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# What Role Can Local Authorities Play in Tobacco 'End-game' Policies in New Zealand?

In March 2011 the New Zealand government agreed to the recommendation that it 'aim for tobacco consumption and smoking prevalence to be halved by 2015 across all demographics, followed by a longer-term goal of making New Zealand a smoke-free nation by 2025' (New Zealand Parliament, 2011, p.4). 'Smoke-free' is defined in this instance as a very low prevalence of smoking and minimal availability of tobacco, rather than prohibition of smoking.

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To date New Zealand has implemented a comprehensive tobacco control programme and has ratified the global Framework Convention on Tobacco Control. Tobacco control policy has been implemented mainly via national law in the form of the Smoke-free Environments Act 1990 and amendments thereof. This law and associated regulations (Smoke-free Environments Regulations, 2007) prohibit indoor smoking in workplaces, tobacco promotion, including display of products at the point of sale, and incentives for retailers from tobacco companies. Graphic warnings required on all tobacco products are covered in the regulations. Tax on tobacco in New Zealand has also been significantly increased. Some smoking cessation medications are subsidised and there is a national organisation which provides cessation support via a variety of networks.

Despite these tobacco control measures, current trends in tobacco use indicate that they will be insufficient to achieve the Smokefree 2025 goal (Blakely et al., 2010). Additional, innovative policy measures will be required. Reducing the availability of tobacco is one of these proposed measures. Extension of smoke-free areas to outdoors is another. This article considers the potential for New Zealand local authorities to contribute to the tobacco 'end game' in their role as regulators of tobacco sales and smoking.

Internationally, local-level tobacco control policies have been implemented in a number of jurisdictions. For example,

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over 150 local jurisdictions in California have smoke-free outdoor policies (Satterlund et al., 2011), ranging from protection around businesses, footpaths, parks and beaches to complete bans on outdoor public smoking. Other US states with local laws restricting smoking include Massachusetts, Texas and North Carolina (Mowery et al., 2012). In New Zealand, the largest local authority, Auckland Council, has committed to a goal of 3% smoking prevalence by 2030 in four of its local board areas (Auckland Council, 2013). Several local authorities in the United Kingdom are considering how they can contribute to reducing smoking prevalence (Cook, 2012). This contribution ranges from explicit support by Wigan Council for national tobacco control measures such as plain packaging, to consideration of bylaws banning smoking around play and sports areas by the London Borough of Hackney.

Licensing of tobacco retailers is uncommon and conditions of licences are generally minimal; restrictions on tobacco availability are also relatively rare (Chapman and Freeman, 2009). The restrictions focus on preventing sales to minors. Conditions for tobacco

sales are inconsistent with those for other hazardous products, such as pharmaceuticals, firearms, and even foods, for example meat (Ministry for Primary Industries, 2013). A consequence is easy access to the most harmful smoked form of nicotine, tobacco, and more strictly regulated access to less harmful medicinal nicotine, such as nicotine patches and gum (Gilmore et al., 2009).

Here we discuss the powers available to local authorities in regard to restrictions on sales and extension of smoke-free areas, the potential for any bylaws to be challenged, and the likely issues arising.

#### Purpose of local authorities

New Zealand local authorities are territorial authorities (which comprise either district or city councils), regional councils, and unitary councils (which combine both territorial and regional bodies). They are constituted and empowered under the Local Government Act 2002 (LGA). There are 11 regional councils, 61 territorial authorities and 6 unitary councils.

Prior to 5 December 2012 a main purpose of local government (set out in section 10 of the LGA) was to 'promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future'. This expansive purpose of promoting community well-being would have included all matters of public health. On 5 December 2012 the purpose was more narrowly defined as: 'to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.'

'Good quality', in relation to local infrastructure, local public services and performance of regulatory functions, was

defined in section 10(2) to mean efficient, effective and appropriate to present and anticipated future circumstances.

Applying the substituted purpose to the regulation of tobacco sales and smoking in public places, the relevant power of local authorities will be to provide for the performance of regulatory functions in a way that is most cost-effective for households and businesses. Whether the change in purpose will affect or limit the achievement of public health objectives remains a matter to be determined, possibly through judicial review before the High Court, in the years to come.

However, the traditional public health functions long mandated under the Health Act of 1956 should be regarded as unaffected by this change to the purpose of local government. Section 11 of the LGA states that the local authority has the role of carrying out the purpose of local government as per section 10 discussed. Section 12 of the act confers on the local authority in performing its role full capacity to carry on and undertake any activity or business, do any act, or enter any transaction, and accords it for this purpose full rights, powers and privileges. These actions remain subject to other acts and laws in New Zealand (section 12(3)). But wider or specific powers under other acts are continued (section 13).

The nature of regulatory control envisages the exercise of a power which may restrict freedoms and rights of individuals and corporate bodies, and the general (common) law requires that local authorities have a specific power, or a power by necessary implication, to carry out the intended regulation. If that power is not present, a court may rule the action to be invalid.

#### Existing powers that will influence tobacco control by local authorities

##### *Health Act 1956*

The Health Act 1956 has a number of sections relevant to tobacco control and local authorities. Section 23 relates to general powers and duties of local authorities in respect of public health. It is the duty of every local authority to improve, promote and protect public health within its district. The Health Act

also specifies that the local authority is empowered and directed to make bylaws for the protection of public health.

Section 64 of the Health Act referring to bylaws states that:

- (1) Every local authority may, for the purposes of this Act, make bylaws for all or any of the following matters, namely:
  - (a) improving, promoting, or protecting public health, and preventing or abating nuisance;  
...
  - (o) regulating the handling and storage of noxious substances, or of goods which are or are likely to become offensive;  
...
  - (q) regulating the conduct of offensive trades, and of manufactures and processes which may be offensive or dangerous to the persons employed in or about the same or injurious to health;  
...
  - (t) prescribing the sanitary precautions to be adopted in respect of any business or trade;  
...
  - (y) generally, for the more effectual carrying out of any of the provisions of this Act relating to the powers and duties of local authorities.

- (2) The powers conferred by this section are in addition to the powers conferred on any local authority by any other Act.

The nature of offensive trades referred to in section 64(1)(q) is limited to trades listed in schedule 3 of the act, and presently handling tobacco products does not feature in the list.

In both sections 23 and 64 of the Health Act the term 'public health' is defined to have the same meaning as in section 6(1) of the New Zealand Public Health and Disability Act 2000, namely:

- public health* means the health of all of
- (a) the people of New Zealand; or
  - (b) a community or section of such people.

The term 'health' is not defined under the Health Acts nor under the New Zealand Public Health and Disability Act. However, 'health' surely includes any

adverse effects on human health from the use of tobacco products and exposure to tobacco smoke.

Under section 65 of the Health Act, bylaws may leave a matter to be determined either generally or for any class of cases; may provide for a licensing and registration system; may provide for payment of reasonable fees for inspections and other services; and may apply generally throughout the district or within any specified part of the district.

#### *The Building Act 2004*

Under section 65A of the Health Act, the effect on bylaws of the Building Code under the Building Act 2004 is that a local authority may not make any bylaw that purports to require any building to

achieve performance criteria beyond that specified in the Building Act or Code.

Presently there are no provisions in the Building Code which relate to smoking as such, except indirectly as to ventilation of internal rooms (which may or may not be used for smoking) under the general performance standards for ventilation. Having regard to that restriction, it is doubtful that a local authority could under a bylaw alter building criteria to exclude smoking or to establish ventilation requirements applicable to smoking within a building.

#### *Smoke-free Environments Act 1990 (SFEA)*

Under section 5 of this act smoking in workplaces is prohibited. A workplace is defined to mean an internal area within a building, and includes corridors and washrooms; there are certain exemptions, comprising private motor vehicles and

bedrooms in motels and hotels. Under section 6, another exemption applies to a dedicated smoking room in a hospital care institution, a residential disability care institution or a rest home, where the mechanical ventilation which may apply is not connected to any ventilation to the other parts of the establishment. An adequate equivalent smoke-free room must be available for socialising.

Smoking in a vehicle supplied by an employer is not permitted under section 5A, except where all users obtain agreement with the employer to allow smoking. Under section 9, smoking in passenger service vehicles is restricted except in a small vehicle where all persons agree. Smoking in an operating taxi is prohibited at all times.

**[Section 20] is important in that any bylaw that may be made under the Health Act or the Local Government Act cannot be challenged merely on the grounds that there are no particular bylaw powers granted under the SFEA ...**

In respect of licensed premises, restaurants, casinos and gambling machine venues, sections 12–13B of the SFEA prohibit smoking in any part of the establishment that is not an open area. Under section 2, an open area means a part that is not an internal area. An internal area is defined as an area that, when all its doors, windows or other closable openings are closed, is completely or substantially enclosed by a ceiling or roof, and the walls, sides, screens and those openings. The interpretation of this provision is the subject of a pending action before the High Court in relation to the Diamond Lounge at the Auckland SkyCity Casino (*New Zealand Herald*, 13 February 2013, p.7).

Significantly, section 20 (saving of powers to make bylaws), states:

Nothing in this Part shall limit or affect the powers of a local authority

under section 145(b) of the Local Government Act 2002, to make bylaws providing greater protection from tobacco smoke than is provided by this Part.

That provision is important in that any bylaw that may be made under the Health Act or the Local Government Act cannot be challenged merely on the grounds that there are no particular bylaw powers granted under the SFEA, and the regulatory restraints under this act in respect of employment or premises are not to be seen as exclusive.

The Ministry of Health has the primary function under section 32 of

authorities. A territorial authority (which includes a unitary authority) may make bylaws for its district for the following purposes:

- (a) protecting the public from nuisance;
- (b) protecting, promoting and maintaining public health and safety;
- (c) minimising the potential for offensive behaviour in public places.

As identified under the SFEA, the appropriate power under which a territorial authority could consider making bylaws in relation to regulating the number of outlets selling tobacco products, and secondly the entitlement of persons to smoke in public places, would be section 145(b).

are set out in the text *Local Authorities Law in New Zealand* (Palmer, 2012). This book sets out the steps to be followed by a local authority in making a bylaw.

In particular, the LGA, section 144 states: 'The Bylaws Act 1910 prevails over this Part [8] and Part 9'. Under section 155 of the LGA (Part 8), a local authority must first determine whether a bylaw is the most appropriate way of addressing the perceived problem, and, if that is established, must determine whether the proposed bylaw is the most appropriate form of bylaw, and whether it has any implications under the New Zealand Bill of Rights Act 1990. Section 155(3) states: 'No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990'.

## The most significant issue would be whether a court would find any restraints under a bylaw upon the sale of tobacco products, or upon the use of those products in a public place, to be unreasonable.

the SFEA to regulate the packaging and display of cigarettes, tobacco and cigars. The ministry has extensive powers under section 39 to issue binding regulations on these matters. The relevant Smoke-free Environments Regulations 2007 (as amended) are highly prescriptive as to advertising by retailers, display of tobacco products, and packaging detail (with mandatory graphic health warnings). Section 30 of the act prohibits the sale of tobacco products to persons younger than 18 years of age. The regulation powers allow for different requirements for different classes of people who offer products for sale, and at different places of business or points of sale. These powers to make regulations do not appear to authorise a complete prohibition on sales, nor do they deal with smoking in public places or in private motor vehicles.

### *Local Government Act 2002*

Section 145 of the LGA confers a general bylaw-making power on territorial

### **Likely challenges to bylaws**

On the assumption that the Health Act, section 64(1)(a) and the LGA, section 145(b) provide sufficient breadth of legal authority to make bylaws relating to the sale of tobacco products and smoking in public places, the question of challenge as to the validity of such bylaws remains an important issue.

### *Bylaws Act 1910*

Under section 12 of the Bylaws Act, the High Court may quash a bylaw on the grounds that it is invalid. Specifically, section 17 states three grounds on which a bylaw may be challenged and quashed: namely, that it is beyond the powers of the local authority, that it is not consistent with the laws of New Zealand, or that it is unreasonable in a legal sense. This review power does not apply to a government regulation, which cannot be challenged for reasonableness.

Many cases which give guidance on the approach by the courts as to validity

### *New Zealand Bill of Rights Act 1990*

Under the New Zealand Bill of Rights Act 1990, a person or body challenging the validity or reasonableness of a bylaw may claim that any restriction upon the sale of tobacco products, or upon the use of smoking in public places, is contrary to section 14, 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;

or contrary to section 16, freedom of peaceful assembly:

Everyone has the right to freedom of peaceful assembly;

or to section 17, freedom of association:

Everyone has the right to freedom of association.

Another angle could be to claim breach of section 19, freedom from discrimination, which reads:

- (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

However, the latter ground would not succeed to the extent that nothing in the Human Rights Act prohibits discrimination in respect of availability

of tobacco products or smoking in a public place.

#### *Whether a bylaw is unreasonable*

The most significant issue would be whether a court would find any restraints under a bylaw upon the sale of tobacco products, or upon the use of those products in a public place, to be unreasonable. Case law on this issue is set out in Palmer (2012, at 13.8.8). Whether a matter is viewed as unreasonable is not a matter of personal opinion for the court or judge. It is an objective question of whether there is a sufficient justification for the interference with some existing right or freedom and whether there is a sufficient justification for the restraint. For example, a bylaw may be considered unreasonable if it prevents a public right and does not have a clear public benefit. Reference can be made to *McCarthy v Madden* (1914) 33 NZLR 1251 at 1268 (restriction on driving stock through local authority area held to be excessive); and *Williford Family Trust v Christchurch City Council* (2011) NZAR 209 at 67 (bylaw restricting location of small brothels found to be unreasonable).

Another parallel may be drawn with the possession of alcohol in a public place. Under *Police v Hall* (2001) DCR 239, a bylaw banning the possession of liquor in a provincial town was held to be unreasonable as a restraint on an existing freedom to possess liquor in a public place. Subsequent to that decision, specific amendments were made to the LGA to empower local authorities to impose liquor bans applying to parts of a local authority area, and for these to extend to potentially a 24-hour, 7-day prohibition.

The Hall case indicates the degree to which a court will evaluate an existing public right against an attempt to restrict that right, having regard to the legality of the activity.

A further parallel can be drawn with the legal situation under the Prostitution Reform Act 2003, which declared prostitution to be lawful for the future. That act stated that a local authority could make bylaws 'for the purpose of regulating the location of brothels'. Subsequent cases have determined the extent to which these restrictive bylaws

may be applied (see *Williford Trust* case referred to above).

Currently, the location and number of shops which may sell tobacco is controlled by zoning laws establishing commercial zones for retail sales. Unlike the Sale and Supply of Alcohol Act 2012, which allows for a council policy on the number of liquor outlets, there is no specific licence required to sell tobacco products. It would be unlikely that any zoning rule would be upheld which restricted the sale of tobacco products from a lawful commercial outlet.

Potentially, under section 151(3) of the LGA a bylaw may provide for the licensing of persons or property. Where established, on robust public health grounds, a bylaw licensing vendors of tobacco products or the premises selling these products, and

restrict a council's capacity to do this. The current approach to smoke-free outdoor areas is educational, and 'No Smoking' or 'Smokefree' and 'Auahi Kore' signs are used to indicate that smoking is undesirable in an area. However, there are anecdotal reports of non-compliance. For example, the shopping centre in the low-income Auckland suburb of Otara has an educational smoke-free policy and signage, but there are reports of groups of people smoking around the smoke-free signs. This undermines the goal to reduce the visibility of smoking. Bylaws may be necessary to achieve compliance with smoke-free policies for outdoor public spaces.

There are two important prerequisites for implementation of robust bylaws restricting access to tobacco. First, further research establishing the benefits of

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imposing additional conditions of sale, could be made. A licensing bylaw aimed at closing down all tobacco sales in a particular location or community would be more difficult to sustain if challenged.

In relation to a restriction on smoking in public places, a bylaw could be made on the grounds of protecting public health. If the bylaw was limited to a public reserve or building, a sporting venue, or some other defined public space, the validity could probably be sustained. Likewise, a bylaw applying to specific shopping streets, malls or gathering points on public land could be held to be valid.

#### **Implications for policy, practice and further research**

Local authorities with or without a community mandate to implement bylaws restricting smoking in public places can do so under the provisions of the Local Government Act and the Health Act. New Zealand smoke-free legislation does not

stronger controls on access to tobacco is required. A question should be answered as to whether fewer stores selling tobacco would reduce uptake and increase cessation. Second, licensing of tobacco retailers will be needed.

#### **Conclusions**

The Health Act 1956 and Local Government Act 2002 provide scope for local authorities to regulate smoking in public places. However, in order to implement robust bylaws regulating the sale of tobacco at retail outlets, retailers would need to be licensed. This step is likely to require evidence that restricting availability of tobacco will reduce the uptake of smoking and increase the number of people who stop smoking. To maintain progress, mayors and council members should be invited to make bylaws to eliminate smoking in selected public places, and to consider bylaws to licence and regulate tobacco vendors.

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# LOOKING FORWARD NZ Aid Beyond 2015

Wednesday 4 September 1:00pm-5:30pm  
Government Building, Lecture Theatre 2

We live in a rapidly changing world. Over the past fifteen years, great progress has been made in reducing poverty and addressing global development problems. The Millennium Development Goals have helped to focus our efforts to ensure all people can enjoy a basic quality of life, free of poverty. These Goals draw to an end in 2015 and currently a new global development framework is being crafted. What is the role of aid amidst the shifting context of global development? How can New Zealand's aid and development efforts best respond to these changes?

This half-day forum will provide an opportunity to reflect on such issues. It will commence with a keynote address by Professor Stephen Howes of the Australian National University's Development Policy Centre on the topic: 'The future of aid: does it have one, and if so what does it look like?' Following this, various other experts on aid issues and political party spokespeople will discuss the future of New Zealand aid, and what role New Zealand can play in building a world where all people live safe, healthy and prosperous lives.

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