

15 February 2024

Hon Judith Collins KC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Smokefree Environments and Regulated Products Amendment Bill**

### **Purpose**

---

1. We have considered whether the Smokefree Environments and Regulated Products 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).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 26014/2.4). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 19 (freedom from discrimination). Our analysis is set out below.

### **Summary**

---

4. The Bill amends the Smokefree Environments and Regulated Products Act 1990 (the principal Act) and the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (the Amendment Act).
5. Specifically, the Bill reverses the following three main changes to the principal Act that came into force on 1 January 2023 via the Amendment Act:
  - a. The retail reduction scheme which would have required retailers of smoked tobacco products to be approved by the Director-General of Health in order to sell smoked tobacco products from 1 July 2024, and limited the number of retailers that can sell smoked tobacco products in New Zealand;
  - b. The reduction of the nicotine content limit in smoked tobacco products due to come into force on 1 April 2025; and
  - c. The prohibition on the sale of smoked tobacco products to anyone born after 1 January 2009, due to come into force on 1 January 2027. It retains the current age restriction on buying smoked tobacco products.
6. The Bill also makes consequential amendments as a result of repealing these initiatives and amends the purposes of the Act to reflect these amendments.

## **Consistency of the Bill with the Bill of Rights Act**

---

### **Section 19 – Freedom from Discrimination**

7. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (Human Rights Act). It is generally unlawful

to treat people in comparable circumstances differently on the basis of a prohibited ground unless the differential treatment is justified. Two factors must be met for discrimination to be identified under s 19(1) of the Bill of Rights Act.<sup>1</sup>

8. Discrimination under s 19 of the Bill of Rights Act arises where:
  - a. there is differential treatment or effects as between persons or groups in analogous or comparable situations based on a prohibited ground of discrimination; and
  - b. that treatment has a discriminatory impact (it imposes a material disadvantage on the person or group differentiated against).
9. Differential treatment will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination, or fails to treat two groups differently when they ought to be in order to achieve an equitable outcome.<sup>2</sup> Whether disadvantage arises is a factual determination.<sup>3</sup>
10. Section 21(1)(f) of the Human Rights Act lists race as a prohibited ground of discrimination.
11. The Bill repeals some elements of a set of measures introduced through the Amendment Act that were expected to have a disproportionately positive effect on Māori, due to high smoking rates amongst Māori. Clause 5 of the Bill also largely reinstates the previous purposes in section 3A of the Principal Act, thereby removing the recently introduced purpose of reducing disparities in smoking rates between Māori and other groups.
12. There are marked inequities in health caused by higher smoking prevalence, particularly for Māori. Ministry of Health modelling in 2021 projected that under a “business as usual” approach the Smokefree 2025 goal was not achievable. The legislative measures were expected to significantly reduce smoking rates, particularly disparities between Māori and non-Māori smoking populations.<sup>4</sup>
13. We have considered whether the removal of these legislative measures and the amendment of the legislative purpose engages section 19(1) (discrimination on the ground of race) on the basis that it results in a failure to treat Māori and non-Māori differently in terms of achieving equitable outcomes (i.e., reducing the disparities between Māori and non-Māori smokers).<sup>5</sup>

---

<sup>1</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

<sup>2</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2015) at 17.10.42

<sup>3</sup> See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

<sup>4</sup> This advice has focussed on the impacts of the Bill on the Māori smoking population and Māori at risk of taking up smoking (rather than other ethnic groups with higher smoking rates) because the modelling in the *Regulatory Impact Statement: Smokefree Aotearoa Action Plan*, 3 November 2021, primarily compared Māori and non-Māori smoking rates.

<sup>5</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2015) at 17.10.42

14. We do not consider that the Bill gives rise to direct discrimination because the removal of the legislative measures applies equally to all racial groups. However, we have also considered whether there may be indirect discrimination as between the Māori smoking population (and Māori at risk of taking up smoking) and non-Māori. To the extent that there may be indirect discrimination, we consider that there is no material disadvantage. We set out our reasons for this conclusion below.
15. Given that smoking is fundamentally a matter of individual choice, and some of the legislative measures did not prevent people from exercising that choice, it is questionable whether the legislative measures that were intended to influence that individual choice amounts to material benefits. However, even if it does, we consider that any potential benefits are unclear given the Government's commitment to reducing the number of smokers and dissuading people from taking up smoking by other means.<sup>6</sup>
16. We understand the Government continues to be committed to achieving the Smokefree 2025 goal, and that it intends to pursue this goal through a combination of legislative and non-legislative measures which will address the specific needs of Māori. *[Material withheld as still under consideration]*
  
17. The Government has also retained the requirement introduced by the previous Government in s 3AB(d) of the principal Act, relating to the Crown's intention to give effect to the principles of te Tiriti o Waitangi (the Treaty of Waitangi), for the Minister to consider the risks and benefits to Māori before preparing regulations relating to requirements for smoked tobacco products.
18. The Government's commitment to taking a preventative approach to tobacco control to ensure the continued provision and delivery of initiatives specifically targeted to the need of populations that are disproportionately impacted by the negative health impacts of smoking, coupled with the continued commitment to the Smokefree 2025 goal, supports the lack of a material disadvantage in this case. Any potential lost benefit from the reversal of the legislative measures may still be achieved by other means.
19. We have therefore concluded that the s 19 right to freedom from discrimination is not engaged.

---

<sup>6</sup> This is not to say that that any removal of future benefits, even when they cannot be exactly quantified, cannot be discriminatory.

## Conclusion

---

20. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

A handwritten signature in blue ink, appearing to read "Jeff Orr". The signature is stylized and cursive.

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**