



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Smoke-free Environments (Removing Tobacco Displays) Amendment Bill

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 whether the Smoke-free Environments (Removing Tobacco Displays) 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'). I have concluded that the Bill appears to limit the right to freedom of expression as affirmed by s 14 of the Bill of Rights Act. The limitation is not justified under s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 261, I draw this to the attention of the House of Representatives.

The Bill

2. The Bill would amend the Smoke-free Environments Act 1990 ('the Act') to ban the display of tobacco products and smoking accessories at places where they are offered for sale.
3. The Bill repeals ss 23A and 23B of the Act and replaces them with new ss 23A, 23AB and 23B banning the visible storage or display of tobacco products.
4. New s 23A provides that tobacco products cannot be visible from inside or outside of the retail outlet.
5. New s 23AB provides that smoking accessories cannot be visible from inside or outside of the retail outlet. There is an exception for smoking accessories that have a common use beyond association with tobacco use. Smoking accessories are defined in the Act to mean "...any article or substance that is used in conjunction with smoking, including cigarette papers, pipe cleaners, cigarette lighters, lighter fuel and ashtrays; and includes the packaging, carton, wrapping, or other container in which smoking accessories are customarily sold at retail."
6. New s 23B clarifies how a tobacco product or smoking accessory is visible for the purposes of new ss 23A and 23AB. The prohibition on the display of tobacco products and smoking accessories includes their packaging being visible or their being visible for a short period of time while the product is being selected by the retailer for sale to a customer. This means that storage devices will have to be so sited or constructed that only the retailer may view the items stored within them. It also appears that the Bill may prohibit the viewing of tobacco products and smoking accessories before purchase by a consumer.

Section 14 of the Bill of Rights Act (freedom of expression)

7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression. This includes the freedom to seek, receive and impart information and opinions of any kind in any form. The right extends to all forms of communication including advertising,¹ and the display of products.²
8. As the prohibition of displays provided for in the Bill limits the right to freedom of expression, it needs to be justified in terms of s 5 of the Bill of Rights Act.

¹ *RJR MacDonald Ltd v Canada* [1995] 3 SCR 199 (SCC).

² *R v Mader's Tobacco Store Ltd*. 2010 NSPC 52.

Is the limit justified in a free and democratic society?

9. 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 in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court decision of *Hansen v R*, the s 5 inquiry may be approached as follows:³
- a) does the objective serve a purpose 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?

Is the objective sufficiently important?

10. The first limb of the s 5 inquiry requires that an objective must be sufficiently important to limit the right to freedom of expression. Objectives that are discordant with the principles integral to a free and democratic society should not gain s 5 protection.⁴
11. The purpose of the Bill appears to be to reduce tobacco use, and the associated harm that is consequent upon smoking tobacco. The Explanatory Note to the Bill states that the main rationale is to protect children and young people from being influenced by tobacco imagery and becoming users of tobacco products. For the purposes of this report, I consider these objectives to be significant and important.

Is there a rational connection with the objective?

12. The prohibition of displays of tobacco products and smoking accessories could be said to be rationally connected to the objective of reducing the rate of smoking and its associated harm. Reduced advertising of a product may lead to reduced consumption of that product.
13. The Supreme Court of Canada considered legislation prohibiting the advertising of cigarettes, and concluded that the legislation was rationally connected to the objective of preventing people from being persuaded to smoke even in the absence of evidence of the link between advertising and smoking.⁵

³ The proportionality test under s 5 of the Bill of Rights Act, as applied in *Hansen v R* [2007] NZSC 7 [123], draws on the test articulated by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103, *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 and *R v Chaulk* [1990] 3 SCR 1303. See for example, *Hansen*, at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J. Noting that the Supreme Court in *Brooker v Police* [2007] 3 NZLR 91 and the Court of Appeal in *R v Morse* [2010] 2 NZLR 625 use a less structured approach to consider the justified limit on a right.

⁴ *R v Oakes* *ibid*, 139-9; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at [140]-[141].

⁵ In *RJR MacDonald Ltd*, above n 1.

14. The same Court later said that effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable.⁶
15. While there may not be conclusive evidence available to show that banning the displays of all tobacco products and smoking accessories will stop people from smoking, following the reasoning of Canada's Supreme Court, that does not mean there is no rational connection between that measure and that objective.
16. For the purposes of this report, I consider the means proposed to be rationally connected with the objective.

Is the impairment on the right greater than reasonably necessary?

17. Parliament is entitled to appropriate latitude to achieve its objectives.⁷ The issue here is whether the means are minimally impairing of the right, and whether the means proposed are carefully tailored to the objective.⁸
18. The proposed ban on displays of smoking accessories, as they are defined in the Act, impairs the right of freedom of expression more than is reasonably necessary to achieve the objective.
19. The proposed ban appears to capture items which could not be said to encourage smoking or cause harm but that do not fall within the exception in new s 23AB for items that have a "common use beyond association with tobacco use".
20. For example, smoking accessories is defined in the Act in terms broad enough to include empty cigar boxes or old ash trays or pipes that may be purchased by collectors for their antique value. The display and sale of such items may no longer be for the purpose of smoking tobacco, but the items could not be said to have "common use beyond association with tobacco use" as provided for in the exception to the prohibition.
21. Smoking accessories include antique or collectors' items at one end of the spectrum, but also items such as ashtrays which may be purchased for their decorative or novelty value. The display of such items would appear to be integral to their purchase. Banning their display would restrict peoples' ability to sell and purchase such items, but may not reduce smoking rates.
22. This restriction on the display of these items also extends to when a retailer is selecting an item for a customer. This too seems to be beyond what is reasonable.
23. I consider that the nature of the restrictions is more than what is reasonably necessary to achieve the objective.

Is the limit in due proportion to the importance of the objective?

24. Considering proportionality requires weighing attainment of the objective against the impact of the limit of the right. The potential benefits of decreasing tobacco use

⁶ *Canada v JTI-MacDonald* [2007] 2 SCR 610 at [41].

⁷ *Hansen*, above n 1, at [126] per Tipping J.

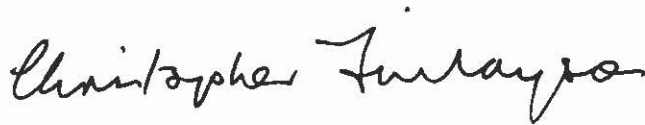
⁸ *Canada v JTI-MacDonald* referred to above at n 6, at [42]-[45].

and discouraging young people from becoming addicted to it are high. On the other hand, a number of the deleterious effects on the right arguably fall at the low end of the spectrum of freedom of expression. When commercial expression is used for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.⁹

25. However, the scope of the proposed ban is over-broad and limits the right to freedom of expression in relation to the display of certain items without appearing to have a corresponding benefit of furthering the Bill's objective. The limit on the right is therefore not proportionate to the intended objective.

Conclusion

26. For these reasons, I have concluded that the proposed prohibition of displays appears to limit s 14 of the Bill of Rights Act and that this is not justified under s 5 of that Act.



Hon Christopher Finlayson
Attorney-General

21 September 2010.

⁹ *Canada v JTI-MacDonald Corp.*, above n 7, at [47].