



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Bill

07/08/2019

Submission on the Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Bill

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Bill (the Bill).
2. The Law Society's comments:
 - a. address Bill of Rights issues arising from the nature of the infringement offence created by the Bill;
 - b. recommends clarification of the sections inserted into the Smoke-Free Environments Act 1990 (the Principal Act) at Part 1A, by clause 9 of the Bill;
 - c. question the extent of personal information that it is necessary to collect under the infringement regime; and
 - d. note measures may need to be adopted to monitor the exercise of Police discretion by reference to ethnicity.
3. The Law Society does not seek to be heard but is happy to discuss its comments with the select committee or officials if that would be of assistance.

Absolute Liability Offence

4. Clause 9 of the Bill creates a new Part 1A of the Principal Act, inserting sections 20B to 20F. Section 20D creates an infringement offence of smoking in a motor vehicle, whether moving or stationary, that is on the road and has a child (under 18 years old) occupant.
5. The Legislation Design and Advisory Committee Guidelines 2018¹ (the Guidelines) identify two issues that apply to infringement offences that have not been addressed in this Bill and its supporting documentation:
 - a. What defences, if any, should be available; and
 - b. On whom the burden of proof should lie.

Strict or absolute Liability

6. The Guidelines state that offences which do not have a *mens rea* element will be either strict or absolute liability offences. The Guidelines identify that the distinction between strict and absolute liability offences is that strict liability offences provide for the existence of a defence or an absence of fault, whereas absolute liability offences do not. The infringement offence created by the Bill does not provide for either a defence or an absence of fault, so it is *prima facie* an absolute liability offence.
7. The Guidelines state that absolute liability offences “are almost never used: it is rarely justifiable to create an offence for which there is no defence. The starting point is always to consider what defences should be open to the defendant.” The Guidelines go on to say that “If legislation is silent as to the mental element or the defences available, the courts will generally

¹ <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/compliance-and-enforcement/chapter-24/>

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.”

8. Consideration should therefore be given to whether any defences should be available, and if so, they should be specified in the Bill.

Burden of proof and limitation of the right to presumption of innocence

9. The Guidelines provide that:

“The default position is that the prosecution must prove beyond reasonable doubt both the existence of the prohibited conduct (actus reus) and the requisite mental element (mens rea). This is described as the legal burden of proof. There is no obligation on the defendant to negate those elements of the offence.

If the legislation specifies a justification or excuse (for example, lawful authority or reasonable excuse) for certain conduct, but does not require the defendant to prove its existence, the defendant must raise credible evidence to bring the matter into issue before the court. This is described as an evidential burden—it is not a burden of proof. If the defence satisfies the evidential burden, the prosecution must then disprove the existence of the defence beyond reasonable doubt (the legal burden).

There may sometimes be good policy reasons for placing a legal burden of proof on the defendant. An example is where a strict liability offence is justified (as described in [24.3](#)). In that case, the prosecution must prove only the physical element of the offence and, to avoid liability, the defendant must prove the existence of a statutory defence or total absence of fault on the lesser standard of the balance of probabilities. However, shifting the burden in this way will constitute a limitation on the presumption of innocence (see section 25(c) of the New Zealand Bill of Rights Act 1990) so there must be compelling justification for departing from the default position and consideration must be given to what defences should be available to the defendant.

Legislation must be very clear if it is intended to place a legal burden of proof on the defendant. If the legislation is not clear, the court may interpret the provision as placing only an evidential burden on the defendant.”

10. While it is therefore clear that the infringement regime created by this Bill engages the right to presumption of innocence affirmed by section 25(c) of the Bill of Rights (BORA), that issue is not addressed in the supporting documentation to the Bill.
11. This is also a departure from the approach taken in 2010 in relation to the Smoke-free Environments (Controls and Enforcement) Amendment Bill which amended the same Principal Act. In that case, detailed advice was provided to the Attorney General which both identified the fact that it created infringement offences which limit the section 25(c) BORA right, and explained why those limits were justified in the context of the Smoke-free Environments (Controls and Enforcement) Amendment Bill.²

² <https://www.justice.govt.nz/assets/Documents/Publications/bora-Smoke-free-Environments-Controls-and-Enforcement-Amendment-Bill.pdf>

12. The Regulatory Impact Statement on the current Bill explains the rationale and justification for the purpose of reducing smoking in vehicles with child occupants, but does not acknowledge that BORA is engaged, nor whether the limit on a BORA right is justified under section 5 of BORA. It would also have been helpful if the supporting documentation to the Bill had specifically addressed the criteria identified in Chapter 25 of the Guidelines, which explain when it is appropriate to create infringement offences.
13. The Law Society therefore recommends that the select committee seeks advice from officials about the justification for the introduction of the infringement regime and whether the limit on the section 25(c) BORA right is justified.

Clarification of the offence – meaning of “Dwelling”

14. Section 20D(2)(b), inserted into the Principal Act by clause 9 of the Bill, provides that a person is permitted to smoke in a motor vehicle if “...*the motor vehicle is stationary on a road and in use as a dwelling*”. Section 20E(3), also inserted by clause 9, provides that a constable cannot exercise powers to require a person to cease smoking, and cannot compel the provision of personal details by either the smoker or the child occupant, in a vehicle that “*is stationary on the road and in use as a dwelling.*”
15. While there is no definition of when a vehicle is in use as a dwelling in either the Bill or the Land Transport Act 1998, the Regulatory Impact Statement says that “*Vehicles that could be considered dwellings would also not be included (eg motorhomes and caravans), except when moving on the road.*” However, the lack of a clear definition of a “dwelling” creates uncertainty, and means that sections 20D(2)(b) and 20E(3) could unintentionally apply to persons who have recently slept or eaten in their vehicle.
16. The Law Society therefore recommends that consideration is given to providing a definition of the term “dwelling” in the Bill.

Privacy considerations – collection and recording of information

17. Subsections 20E(1)(d) and 2(d) empower constables to demand identifying information from any person who is smoking or appears to be under the age of 18, i.e. child occupants, to provide their particulars. They are required to provide details of their full name, full address, date of birth, occupation and telephone number.
18. It is unclear why it is necessary for the child occupant to provide this extent of information in the context of an infringement offence regime where the smoker, not the child occupant, is the target of the infringement regime. A more proportionate and privacy focussed approach would be to limit the amount of information to that which is necessary for the constable to establish the child occupant’s age, in order to determine whether the offence is made out.
19. Further, in respect of any adult occupant, it is unclear why it is necessary to collect and record information about their occupation for the purposes of administering the infringement regime.

Disproportionate impact

20. The Regulatory Impact Statement notes at page 2 that the Bill is likely to disproportionately affect Māori and those living in deprived areas and that any fines are therefore likely to impact those with fewer resources to pay. The Regulatory Impact Statement identifies mitigation options including reliance on Police discretion not to issue fines but rather to give a warning, information or referral to support services. Since it is acknowledged the Bill is likely to

disproportionately affect Māori and that the infringement regime is dependent on Police discretion, measures may need to be adopted to record how discretion is exercised by reference to ethnicity.

A handwritten signature in black ink, consisting of several fluid, overlapping strokes that form a stylized representation of the name 'Herman Visagie'.

Herman Visagie
Vice President
7 April 2019