

Submission

By



To The

Health Committee

On The

Public Health Bill

7 March 2008

PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 6550

**PUBLIC HEALTH BILL
SUBMISSION BY BUSINESS NEW ZEALAND¹
7 MARCH 2008**

1. INTRODUCTION

- 1.1 Business New Zealand welcomes the opportunity to comment on the Public Health Bill (referred to as 'the Bill'), released by the Health Committee. While the Bill is sizeable in terms of both length and issues covered, Business New Zealand wishes to concentrate its comments on key clauses of the Bill.

2. SUMMARY OF RECOMMENDATIONS

- 2.1 Business New Zealand makes the following **recommendations** with regard to the Public Health Bill, namely that:

- (a) *Clause 80 includes a reference to the wider economy and the business community as an area that the Director-General must take into account when performing his/her functions (p.3);*
- (b) *If any prospective codes of practice or guidelines are to be issued by the Director General, they must first be taken up by the relevant sector to conduct an independent review in accordance with best practice, along with independent monitoring and reporting back to the Ministry and other relevant stakeholders. (p.4);*
- (c) *Notwithstanding our recommendation above, if the Director General will continue to have powers to issue codes of practice and guidelines, then any prospective codes of practice or guidelines issued by the Director General must follow a mandatory and rigorous regulatory criteria checklist (p.5);*
- (d) *Part of a mandatory and rigorous regulatory criteria checklist for issuing or modifying codes of practice or guidelines must also include significant and transparent discussion with key affected people and groups (p.5);*
- (e) *The words 'endeavour to' are removed from clause 84 of the Bill (p.5);*
- (f) *A code of practice or guideline as stipulated by the Director General should not be able to be issued when a self-regulatory or co-regulatory code already exists (p.6);*
- (g) *Unless there are significant amendments to the Bill as outlined above, Business New Zealand does not support a review by way of a report to the Minister within three years of commencement of the Act (p.6); and*

¹ Background information on Business New Zealand is attached in the appendix.

- (h) ***Actions undertaken by the Governor-General available under clause 374 must only take place if appropriate regulatory processes are established, including prior consultation with affected industries (p.7).***

3. BACKGROUND & GENERAL COMMENTS

- 3.1 It is generally recognised that the existing Health Act 1956 is now outdated in parts and requires amendment to bring the associated regulations into relevance for modern day. As stated in the explanatory notes to the Bill, its purpose is to *“update existing public health legislation in order to improve, promote, and protect public health and help attain optimal and equitable health outcomes for all population groups in New Zealand”*. This is certainly a weighty objective, given the number of issues to take into consideration and the potential for conflicts of interest to develop. It is no surprise that the process of reviewing the present legislative framework has been extensive, with several rounds of consultation that have thrown up proposals that the business community has not been in favour of.
- 3.2 While the Bill covers a variety of issues, Business New Zealand only wishes to concentrate on certain areas of the Bill that have the potential for the strongest effect not only on business, but on the way in which regulatory practices are carried out.

4. PART 3 – NON-COMMUNICABLE DISEASES

Codes of Practice and Guidelines

- 4.1 Subpart 3 (clauses 81-87) of the Bill outlines the particulars for codes of practice and guidelines for non-communicable diseases. While on the face of it, the introduction of codes of practice and guidelines appears to be a regulatory option that is positioned at the lighter end of regulation, regulation of this kind would in this instance, be fraught with problems, creating more confusion than clarity.
- 4.2 Business New Zealand believes that any path toward regulatory control should only occur when there are significant – not minor - cases of market failure. There is a wide range of types of market failure, as outlined in Business New Zealand's *Regulation Perspectives*² publication. Some cases of market failure are major, some minor, but it is wrong to assume that regulation is called for in every case, as market failure can often self correct in a relatively short space of time. Also, market failure should not mean government intervention, as the result of government failure in attempting to address market failure could well be even worse.
- 4.3 The pathway to regulation can often be depicted within a regulatory pyramid that shows government legislation applied to specific targets at the top, with general laws and regulations below. As one travels further down the pyramid, the more light-handed the regulatory approach becomes.

² <http://www.businessnz.org.nz/file/1053/Regulation%20Perspectives.pdf>, page 4.

- 4.4 At first glance, the particulars for codes of practice and guidelines regarding non-communicable diseases as stipulated in the Bill look sensible and do not involve steps that are at the sharp end of the regulatory pyramid. However, the details of the clauses provide sufficient reason for concern.

Clause 80 – Principles

- 4.5 Clause 8 of the Bill stipulates eight functions that the Director-General of Health must take into account when performing his or her duties. While areas such as general health, families & communities, social & cultural aspects and public-private health are specifically mentioned, there is absolutely no mention of possible effects to the economy or the business community. For instance, any codes or practices that are introduced have the ability to not only affect particular food or alcohol producers, but also other businesses along the value chain, such as advertisers, wholesalers and retailers. The flow-on effects regarding any negative consequences for one business on the value chain can be equally significant for the rest.
- 4.6 A thriving and success economy can only come about via an environment that is conducive to business, which is the engine room for the economy. There is a clear and undisputable link between a strong economy and improved standards of living, including health. Therefore, any functions undertaken by a Director-General must also take into account the importance of the general economy and business community.

Recommendation: That clause 80 includes a reference to the wider economy and the business community as an area that the Director-General must take into account when performing his/her functions.

Clause 81 – Director-General May Issue Codes of Practice or Guidelines

- 4.7 Clause 81 of the Bill states that “*the Director-General may issue a code of practice or guideline to a sector on a particular activity that the sector undertakes if the Director-General has reason to believe that the sector can reduce, or assist in reducing, a risk factor associated with, or related to, the activity*”. This is an extremely wide-ranging power for the Director-General. Essentially, he/she can issue a code or guideline on almost anything, and can issue these even if there exist codes or guidelines in practice that are of a more self-regulatory nature.
- 4.8 The issuing of these codes and guidelines, on face value, seems to be pitched at the self-regulatory aspect of regulatory practices. However, it is confusing for the public to understand where these will fit with existing voluntary guidelines. For instance, during the same time the Bill was introduced before Parliament, the Government released their response to the Inquiry into Obesity and Type 2 Diabetes. Part of the Government response proposed the food industry to work with the Ministry of Health and Ministerial Committee to develop specific processes and outcome targets, and generally supported the current self-regulatory approach. The Bill takes a very different approach, where the Ministry of Health imposes codes on the industry with the power to regulate as the Ministry sees fit. It is simply confusing to have

differing regulatory outcomes in the same sector, which at a practical level will not work.

- 4.9 Furthermore, the introduction of any regulatory structures by either the government or the private sector must clearly show what type of regulation model a particular structure purports to be, so that businesses can understand how it works and all the implications involved. As the Bill currently stands, it is unclear whether the codes of practice proposed by the Director General will be self-regulatory codes, or co-regulatory codes. Business New Zealand's *Regulation Perspectives* provides examples of successful regulatory approaches across the spectrum, including codes of practice (Insurance Council of New Zealand), a Standards Approach (Advertising Standards for Alcohol), and one in which there is both self-regulation and co-regulation (Gas Industry). It even highlights a case of unsuccessful self-regulation that has reverted back to government imposed regulations (electricity market). In all these cases, there was clear and concise understanding from both the government and the private sector as to the type of model implemented. This is certainly not the case given the conflict of the Bill with existing regulatory practices.
- 4.10 If the codes of practice as outlined in the Bill fall under a self-regulatory approach, then they should be owned and developed by the sector, not by the Director-General. A co-regulatory approach should still see codes of practice owned and operated by the sector, with the Director-General involved as an important stakeholder. With either situation, the current model is flawed, as it does not fit with standard regulatory model options.
- 4.11 The preferred approach would be to ensure that any matters that require codes of practice to be established should first be taken up with the relevant sector, which in turn would conduct an independent review as typically experienced with a self-regulatory code.

Recommendation: That if any prospective codes of practice or guidelines are to be issued by the Director General, they must first be taken up by the relevant sector to conduct an independent review in accordance with best practice, along with independent monitoring and reporting back to the Ministry and other relevant stakeholders.

- 4.12 Notwithstanding the fact that the issue of codes of practice should lie with the sector to begin with, we are deeply concerned that there appears to be no framework regarding why or how the decision to issue a code of practice or guideline is made by the Director-General. Apart from the principles that must be taken into account as an initial guide, there is no discussion in the legislation regarding clear cases of market failure where some form of intervention is required. Even if there is an area where market failure has been identified by the Director-General, there appears to be no processes required for ascertaining whether imposed solutions are justified. For example, there is no mandatory requirement for any form of cost-benefit analysis to be undertaken to ascertain whether the introduction of a practice will lead to a net positive outcome for the economy.

- 4.13 Therefore, if the Committee wishes to continue providing the Director General with powers to issue codes of practice and guidelines, then Business New Zealand would want to see proper and comprehensive criteria for determining whether a code or guideline needs to be issued.

Recommendation: Notwithstanding our recommendation above, if the Director General will continue to have powers to issue codes of practice and guidelines, then any prospective codes of practice or guidelines issued by the Director General must follow a mandatory and rigorous regulatory criteria checklist.

Clause 82 – Prior Consultation Required

- 4.14 Subparts (3) and (4) of clause 81 outline the notification process when issuing a code of practice or guideline, while clause 82 stipulates that the Director-General must consult with persons or organisations who would be most affected by any new or changed codes or guidelines. Apart from our discussion in 4.12 above that any proposed code of practice or guideline should first follow a rigorous regulatory criterion, consultation is another essential element for any modification to, or introduction of a particular regulation. However, one would expect that any new or changed code or guideline would involve consultation with affected groups from day one, and be part of the rigorous regulatory criteria checklist that Business New Zealand has recommended above.

Recommendation: That part of a mandatory and rigorous regulatory criteria checklist for issuing or modifying codes of practice or guidelines must also include significant and transparent discussion with key affected people and groups.

Clause 84 – Codes of Practice and Guidelines to Avoid Overlap with Enactments

- 4.15 Clause 84 of the Bill states that ‘*in issuing or amending a code of practice or guidelines, the Director-General must endeavour to avoid including any provisions that overlap with matters contained in an enactment*’. Business New Zealand would want this to be taken one step further by taking out the words ‘*endeavour to*’, so that there is absolutely no overlap with matters contained in an enactment. That fact that a Director-General endeavoured to avoid overlapping matters, but subsequently could not avoid such a consequence is simply not improving the quality of regulatory practice, and should not occur to begin with.

Recommendation: That the words ‘endeavour to’ are removed from clause 84 of the Bill.

- 4.16 In addition, clause 84 should also clearly state that a code of practice will not be introduced when existing self-regulatory codes or co-regulatory codes are already in existence. This would go some way towards eliminating the doubling up of codes from two separate regulatory frameworks, which would undoubtedly lead to confusion for the private sector.

Recommendation: That a code of practice or guideline as stipulated by the Director General should not be able to be issued when a self-regulatory or co-regulatory code already exists.

Clauses 87 (Codes of Practice and Guidelines Not Legally Enforceable) and 88 (Report to Minister)

- 4.17 While clause 87 of the Bill states that codes of practice and guidelines issued under this sub-part are not legally binding, clause 88 effectively puts a time limit on voluntary versus imposed regulations via the requirement for the Ministry of Health to review this part of the Bill and report to the Minister not later than three years after the commencement of the Bill as enacted. While Business New Zealand generally supports regulations being reviewed for effectiveness and relevance on a semi-regular basis (typically via the need for more ‘sunset’ clauses), given the sizeable problems associated with this section of the Bill in terms of the blurring regulatory frameworks, one could argue that a three year review that showed the workings of a code of practice and guideline to be a failure is almost a *fait accompli*.
- 4.18 Therefore, unless there are significant amendments to the Bill as outlined above, Business New Zealand does not support a review by way of a report to the Minister within three years of commencement of the Act, as we believe the review will inevitably be biased towards even stricter regulatory controls.

Recommendation: That unless there are significant amendments to the Bill as outlined above, Business New Zealand does not support a review by way of a report to the Minister within three years of commencement of the Act.

Clause 374 – Regulations about Public Health Generally

- 4.19 Clause 374 states that the Governor-General may, by Order in Council, make regulations at any time for all or any purposes, which are outlined under 27 different areas.
- 4.20 Business New Zealand is particularly concerned about sub-clauses 374 (r), (w) and (x), which state:

Sub-clause 374 (r)

The prohibition or regulation of the importation manufacture, packing, or sale of any thing likely to introduce or increase a risk to public health.

Sub-clause 374 (w)

Prescribing or providing for the fixing of reasonable fees to be paid in respect of any specified matter under this Act or regulations made under this Act, and the persons or authorities entitled to claim and receive those fees

Sub-clause 374 (x)

Reducing or assisting in reducing, risk factors (within the meaning of section 79) associated with, or related to, non-communicable diseases.

Such wide-ranging powers need to have the appropriate checks and balances; otherwise there is the possibility of misuse on a significant scale. Therefore, Business New Zealand recommends that a proper and meaningful regulatory process be established before such regulations are made, including prior consultation with affected industries, cost-benefit analysis and pinpointing the incidence of market failure that has occurred for such action to take place.

Recommendation: That actions undertaken by the Governor-General available under clause 374 must only take place if appropriate regulatory processes are established, including prior consultation with affected industries.

APPENDIX

5. About Business New Zealand

- 5.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.
- 5.2 In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.
- 5.3 Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.