

# New Zealand Law Society

## SUBMISSION ON THE ALCOHOL REFORM BILL

### Introduction and summary

1. The New Zealand Law Society (Society) welcomes the opportunity to comment on the Alcohol Reform Bill (Bill).
2. The Society does not express any view on the underlying policy issues which the Bill is designed to address but raises some matters which it believes will improve the certainty, effectiveness and workability of the Bill. The Society considers that it is possible to achieve the chosen objectives in a way that is more consistent with human rights, the New Zealand Bill of Rights Act 1990 (NZBORA) and the rule of law.
3. In summary, the Society submits on the following issues, which raise concerns about the Bill's consistency with NZBORA:
  - **The power to arrest for an infringement offence:** the Society submits that if a breach of the liquor ban is made an infringement offence, it should not attract a power of arrest.
  - **The power to demand particulars in an alcohol ban area:** the Society submits that greater restrictions should be placed on constables before they are able to demand particulars about individuals.
  - **Reverse onus provisions:** the Society submits that these provisions should be deleted from the Bill.
  - **Disqualification of some people from licensing committees and licensing trusts:** the Society submits that the limitations on membership should be less restrictive and dealt with instead by conflicts of interest provisions.
  - **The restriction on judicial review of a decision to remove a licensing trustee:** the Society submits that this restriction should be deleted from the Bill.
  - **The Bill's differential treatment on the basis of age:** the Society submits that the rights issues arising from these provisions should be carefully considered by the Select Committee.

4. The rights and freedoms protected by NZBORA are not inviolable. Section 5 of NZBORA allows rights and freedoms protected by NZBORA to be infringed by reasonable limits that can be demonstrably justified in a free and democratic society. For the discrimination under section 19 to be justified under section 5, the discrimination must:
- (a) be in pursuit of an important and legitimate objective;
  - (b) be rationally connected to that objective;
  - (c) be as minimal as possible while still achieving that objective; and
  - (d) be in proportion to that objective (in addition to being as minimal as possible while still achieving that objective).
5. The Society encourages the Select Committee to take the least restrictive means to achieving the Bill's chosen objectives. The Society would also encourage the Select Committee to address in its report on the Bill human rights and rule of law issues raised by submitters.

#### **Power to arrest for infringement offence**

6. The Bill proposes to amend the Local Government Act 2002 to change the breach of an alcohol ban from a summary offence with a penalty of \$20,000, to an infringement offence with the power of arrest.<sup>1</sup>
7. The Cabinet Paper on the Bill (5 October 2010) (Cabinet Paper) recognises that there are no current infringement offences that also carry a power of arrest.<sup>2</sup> The Society submits that setting such a precedent deserves full consideration.
8. The Cabinet Paper justifies the decision to change the offence to an infringement offence and yet retain the power of arrest, in the following ways:<sup>3</sup>
- (a) It would allow Police to take enforcement action on the spot and to remain in public during peak hours.
  - (b) There would be a significant reduction in paperwork for Police staff, enabling them to return from back office to frontline duties more quickly.
  - (c) The power of arrest is critical for managing high-risk situations and preventing escalation of alcohol-related offending in liquor ban areas.
  - (d) It would allow the Police to remove people from liquor ban areas when necessary, while reducing inflow into the court system by around 9,000 cases per annum, which would bring savings to the Police and Courts.

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<sup>1</sup> Local Government Act 2002, s 239; Alcohol Reform Bill, clause 406.

<sup>2</sup> Cabinet paper, Alcohol Law Reform, paragraph 322.

<sup>3</sup> Cabinet paper, paragraph 320.

9. However, as discussed in the Attorney-General's section 7 report, the power to arrest for an infringement offence creates a prima facie inconsistency with section 22 of the NZBORA, which provides that "*Everyone has the right not to be arbitrarily arrested or detained*".
10. The purpose of the power of arrest is to bring the suspect before the court through the criminal process, and to prevent defendants absconding.
11. An infringement offence attracts an automatic fine and is not prosecuted unless the defendant requests a hearing or the prosecution seeks leave to lay an information.<sup>4</sup> Infringement offences do not attract a conviction, nor result in a term of imprisonment.<sup>5</sup> An infringement offence that carries a power of arrest means that a person can be arrested for an offence that they will never receive a term of imprisonment for. Therefore, the purpose of arrest is not relevant to infringement offences, meaning that the power of arrest is without purpose and is arbitrary.
12. Further, infringement offences are intended to address minor misconduct. Infringement offences are intended to provide an efficient mechanism by which Police can deal administratively with minor breaches of the law.<sup>6</sup> They are intended to avoid the time and effort involved in prosecution, which is generally seen as disproportionate when the offences are of comparatively minor concern to the general public. Further, they are only intended to apply to strict or absolute liability offences.<sup>7</sup> The Law Commission in its Report, "Alcohol in our Lives: Curbing the Harm" (27 April 2010) (Report), describes an infringement offence as "too small a matter to warrant the use of coercive power"<sup>8</sup> and that "the power of arrest should be maintained for seriously objectionable behaviour".<sup>9</sup>
13. Although the Police regard the power of arrest as important in the policing of liquor bans for managing high-risk situations, the Society submits that this will not always be the case. Merely possessing or consuming alcohol in a liquor ban area does not automatically lead to the conclusion that it is a high-risk situation. The power of arrest should not lightly be used to detain people whose behaviour merely has the potential to escalate. When alcohol-related offending does escalate and public disorder issues arise, there exist several other current offences that enable the Police to arrest people to address these situations. These include

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<sup>4</sup> Summary Proceedings Act 1957, ss 21(6)-(8) and 21(1).

<sup>5</sup> Guidelines for New Infringement Schemes, Ministry of Justice.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Law Commission Report, "Alcohol in our Lives: Curbing the Harm" (27 April 2010), paragraph 21.38.

<sup>9</sup> Law Commission Report, paragraph 23.18.

powers to arrest for breach of the peace,<sup>10</sup> offensive and disorderly behaviour,<sup>11</sup> fighting in public,<sup>12</sup> and care and protection of intoxicated people.<sup>13</sup> The Law Commission considered that there are “ample existing powers of arrest where behaviour is objectionable”, and the Society agrees.<sup>14</sup>

14. Finally, the Law Commission recommended an increased use of infringement notices to address the concern that the current Sale of Liquor Act is seldom enforced.<sup>15</sup> However, the Society notes that breach of a liquor ban was not one of the offences that the Commission recommended become an infringement offence. Although under the current Sale of Liquor Act, breach of a liquor ban is accompanied by the power of arrest,<sup>16</sup> the Law Commission expressly stated that if the offence were made an infringement offence it should not attract a power of arrest.<sup>17</sup> Again, the Society agrees with the Law Commission's recommendations.

#### **Power to demand particulars in an alcohol ban area**

15. The Bill would insert new section 245A into the Local Government Act 2002, which would give constables the following power:<sup>18</sup>

A constable who believes on reasonable grounds that a person is committing or has committed an infringement offence may direct the person to give the constable -

- (a) his or her name or address; and
- (b) the name and address and whereabouts of any other person connected in any way with the alleged offence.

16. This provision is equivalent to an existing power in section 178 of the Local Government Act. The existing section 178 already permits enforcement officers to direct that a person suspected of committing or who has committed an offence under the Local Government Act give the name and address and whereabouts of any other person connected in any way with the alleged offence. Section 238 of the Local Government Act provides that a person who fails to comply with both the Bill's new provision and the existing power in section 178 commits an offence and is liable on summary conviction to a fine of up to \$5,000.

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<sup>10</sup> Crimes Act 1961, s 42(2).

<sup>11</sup> Summary Offences Act 1981, ss3-5A, 39.

<sup>12</sup> Sections 7 and 39 Summary Offences Act 1981, ss 7, 39.

<sup>13</sup> Policing Act 2008, s36.

<sup>14</sup> Law Commission Report, paragraph 21.37.

<sup>15</sup> Law Commission Report, paragraph 20.36.

<sup>16</sup> Local Government Act 2002, s169.

<sup>17</sup> Law Commission Report, paragraph 21.38.

<sup>18</sup> Alcohol Reform Bill, clause 408.

17. The repetition of this power in the Local Government Act raises the question of whether section 245A is required at all. Section 245A is specific to infringement offences, but these are already covered under the existing provision in the Local Government Act.
18. The Attorney-General's section 7 report raises concerns about section 245A's apparent inconsistency with the right to silence and the right to be free from unreasonable search and seizure (NZBORA ss 13, 21). The right to silence under NZBORA (s 23) only arises once a person has been arrested. The Society agrees with the Attorney-General's assessment that issues relating to freedom of expression also arise from section 245A.

### *Freedom of expression*

19. Section 14 of NZBORA provides 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.
20. The right to freedom of expression encompasses the right not to express an opinion or information, so section 245A's power of a constable to compel expression raises an inconsistency with this right.
21. The next issue is whether the prima facie limit on freedom of expression can be said to be a justified limitation terms of section 5. The proposed section 245A presumably has the purpose of increasing the efficiency with which minor infringement offences are dealt with. The inquiry is therefore whether this objective is implemented in a rational and proportionate manner that impairs the right to freedom of expression as little as possible.
22. If the State has a legitimate interest in information which can only be obtained from an individual, especially for a purpose which benefits the wider community, the right to provide information can be justifiably limited.<sup>19</sup> However, the Society submits that it is not the case that information about a person who is connected with an offence can only be obtained under such a provision. It would be more consistent with individuals' rights for a law enforcement official to be required to reasonably suspect that a person has committed an offence before they can obtain personal information about them.
23. Further, the Society submits that the provision creates a risk that being required to name someone who is involved in the alleged offence effectively incriminates that named person, without their ability to defend these allegations. In addition, while personal information given

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<sup>19</sup> Butler and Butler, *The New Zealand Bill of Rights Act, 2005*, paragraph 13.27.3.

by third parties about a suspect voluntarily does not raise concerns under NZBORA,<sup>20</sup> the threat of criminal sanction that accompanies the provision raises the risk that false accusations could be made.

24. The Society submits that a less rights-infringing approach would be to require that a constable also reasonably suspects other people to be involved in the offence before they ask for personal information about another person.

### **Reverse onus provisions**

25. Clauses 260(3) and 404 of the Bill also raise concerns about their compatibility with the presumption of innocence protected by section 25(c) of NZBORA. The Attorney-General raised this issue in his Report to Parliament under section 7 of NZBORA, concluding that clauses 260(3) and 404 of the Bill are not justified limitations on section 25(c) of NZBORA.

26. The relevant provisions are:

**Clause 260(3):**

“In any proceedings for an offence against any of the provisions of sections 222 to 228, 230, 231, 238, and 239, the onus of proving that any person was at the time of the alleged offence entitled to have alcohol sold or supplied to him or her, or to consume or procure it or have it in his or her possession on the licensed premises, or to be on the licensed premises or any particular part of the licensed premises, is on the person alleging the fact.”

**Clause 404:** new section 169A

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“(2) This subsection applies to a substance in respect of which an offence against section 239A is alleged to have been committed if the substance was in a container at the time the offence is alleged to have been committed, and—

- (a) the container was a labelled trade container; or
- (b) the container was not a labelled trade container but appeared to contain alcohol, and when it was opened the substance smelled like alcohol; or
- (c) the defendant has at any time made to a constable an admission to the effect that the substance was alcohol.

- (3) If, in any proceedings for an offence against a bylaw made under section 147, it is proved that subsection (2) applies to the substance in respect of which the offence is alleged to have been committed, the substance must be presumed to be alcohol unless the defendant proves that it was not.”

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<sup>20</sup> Butler and Butler, paragraph 18.11.5.

27. Both provisions transfer the legal onus to prove certain facts from the prosecution onto the accused. The accused must prove that an element of the offence did not exist. Rishworth et al considers that reversing the onus so that the accused faces a “persuasive burden” must generally be regarded as prima facie inconsistent with the presumption of innocence.<sup>21</sup> The wording in both these clauses indicates that the accused will have the burden of proving the elements beyond reasonable doubt, thereby constituting a persuasive burden, rather than merely an evidential burden, which would likely be upheld as a reasonable limit on the right.
28. The reverse onus provisions, including clauses 260(3) and 404, were not assessed specifically in the Law Commission's recommendations in its Report. The Cabinet Paper also did not provide any justification for the reverse onus provisions, and did not include them in its concerns regarding human rights.

*Clause 260(3)*

29. Clause 260(3) of the Bill states that, for the offences under sections 222 to 228, 230, 231, 238 and 239, the accused bears the onus of proving that a person was entitled to have alcohol sold or supplied to them, or to consume or procure it, or to have it in their possession on the licensed premises, or to be on the licensed premises. The offences specified in clause 260(3) include:
- (a) the sale or supply of alcohol to any person under the buying age by either a licensee, manager, or other person (clause 222);
  - (b) the supply of alcohol to minors (clause 224);
  - (c) the employment of a minor in any restricted area on a licensed premises while that area is open for sale of alcohol (clause 224);
  - (d) permitting minors to be in restricted or supervised areas by licensee or manager (clause 228);
  - (e) the sale or supply of alcohol to any person by a licensee or manager of any licensed premises outside of licensing hours (clause 230);
  - (f) the sale or supply of alcohol to an intoxicated person by a licensee, manager, or other person (clause 231); and
  - (g) permitting a person to be on licensed premises outside of licensing hours in contravention of s 238 by a manager or licensee (clause 239).

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<sup>21</sup> Paul Rishworth et al, *The New Zealand Bill of Rights*, 2003, pp 678-679. An persuasive burden requires the defendant to disprove an element of the offence beyond reasonable doubt, while an evidential burden merely requires that the

30. The offences largely require the accused to prove age; however, the concern is that it is not their own age they must prove. The accused is likely to be a licensee, manager, or employee in these offences, and must prove the age of a third party customer or minor.
31. The policy behind clause 260(3) is both to decrease unentitled consumption and to increase vigilance by licensees as to who is entitled to alcohol, so as to increase safe and responsible sale, supply and consumption of alcohol. The Law Commission in its Report did recommend stricter provisions around this issue, lest it become too easy for suppliers to escape liability. Reduction in time and cost during proceedings against the defendant is another underlying reason for the provision. It is seen as being more appropriate and efficient for the defendant to disprove the fact of non-entitlement.
32. A requirement for an accused to prove their own age is justifiable on the basis that they have particular knowledge of that fact. However, requiring an accused to prove the entitlement of another person, when they are not in the position to know whether that person is entitled to alcohol, has no rational basis. The means (reversing the onus and forcing the defendant to prove entitlement of another person) is not rationally connected to the objective of reducing the duration and costs of prosecution.
33. The provision also raises difficulties as to how it will work on a practical level. The provision presumes, for example, that a licensee has sold liquor to a person younger than the purchase age, unless the licensee proves otherwise. It might require a licensee to obtain affidavits from the purchaser giving evidence of their age, or requiring the purchaser to appear in court as a witness, in order to prove this. The Society considers this to be difficult in practice.
34. The Society agrees with and endorses the Attorney-General's conclusion that the reverse onus contained in clause 260(3) is not a justified limit on the right to be presumed innocent. It should be deleted from the Bill.

#### *Clause 404*

35. Clause 404 of the Bill amends the Local Government Act by inserting section 169A. Section 169A states that, for certain offences, where a container is labelled a trade container, or appeared to contain alcohol, or the defendant admitted to a constable that it contained alcohol, the accused must prove that the substance in question was not alcohol. If they fail so to do, the substance will be presumed to be alcohol.

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defendant must tender some evidence to suggest that an element of the offence is non-existent, and the burden of proving the element beyond reasonable doubt reverts to the prosecution.

36. The policy behind clause 404 and section 169A is to eliminate the expense of proving a substance was alcohol in the many prosecutions involving the offences to which section 169A would apply. The Ministry of Justice has indicated that thousands of prosecutions are undertaken each year, with substance analysis costing approximately \$200 each time. Another reason for this provision is that there is a high probability that the substance in fact is alcohol, so that the chances of wrongful conviction due to reverse onus are low.
37. However, the Society agrees with the Attorney-General's view that clause 404 is disproportionate to the objective of reducing prosecutorial duration and expense. In fact the offences affected are infringement offences, so that in most cases formal proof is not required: a hearing or the laying of an information is not automatic and must be requested. Moreover, the accused would not be in a position to prove the substance was alcohol any more than the prosecution, and even less so where the Police have seized relevant substances. The reverse onus seems here to be an arbitrary way of reducing the prosecution's expenses, without reducing the overall costs and duration of trial, and while jeopardising the defendant's rights. This does not reflect the policy behind the provision.
38. The Society also considers that clause 404 is not rationally connected to and is disproportionate to the objective. It submits that the clause is inconsistent with section 25(c) of NZBORA and should be deleted from the Bill.

#### **Disqualification for licensing committees and licensing trusts**

39. Several provisions in the Bill relating to the membership of district licensing committees (DLCs) and licensing trusts raise concerns about their consistency with the right to be free from discrimination on the basis of family status under section 19(1) NZBORA. The relevant clauses in the Bill are:
- Clause 179(6)(c):** A person is barred from appointment to a licensing committee, whose spouse, civil union partner, de facto partner, child, or parent is involved in the production, importation, or sale of alcohol, or has more than an insubstantial financial interest in the alcohol industry.
- Clause 307(1)(f)(iii):** A person is barred from election to a licensing trust whose spouse, civil union partner or de facto partner is a shareholder or employee of a company that carries on business related to alcohol, or owns an estate in licensed premises. A person who becomes disqualified (for example upon marriage) vacates their trusteeship; and commits an offence if they continue acting while disqualified.
40. Given the broad range of powers granted to DLCs under the Bill, including considering and determination applications for licences and manager's certificates, variations of licenses and

temporary authority to sell alcohol, a high standard of impartiality is required to preserve the integrity and objectivity of DLCs. However, these objectives must be achieved in a way that is the least rights-infringing.

41. The overly broad nature of the provisions raises concerns that the exclusions are not proportionate to the objectives. Examples given in the Attorney-General's report indicate how broad the implications of these provisions are:
  - (a) Clause 307(1)(f)(iii) is so broad that a person may be disqualified if their spouse has an interest in a company that owns the property on which an industry business is located, even if the spouse has no involvement with the industry at all.
  - (b) The prohibition in relation to licensing committees would disqualify a person who has a child working in a bar in another centre, away from the DLC's area of operation.
42. The Society submits that there are also concerns about the rationality of the prohibitions, because they are not consistent across licensing trusts, licensing committees and community trusts, which share many of the same functions.
43. Although discrimination on the basis of family status might be reasonable in order to avoid conflicts of interest, the Society submits that a more proportionate response would be to allow people onto licensing trusts and DLCs, but have guidelines as to how conflicts of interest will be managed. An appropriate model for managing conflicts of interest might be the provisions governing Crown Entities in the Crown Entities Act 2004.

### **Restriction on judicial review**

44. Clause 313(4) places a restriction on judicial review of a decision to remove a licensing trustee:
 

The High Court must not determine any question that may be determined under this section, and a proceeding under this section (including the issue of a removal summons under s 312) must not be removed into the High Court by certiorari or otherwise.
45. Although rights of appeal are statutory and can be restricted by an express provision, powers of judicial review are part of the High Court's inherent jurisdiction to rule on the legality of public acts.
46. Given that the right of appeal against a District Court's decision to remove a member of a licensing trust is removed under the clause, the ousting of the High Court's power of judicial

review is particularly concerning. The result is that there is no ability to supervise the lawfulness of a District Court's decision.

47. If both appeal rights and the right to judicial review are excluded, there is a concern that there is no oversight to ensure that decision-makers are staying within the limits of the powers entrusted to them by Parliament.
48. As identified by the Attorney-General, this restriction raises an apparent inconsistency with section 27(2) of NZBORA, which provides:
- Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
49. The clause 313(4) restriction dates back to the Licensing Trusts Act 1949 and was repeated in the Sale of Liquor Act 1989. Given that NZBORA has been enacted in the intervening period, its consistency with section 27(2) of NZBORA should not be assumed.
50. There is no justification given for why the clause purports to oust the jurisdiction for judicial review. As such, it cannot be justified in terms of section 5 of NZBORA.

#### **Differential treatment on the basis of age**

51. The Bill contains several provisions which create distinctions on the basis of age:
- (a) Clauses 9-11, which split the purchase age to 20 years for consumption off licensed premises, and 18 years for consumption on licensed premises;
  - (b) Clause 31, which states that licenses can only be held by persons 20 years and over; and
  - (c) Clauses 222-229, which provide for offences relating to people under the buying age.
52. The Society notes that the Attorney-General considers these age-based distinctions are justified under section 5 of NZBORA because they reflect the greater vulnerability of young people to alcohol-related harm.
53. The Society understands that the alcohol purchase age will be decided by a conscience vote. The Society encourages Members of Parliament to consider this issue from a rights perspective, as well as taking into account other policy considerations, when forming their positions on this proposal.

**Conclusion**

54. The Society wishes to be heard in support of this submission.

A handwritten signature in black ink, appearing to read 'Jonathan Temm', is enclosed in a light gray rectangular box. The signature is written in a cursive style with a large, looping initial 'J'.

Jonathan Temm  
**President**  
18.2.11