insufficient information available to the Ministry at this time to assess if 18 and 19 year olds pose more of a risk in traffic offending than other legal drinkers (20 years of age and over) and, therefore, whether the proposed amendment is a proportionate response to this problem. However, given the seriousness of the traffic related incidents and the risk and harm to not only to those drinking, but to other drivers, it is arguable that increasing the age limit may be a proportionate response to this problem.

#### **Role of the Parliament and Complex Social Policy Issues**

32. The setting of a minimum legal drinking age, is a complex social policy issue that requires the careful assessment of many factors, including the consideration of the mixed picture of the findings from both domestic and international studies into the possible outcomes of lowering the minimum legal drinking age.
33. In many jurisdictions, including Canada and the United Kingdom, [17](#) Courts have determined that a degree of deference to Parliament may be appropriate where the law involves complex social issues “in which reasonable legislators could disagree while still respecting the ... right”. [18](#) Of particular note are situations where the legislative choices include a law is designed to protect a vulnerable group, or where the law is premised on complex social-science evidence.
34. In our view, the difficult, political judgements inherent in setting social policy in complex areas suggest that Parliament should, in some circumstances, be allowed a degree of flexibility in such areas. This view is also supported by judgments of the Privy Council and the New Zealand Court of Appeal. [19](#)
35. We note also the “deference” approach found throughout Canadian case law is persuasive, notably in *M v H* [1999] 2 SCR 3. The Court considered that the legislature’s burden under the Charter:  
“...will [sometimes] involve demonstrating why the legislature had to make certain policy choices and why it considered these choices to be reasonable in the circumstances. These policy choices may be of the type that the legislature is in a better position than the court to make, as in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research.” [20](#)
36. Justice Iacobucci (who, with Cory J, wrote the main majority judgment) concurred with Bastarache J that “an examination of context is essential in determining whether deference is appropriate.” [21](#) In *M v H* a majority of the

Canadian Supreme Court also reiterated that “[t]he notion of judicial deference to legislative choices should not ... be used to completely immunize certain kinds of legislative decisions from the Charter scrutiny”. [22](#)

37. The Canadian Supreme Court [23](#) has considered the issue of age in the context of establishing thresholds that determine eligibility for particular entitlements. Although the Court in this case was considering whether a particular age could be used to determine eligibility to a particular social assistance programme, the Court made some observations that are of relevance. McLachlin CJ observed that in some circumstances using age as a proxy may be justified on the grounds that:
- "Perfect correspondence between a benefit programme and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate [the right to be free from discrimination]...As Iacobucci J noted in Law [24](#) we should not demand "that legislation must always correspond perfectly with social reality in order to comply with [the right to be free from discrimination]".
38. In the context of setting an appropriate minimum legal drinking age, we note that the research in New Zealand has resulted in a mixed picture about the possible impact of lowering the minimum legal drinking age and other factors, such as improvements in law enforcement, may have influenced findings. However, as noted by the Explanatory Note and the Young People and Alcohol report, some negative social trends have continued upwards, including an increase in traffic crashes in which alcohol is a factor. In our view, therefore, this indicates that some deference to the policy objectives of Parliament when it is legislating in this area may be appropriate.

#### **Conclusion: section 19(1) Bill of Rights Act**

39. We consider that the Bill, by increasing the legal drinking age from 18 to 20 years old gives rise to a prima facie issue of discrimination on the ground of age. We have concluded that the arguments as to whether these provisions are justified are very finely balanced. However, after consideration of the context in which these issues arise and having regard to the degree of deference appropriately allowed to Parliament in matters of complex social policy, we have concluded that, although the Bill contains discriminatory aspects, it does not introduce discrimination that is so unreasonable as to be considered “unjustified” in terms of section 5 of the Bill of Rights Act.

#### **CONCLUSION**

40. We consider that the Bill, by restricting the hours in which broadcasting liquor advertising programmes may occur, gives rise to an issue of prima facie inconsistency with section 14 of the Bill of Rights Act. We have concluded that this proposed amendment is a justifiable restriction under section 5 of the Bill of Rights Act to the right to freedom of expression as affirmed by section 14 of the Bill of Rights Act.
41. We consider that the Bill, by increasing the legal drinking age from 18 to 20 years old gives rise to a prima facie issue of discrimination on the ground of age. However, after consideration of the context in which these issues arise and having

regard to the degree of deference appropriately allowed to Parliament in matters of complex social policy, we have concluded that, although the Bill contains discriminatory aspects, it does not introduce discrimination that is so unreasonable as to be considered “unjustified” in terms of section 5 of the Bill of Rights Act.

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CC Minister of Justice  
Associate Minister of  
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#### Footnotes

1. We have considered whether New Part 8A, which requires matters about liquor advertising to be considered only by the Broadcasting Standards Authority (rather than the Advertising Authority), raises issues of inconsistency with section 14 also. However, to the extent that such issues might arise, we consider that the transfer of jurisdiction does not of itself give rise to unreasonable limits on the right to freedom of expression as the Broadcasting Standards Authority is required to apply the Bill of Rights Act in its determination of complaints under existing broadcasting codes. See *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1.
2. Section 2(a)(i) and (ii) of the Broadcasting Act.
3. Section 2(b)(i) and (ii) of the Broadcasting Act
4. *R v Keegstra* [1990] 3 SCR 697,729,826.

5. *Irwin Toy Ltd v A-G (Quebec)* (1989) 58 DLR (4th) 577 (SCC).
6. *RJR-MacDonald Ltd v Attorney General of Canada* (1995) 127 DLR (4th) 1; see on this point the dissenting judgment of La Forest J.
7. Richard Claydon & Hugh Tomlinson *The Law of Human Rights* (Oxford University Press, Oxford, 2000), Vol.1, 15.171 – 15.176
8. (September 2003). NB: The Authority is an incorporated body established by media and advertising representatives to help industry regulate advertising standards. The powers of the Authority are limited and may only require an advertiser to withdraw an advertisement if the complaint is upheld. See [www.asa.co.nz](http://www.asa.co.nz)
9. (2 December 2004)
10. In applying section 5, the Ministry of Justice has regarded to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.
11. These amendments will not affect the employment opportunities for young people as the Bill does not propose to amend section 161 which covers the employment of minors. Therefore, 18 and 19 year olds will be able to serve alcohol despite not being able to consume it.
12. The proposed amendment will continue to prevent 16 and 17 year olds from purchasing and consuming alcohol. For the purposes of this advice the issue as to whether continuing the restriction on the legal drinking age for 16 and 17 year olds constitutes a justified restriction on the right to be free from discrimination has not been revisited.
13. These amendments will also affect the ability for adults to provide alcohol to minors unless the adult is a parent or guardian. This goes further than the current Sale of Liquor Act (refer clause 6, purchasing liquor for minors).
14. See for example Wagenaar, A.C, and Wolfson, M: *Deterring sales and provision of alcohol to Minors: A study of enforcement in 295 counties in four states.* (US) Public Health Reports 110(4): 419-427, 1995.
15. See for example Wagenaar, A.C: *A. Minimum drinking age and alcohol availability to youth: Issues and research needs.* In: Hilton, M.E., and Bloss, G., eds. *Economics and the Prevention of Alcohol-Related Problems.* National Institute on Alcohol Abuse and, Alcoholism Research Monograph No. 25. NIH Pub. No. 93-3513. Bethesda, MD: the Institute, 1993. pp. 175-200
16. See *Manuel vs State of Louisiana*, No.95-CA-2189, Supreme Court of Louisiana, 2 July 1996; and *State of Louisiana v Ferris*, No.99-KA-2329, Supreme Court of Louisiana, 16 May 2000
17. CANADA: *M v H* [1999] 2 SCR 3; *Law v Canada (Minister of Employment and Immigration)* 170 DLR (4th) 1; and *Gosselin v Attorney-General of Quebec; Attorney-General of Ontario et al* 221 DLR (4th) 257; UNITED KINGDOM: *R v DPP Ex p Kebeline* [2002] 2 AC 366 (UK); *R v Lambert* [2001] 2 WLR 211 (UK); *R (on the application of Pretty) v DPP* [2001] UKHL 61 (UK).

18. Profession Peter Hogg, Constitutional Law of Canada (looseleaf) (1999-Rel. 1), 35.11(b)
19. Matadeen & Anor v Pointu & Ors [1998] WLR 18, 26 where the Privy Council noted: “The reasons for not treating people uniformly often involve ... questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves.” In Quilter v Attorney-General [1998] 1 NZLR 523, 527 Gault J noted that “Justification for differences will frequently be found in social policy resting on community values.” Justices Keith and Thomas also accepted that changes to the law will need to be gradual and incremental, with some leeway for Parliament.
20. M v H [1999] 2 SCR 3, para 79
21. M v H [1999] 2 SCR 3, para 80
22. M v H [1999] 2 SCR 3, para 78 referring to Vriend v Alberta [1998] 1 SCR 493, per Cory J at para 54
23. Gosselin v Attorney-General of Quebec; Attorney-General of Ontario et al 221 DLR (4th) 257, at 294 per McLachlin CJC
24. Law v Canada (Minister of Employment and Immigration) 170 DLR (4th) 1