

NEW ZEALAND BUSINESS ROUNDTABLE

Submission to the Law Commission on *Alcohol In Our Lives*: An issues paper on the reform of New Zealand's liquor laws

October 2009

1. Introduction

- 1.1 This submission on the Law Commission's Issues Paper *Alcohol in our Lives* is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall national interests.
- 1.2 A national interest perspective in the context of the Law Commissions' inquiry means giving primacy to the interests of consumers. In respect of alcohol, it does not, as in the days of pervasive controls on competition in the liquor industry, mean favouring producer interests. At the same time, such a perspective requires attention to the effects and costs of misuse of alcohol products and effective ways of minimising them.
- 1.3 We support a liberal and competitive regime for the supply and use of alcohol products in the interests of responsible consumers – the vast majority – coupled with strong and effective remedies for abuse. Our overall criticism of the Commission's paper is that it is misdirected and deficient in both respects.
- 1.4 We have been struck by the number of independent commentators who have expressed similar views. As a *New Zealand Herald* editorial put it (1 August 2009):

Little would be gained by raising the age, restricting trading hours, or otherwise reducing access to liquor. We have been there and in many ways drinking habits were worse. Let's not go back

Similarly, the Christchurch *Press* editorialised as follows (8 October 2009):

The Law Commission is at present surveying New Zealanders on proposals to reform licensing laws, with the suggestions that hours might be tightened, more restrictions imposed on off-licence outlets, curbs on advertising and a ban on discounting. These ideas, and others, would all have some effect at the margin no doubt, but they do not get to the core of the problem. It is not its availability or its price that induces bad behaviour with drink. It is rather a matter of personal attitude and choice. Changing attitudes is not a short-term matter but it can be done. It took less than a generation, for instance, to make smoking in public, even apart from the laws that proscribe it, a

decidedly questionable thing to do. With a little effort, it could be done with alcohol too.

- 1.5 Many have suggested to us that in a report littered with graphic illustrations, diary notes and the like, the Law Commission has bought into a political campaign rather than presented evidence-based policy analysis and recommendations. To give an impression of an epidemic of alcohol misuse in New Zealand is quite misleading. An anti-alcohol tone pervades the report, negative statistics are highlighted, and positive trends associated with drinking are de-emphasised or omitted. Much of it reads like a moral panic about people who enjoy drinking.
- 1.6 In the course of consulting knowledgeable advisers on our submission, we received an interesting comment from a former senior police officer (who agreed with some of our draft but not all of it). It read:

I will relate just one experience I had as a Detective Constable in 1971 approaching a three week night shift as the sole South Auckland detective. Usually the three weeks produced a multitude of stabbings, rapes, grievous assaults and domestic violence with every night being occupied with numerous arrests and long hours. The five days before my period of night shift commenced the breweries went on strike for about a month. By the time my period of night shift started there was effectively a prohibition (at least on beer – wine being less popular) and for the three weeks I finished every shift on time, I made only a few arrests (none alcohol-related) and attended few incidents. When the brewery workers returned, within 24 hours the abundance of crime and incidents returned.

Two points here are noteworthy. First, the problems of alcohol-related crime described in the Commission's report are in no way new. Second, the events described occurred at a time when liquor laws in New Zealand were far more restrictive, which calls into question the Commission's wish to move back in that direction.

- 1.7 We also note the stark contrast between the general thrust of the Commission's commentary and the view of Brian Easton cited in the paper that:

The Sale of Liquor Act was one of the most successful reforms of its times, vastly improving access to liquor for moderate drinkers, transforming and enlivening inner cities with a plethora of small bars and restaurants. There is no evidence that harm rose – indeed the

downward trend of absolute consumption of alcohol per adult continued until 1998.

Easton rightly stated that the effectiveness of various regulatory interventions is limited because of the need to allow consumption which is benign and socially beneficial.¹ We also note in relation to the Sale of Liquor Act the following statement from the latest Annual Report to Parliament of the Liquor Licensing Authority:

Suffice to say that there are no urgent concerns about the way the Act is currently being applied and administered. Despite the level of apparent disquiet we believe that the current Act is working reasonably well. In our view it could not be said that the system of control over the sale and supply of liquor to the public in this country is an unreasonable one.

These statements are at odds with the general thrust of *Alcohol in Our Lives*. We would urge the Commission to strive for a more balanced presentation of trends in its final report. This should also mention the contribution the changes of the 1980s and 1990s have made to New Zealand's tourism offerings and the positive personal and external health benefits of moderate drinking.

- 1.8 Questions have been raised by Chris LaHatte in *NZ Lawyer* (2 October 2009) as to whether the Law Commission is competent to handle questions of social policy and matters "well outside of the Law Commission Act". We do not have a view on the matter but if the Commission is to advise on such issues it should do so on the basis of sound public policy principles and good regulatory practice. We discuss these issues below before commenting on some of the questions the Commission raises and suggesting alternative lines of inquiry.
- 1.9 A dilemma we had in preparing a submission concerns the scope of the Commission's report. On the one hand it is billed by the President as a "top-to-toe" examination of "the whole scene" and its terms of reference are far-reaching. They include a requirement to deal explicitly with "the effects of alcohol use on the level of offending

¹ Easton went on to make a tentative case for raising excise tax on alcohol, with which we disagree. We discuss excise taxes in section 4 below. We also think Easton's estimates of the social costs of alcohol consumption are exaggerated and refer the Commission to the work of Felicity Barker and Crampton and Burgess on this issue.

in the community *and consideration of measures to minimise such offending*" (emphasis added). Moreover, the paper invites responses to a range of questions under the headings 'Problem Limitation: Enforcement and Penalties Options' and 'Transport Options', yet we have been told in consultations that the Commission will not consider such obvious 'measures to minimise offending' as denying abusers eligibility for ACC benefits or address what is arguably the most serious alcohol offence, drink driving. If the Commission chooses or has been instructed to be selective in respect of the issues it addresses, we think it should make it plain in its report that it has not conducted a "top-to-toe" inquiry, as well as emphasise that there are severe constraints on what can be done about alcohol problems through law governing just the supply and sale of liquor.

- 1.10 The Business Roundtable is interested in policy related to liquor, first, because it is a large industry in the economy, using significant economic resources and accounting for a significant share of household spending, and, second, because of our interest in disciplined policy-making and concern at the poor quality of much regulatory and tax policy-making in recent years.² We were involved with the earlier Laking working party and the 1996 Robertson review. We attach our submission to that review as an integral part of this submission. That submission contains discussion of a number of issues which is not repeated here. It includes the point that controls on the availability of alcohol are an inefficient means of limiting alcohol abuse (the discredited 'availability theory'); the economic evidence on advertising; the research suggesting that drinkers do not systematically under-estimate the risks involved; and specific recommendations on identification cards, trading hours and days, and health warnings.

² Spending on alcohol products is \$19 a week on average, or 2% of net household expenditure and about the same as spending on fruit and vegetables (1.9%) and meat and poultry (2.1%). Source: SNZ, Household Economic Survey, year ended June 2007.

2. General approach

- 2.1 A key issue in alcohol policy is whether the problems of alcohol abuse, which are rightly matters of public concern, are best addressed by what have come to be known as paternalist or 'nanny state' interventions (the type generally favoured in the Commission's paper) or whether they should be mainly seen as the responsibility of individuals, parents and institutions of civil society (such as the media and universities), subject to incentives created by the law and social sanctions. A parallel issue is whether the focus should primarily be on the suppliers of alcohol or those who use it.
- 2.2 The present government has stated that it stands for individual freedom, personal responsibility, competitive enterprise and limited government (see, for example, the National-ACT Confidence and Supply Agreement). We support these principles. In the Speech from the Throne on 9 December 2008, the Governor-General said:

[My] government will not seek to involve itself in decisions that are best made by New Zealanders within their own homes and their own communities. The new Government's vision is not to dictate the way in which New Zealanders should live their lives, but instead to ensure that they have the opportunities they need to make the best choices for themselves.

We see the Commission's approach, including its focus on regulation of suppliers, as more in keeping with the pattern of the 'nanny state' interventions of the previous government, which provided its terms of reference. We think such an approach is unwarranted and certain to be ineffective.

- 2.3 The government's emphasis on individual freedom and personal responsibility is directly relevant to alcohol issues – most drinkers are responsible non-abusers. Closely linked to such liberal ideas is a proper conception of harm, and of harm minimisation which is relevant in the alcohol context. A carefully formulated harm principle was enunciated by John Stuart Mill in his essay *On Liberty*:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of

public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right ... The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.³

In respect of alcohol policy, this principle calls for an emphasis on harms to third parties – the so-called ‘externalities’ associated with alcohol consumption.

2.4 Mill went on to apply this harm principle to alcohol, in opposition to the prohibitionist movements of his time. The following are some relevant quotations:

- Selling fermented liquors, however, is trading and trading is a social act. But the infringement complained of is not on the liberty of the seller, but on that of the buyer and consumer; since the state might just as well forbid him to drink wine, as purposely make it impossible for him to obtain it.
- A theory of “social rights”, the like of which probably never before found its way into distinct language – being nothing short of this – that it is the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal of the grievance... So monstrous a principle is far more dangerous than any single interference with liberty ...
- Drunkennesses, for example, in ordinary cases, is not a fit subject of legislative interference; but I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself; that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offence, the punishment to which he would be liable for that other offence should be increased in severity.
- To tax stimulants for the sole purpose of making them more difficult to be obtained, is a measure differing only in degree from their entire prohibition; and would be justifiable only if that were justifiable.
- The limitation in number, for instance, of beer and spirit-houses, for the express purpose of rendering them more difficult of access, and diminishing the occasions of temptation, not only exposes all to an inconvenience because there are some by whom the facility would be abused, but is suited only to a state of society in which the laboring classes are avowedly treated as children or savages, and placed under

³ John Stuart Mill, *On Liberty*, Prometheus Books, p 16.

an education of restraint, to fit them for future admission to the privileges of freedom.

- It is only because the institutions of this country are a mass of inconsistencies, that things find admittance into our practice which belong to the system of despotic, or what is called paternal, government ...

We would note that in addition to alcohol, hundreds of products – poisons, matches, detergents, motor vehicles, electricity, pharmaceuticals and firearms, for example, can cause harm if misused. The policy response is usually proportionate and targeted.

- 2.5 Even if a more paternalistic view is taken of the role of government, contemporary writers (influenced by behavioural economics thinking) do not typically reach for the kind of blunt interventions favoured by the Law Commission. An example is the discussion on alcohol in the book *Nudge* by prominent US academics Richard Thaler and Cass Sunstein which was published last year.⁴ Their approach is characterised as libertarian paternalism, and in respect of alcohol they write:

A related example is the “social norms” approach, which tries to reduce drinking and other undesirable activities. Consider, for instance, the problem of alcohol abuse by (mostly underage) college students. A survey by the Harvard School of Public Health found that about 44 percent of college students engaged in binge drinking in the two-week period preceding the survey. This is, of course, a problem, but a clue to how to correct it lies in the fact that most students believe that alcohol abuse is far more pervasive than it actually is.

Misperceptions of this kind result in part from the availability heuristic. Incidents of alcohol abuse are easily recalled, and the consequence is to inflate perceptions. College students are influenced by their beliefs about what other college students do, and hence alcohol abuse will inevitably increase if students have an exaggerated sense of how much other students are drinking.

Alert to the possibility of changing behaviour by emphasizing the statistical reality, many public officials have tried to nudge people in better directions. Montana, for example, has adopted a large-scale educational campaign, one that has stressed the fact that strong majorities of citizens of Montana do not drink. One advertisement attempts to correct misperceived norms on college campuses by asserting, “Most (81 percent) of Montana college students have four or fewer alcoholic drinks each week.” Montana applies the same approach to cigarette smoking with an advertisement suggesting that “Most (70 percent) of Montana teens are tobacco free.” The strategy has produced big improvements in the accuracy of social perceptions and also statistically significant decreases in smoking (pp 68-69).

⁴ Richard H Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness*, Penguin 2008, 2009.

Both the research (the inflated perceptions of binge drinking) and the response may be relevant in the New Zealand context.

- 2.6 We submit that in its final report the Commission should start by setting out its view of the role of government in relation to alcohol. In our view the statement of the President earlier this year that “the minimisation of harm has to be the prime object of any new law” is clearly misguided. This cannot be a sound public policy criterion: it would justify prohibition were prohibition to be effective. Similar logic applied to motor vehicles would suggest lowering the speed limit on roads to, say, 5 kph. A more balanced statement of relevant principles and values is called for, referring to those of the government mentioned above and the Legislation Advisory Committee’s Guidelines relating to individual freedom and other common law principles. It should also include a discussion of conceptions of harm, particularly with respect to third parties. Such a discussion should set out a framework for the consideration of subsequent issues.

3. Good regulatory practice

- 3.1 Part of the implicit mission of the Law Commission is to promote regulation (legislation) of the highest quality. The President is also chairman of the Legislation Advisory Committee (LAC). The LAC Guidelines and the Regulatory Impact Statement (RIS) requirements, which are additional and complementary, are the main current disciplines aimed at promoting good regulatory practice.
- 3.2 Since 1 April 2008 there has been a Cabinet Manual requirement to include an RIS in departmental discussion papers or to use essentially an RIS framework. We were surprised to discover in our first consultation with the Law Commission that it was unaware of this procedure. We were pleased to learn that it subsequently consulted the Treasury on the matter and, presumably as a result, the Issues Paper includes Appendix 3: Draft Regulatory Impact Statement for Issues Paper. However, as an RIS or equivalent it is seriously deficient.

- 3.3 First, the Commission specifies the Public Policy Objective (as in paragraph A16) as follows:

The objective of the Law Commission's review, based on the terms of reference, is to identify legislative measures that will successfully reduce the harm associated with the consumption of alcohol.

For the reasons indicated earlier, this alone is not a valid public policy objective. Nowhere in the dot points that follow from this statement does the Commission acknowledge the goal of promoting benefits to consumers. Four pages earlier it does state that:

The objective of the Law Commission's review of the Sale of Liquor Act 1989 is a reduction in the harm to both society and individuals associated with the consumption of alcohol while securing for the community the benefits of it.

However, that statement of goals should be the other way round and the objective in respect of harm should be to minimise the sum of the costs of harm and the costs of preventing it.

- 3.4 Second, under the heading of Options (and Impact where Identifiable), the Commission states:

The range of feasible options identified in the issues paper is extensive and, in the time available to the Commission preparing this paper, it has not been possible to identify all the impacts (costs and benefits) of each proposal.

In fact **no** cost benefit analysis undertaken by the Commission is included in Appendix 3. The essence of an RIS is cost benefit analysis, and the essence of a cost benefit analysis is quantification. Estimates of costs and benefits are needed to establish whether regulatory proposals are likely to yield net social benefits.

- 3.5 Third, in the Conclusion of the Appendix the Commission states:

It is hoped that public consultation on the Issues Paper will provide the Commission with more information, enabling it to better identify the impacts (including costs and benefits) of the various regulatory measures under consideration.

Yet at a recent consultation we were informed by the President that the Commission would not be undertaking any cost benefit analysis. The reason given was that the Commission did not have the time, expertise or resources to carry it out.

- 3.6 We regard this as a totally unacceptable state of affairs. It means that the Commission's recommendations can have little or no evidence-based foundation. Good policy cannot be made without rigorous analysis. By the time the Commission reports it will have had almost two years to do its work and it has devoted substantial resources to it. If the Commission lacks the expertise to undertake economic analysis, this may validate the criticism cited earlier that it is the wrong body for the job. In that event it should not have accepted it or it should have adjusted its staff to acquire the necessary expertise. Failing an evidence-based case for intervention, the Commission should conform with the common law presumption in favour of liberty that is endorsed in the LAC Guidelines.
- 3.7 A good deal of the necessary analysis is not rocket science. Take, for example, the idea the Commission has floated of introducing a minimum price for alcohol. On the basis of any price increase it wishes to consider, the effect on consumer welfare would be straightforward to calculate. Assuming the increase was not trivial, there would be a transfer of wealth to producers and the impact on consumers would be in the order of many millions of dollars a year. In addition there would be additional administrative, compliance and enforcement costs, and unintended consequences such as black market activity and increased demand for non-alcoholic abusive substances. Could it plausibly be argued that there would be commensurate benefits? – the Commission would need to demonstrate net benefits, not just assert them. We give further examples of issues that are readily amenable to economic analysis below.
- 3.8 In the absence of a meaningful draft RIS, submitters have had no useful basis to respond to the 'laundry list' of questions posed in the Issues Paper. How can they assess, for example, the possible net benefits of requiring mandatory age verification for the sale of alcohol? The costs would be large, as noted in our 1996 submission. What are the related benefits? Submitters are flying blind. In the absence of analysis the Commission's final report might be based on

little more than subjective judgments and 'head counts' for or against particular options, which are no substitute for rigorous analysis.

- 3.9 What can be done? We think the Commission should see it as its duty to meet the RIS requirements and, if necessary, seek the assistance of the Treasury and other sources in doing so. Although it is an independent statutory body and not subject to the Cabinet Manual requirements, it ought to regard itself as a role model on good regulatory practice and voluntarily submit to the same disciplines. From 2 November 2009 these are being strengthened and a key aspect of the new procedures is a sign-off as to the adequacy of an RIS by the Regulatory Impact Audit Team of the Treasury. We think that the Commission should seek an RIAT sign-off for its report. We would also point out that if an RIS is not undertaken by the Commission despite two years' work, it will have to be undertaken by the Ministry of Justice and be certified by the minister and the RIAT if a bill is to be introduced into parliament. In our view taxpayers should not be asked to bear the costs of unnecessary policy-making failures.

4. Issues raised in Law Commission's report

- 4.1 We comment briefly in this section on a range of proposals floated by the Commission. On certain additional issues we retain the views expressed in our 1996 submission and refer the Commission to them.

- Increase in purchase age to 20 years

We oppose this suggestion. Among the many people we have spoken to, none (even people who support the idea) think it would make any real difference to problems of misuse. It is noteworthy that, in the Issues Paper itself and in the District Court Judges' Preliminary Submission, case after case is cited of young people well below the current purchase age misusing alcohol. The roundabout ways of obtaining alcohol are innumerable. Internationally, the most common age at which people may purchase alcohol is 18 years. The argument that it is bizarre to allow young people to vote, marry, have children and enlist in the armed forces at age 18 but not to allow them

to purchase alcohol until age 20 is powerful. Is it really credible to tell 18 year olds that they are responsible enough to help determine the selection of their government but not responsible enough to purchase alcohol? Such 'nanny state' treatment simply infantilises them and is no way to promote responsible drinking.

We favour retaining the status quo.

- ***Minimum pricing***

We find this an extraordinary anti-consumer suggestion, reminiscent of New Zealand's old price control regimes which once included an anti-competitive minimum price regime for petrol. The terms of reference require the Commission to consider the application of competition law to the sale of liquor. We cannot see how minimum pricing can possibly be consistent with competition policy.

The interests of consumers, including the vast majority of responsible consumers of alcohol, are in lower prices, not higher ones, for a given quality of product. Their interests should be regarded as paramount. Promotions and discounting are a healthy feature of normal commercial life and we see no grounds for discriminating against alcohol, which is a lawful article of commerce. The costs of enforcement of such a regime across a huge number of outlets would be large. As noted earlier, we believe a cost benefit analysis, which the Commission should undertake if it wishes to pursue the idea, would fail by a wide margin.

- ***Trading hours***

We reiterate the view expressed in our 1996 submission that:

The regulation of trading days and outlets cannot be justified on the grounds of controlling sales to under-age people or intoxicated adults. The only plausible rationale, aside from paternalism, is a belief in the discredited availability theory.

The key point here is that outlets respond to consumer demand, as do firms in all other industries. We now live in a 24/7 world. In our view there is no good case for restricting the right of traders to decide

on the hours and days they wish to trade. They open because consumers want them to.

- ***Regulation of outlets***

The lack of evidence in support of the availability theory again suggests that there is no sound case for restricting outlets. To do so would be a throwback to past bureaucratic regimes of licensing restaurants, transport and other activities of the basis of 'need'. Owners of small premises have rightly protested against action that could threaten their livelihoods. In terms of the LAC Guidelines, any proposals to do so should require consideration of compensation.

- ***Excise taxes***

The Issue Paper states (p 171) that if the legitimately attributed external costs of alcohol consumption are as high as some of the estimates indicate, the case for increasing excise tax is strong. However, the BERL report that the Commission earlier relied on unquestioningly has been comprehensively discredited by Eric Crampton and Matt Burgess. We regard the expenditure on it of \$135,500 (plus GST) by the Ministry of Health and ACC as a waste of taxpayers' money. Crampton and Burgess initially put the policy-relevant net external costs of alcohol consumption at \$146.3 million – a relatively small amount for a large industry. Following comments from BERL, this figure was revised down to -\$37.8 million – ie a small net external benefit where taxes collected exceed the estimated external costs. This finding is consistent with a Treasury Working Paper (Barker, 2002). Moreover, tax policy should not be based simply on external cost calculations.

In consultations we urged the Commission to engage with the analysis on excise taxes in the 2001 McLeod Tax Review, which is of high quality. The Review found that the then levels of excise could not be justified. We are disappointed that the Commission did not do so in the Issues Paper, merely noting that the government did not

implement the Review's recommendation as if that were sufficient to disregard it.

The Law Commission has sought the advice of the Treasury on excises and stated that it "will need to embark on a detailed study for its final report." We have reservations about the Treasury analysis quoted in the Issues Paper. It risks undermining the case for a flat rate of GST when it employs Ramsey arguments for excises. Because no one can be sure what the elasticities really are, setting differential rates becomes a political decision influenced by rent-seeking and likely to be endlessly relitigated. We ask that the Commission also consult with the Inland Revenue Department and the relevant members of the 2001 Tax Review, Rob McLeod and Ted Sieper. Our view is that raising taxes on alcohol to prevent problem drinking would be a hopelessly blunt approach: it would be like raising the price of petrol to prevent people from speeding. It is also inequitable to ask responsible drinkers to meet the social costs associated with problem drinkers – they should be met by the community (taxpayers) at large. Consumption by heavy drinkers is less price elastic than that of moderate drinkers who would be hit most by an increase in excise tax.⁵

- ***Advertising***

Advertising is a form of commercial free speech which should be protected under the LAC Guidelines. Our 1996 submission has a lengthy discussion on restrictions on advertising and promotion in section 6. It found that:

The evidence indicates that such restrictions harm consumers. Controls on advertising focus on restricting liquor consumption rather than addressing abuse. They cannot be justified on economic grounds and should be abolished.

⁵

Note, in this context, Eric Crampton's criticism of the WHO study cited by the Commission at <http://offsettingbehaviour.blogspot.com/2009/07/and-further-on-price-elasticity.html> sourced from a meta study Alexander C Wagenaar, Matthew J Salois & Kelli A Komro (2009), 'Effects of beverage alcohol price and tax levels on drinking: a meta-analysis of 1003 estimates from 112 studies,' *Addiction Review* (104), pp 179-190. We understand the basic finding that heavy drinkers are relatively price unresponsive is a standard finding in the literature.

Attached as Annex I is a recent survey of relevant literature, 'Banning alcohol ads won't cure alcoholism' by Patrick Basham and John Luik, which confirms earlier evidence. The anti-advertising campaign mounted by some academics lacks credibility.

In relation to advertising, we commend to the Commission the standard of analysis in the recent report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Liquor Advertising (Television and Radio) Bill.

- ***Products available at off-licence premises***

The Issues Paper notes that a number of other countries, including some Australian states and the United States, allow the sale of spirits in supermarkets. There are many others. We see no reason for maintaining restrictions in New Zealand.

The Issues Paper rightly notes that the existing rules are anti-competitive and also observes that it is difficult to see how allowing supermarkets to sell spirits and spirits-based drinks would lead to greater sales to minors.

The Commission suggests that the strongest argument against widening the range of alcoholic beverages that supermarkets and grocery stores might sell is that it might lower prices. Our comments above on minimum prices apply. This is another example of the Commission not putting the interests of the mass of responsible consumers first.

It is also an issue that is readily amenable to economic analysis. The Commission should assess the benefits to consumers of lower prices and greater convenience, compare them with the detriments of liberalisation (if any), and make a recommendation accordingly.

- ***Licensing trusts***

Licensing trusts with monopoly trading rights are an anachronism. There is a strong injunction in the Government Statement on

Regulation against measures that impair market competition. We reiterate the recommendation in our 1996 submission that licensing trusts should be exposed to competition.

The Issues Paper acknowledges the anti-competitive nature of preferential trading rights and the detriments to consumers. However, it also states that the trusts appear to enjoy wide support in their respective communities. So did compulsory union membership among union officials. That is no argument for not allowing choice and competition, nor is it relevant that trusts support local projects. That argument could be used to support trusts with local monopoly rights for any number of trading activities.

Again this issue is easily amenable to economic analysis. The Commission should assess the economic costs of monopoly licensing trusts, in terms of higher prices and less convenience for consumers, compare them with the detriments (if any) of removing monopoly rights, and make a recommendation accordingly.

- 4.2 A theme running through all the comments in this section is that the Commission is wrongly focusing on controlling supply and blunt, across-the-board, demand reduction measures. We believe these measures would be largely ineffective in limiting alcohol abuse and neglect the interests of many hundreds of thousands if not millions of responsible consumers. The Commission is adopting failed past policy approaches to current problems. A far better approach would entail the use of targeted measures aimed at abuse and abusers.

5. Better strategies for dealing with abuse

- 5.1 We want to see much more effective remedies for controlling alcohol abuse than the Commission is recommending. We see nothing in the Issues Paper that would have prevented or materially reduced the risk of the fatal attack on Mr Navtej Singh in South Auckland last year. The emphasis in our view should be on issues such as individual and parental responsibility, disincentives and penalties for abusive behaviour, making abusers face the consequences of their actions,

the responsibility of institutions such as the media and universities, better enforcement and social sanctions. We believe that, as a Law Commission, it is much better placed to suggest improvements in relevant laws than attempting to tackle wider social policy issues.

- ***Better enforcement***

The frequent tendency in New Zealand to reach for new laws rather than focus on better enforcement of existing laws is apparent in the Commission's report. In our view the Sale of Liquor Act as it stands provides for a generally satisfactory system of licensing, but problems have arisen from its poor application and under-resourced enforcement. As with many spheres of regulation in society, the desired outcomes are unlikely to be realised if the enforcement regime is ineffective.

We believe the Commission should examine these issues in greater depth. We suspect that at present local authority enforcement, in particular, is subject to severe financial constraints. One possible remedy might be to enhance local authorities' ability to prosecute by enabling them to recover the costs of their enforcement actions and to keep, say, 90 percent of the cost of fines (as they are able to do under the Resource Management Act). The costs regime should also be brought up to date.

- ***The offence of drunken and disorderly behaviour***

The Issues Paper asks whether the offence of being drunk in a public place should be reintroduced. This is a misplaced focus. The focus should be on harm to others. It is hard to see what is wrong with people being 'high' and enjoying themselves over Wellington's rugby Sevens weekend, for example, provided they are not harming others. The offence to focus on should be 'drunken *and* disorderly behaviour', where 'disorderly' refers to such harms. The Commission could usefully put some effort into careful drafting of an appropriate law.

- ***Alcohol in public places***

The Commission invites comment on whether drinking in a public place should be an offence. We can see no general grounds for such a measure: why would anyone want to ban drinking in camping grounds or at picnics, for example? We think liquor bans may be justified in certain places, such as on New Year's Eve when large crowds are gathered at places like beach resorts and in other areas that have proved or are likely to be trouble spots. However, in general, public places should be just that: places open to citizens as they have been under common law for centuries, with the relevant issue being the actual or potential harm to others.

- ***Infringement notices***

We agree with the Commission that more use could be made of infringement notices (instant fines). We are told that in Canada a graduated range of police actions against disorderly conduct is available starting with warnings and emptying of bottles, followed by the equivalent of an infringement notice, followed by arrest. This seems sensible. Careful drafting would be needed to specify the range of offences for which infringement notices could be issued and the level of penalties, and there should be provision for appeals.

Infringement notices might also be appropriate in cases of drunkenness which the police have to take care of (because the person concerned is incapacitated).

- ***Minor in possession***

We understand that in consultations the President of the Commission indicated that a minor in possession offence was not feasible because it could not be enforced. We do not understand this comment. As the report in Annex II indicates, courts are willing to impose severe sentences on minors. While possession of liquor by a minor can, in some circumstances, be hard to detect (and therefore enforce) this does not necessarily mean that the courts should be

deprived of what might be an effective method for the prevention of harm to others.

District court judges have a lot of experience in this area and it is disappointing that their submission did not contribute to the Commission's thinking on it and instead focused largely on treatment issues. We see this as an area that the Commission should explore in much greater depth. Again, any new law should be carefully drafted as introducing young people to alcohol under parental supervision is desirable.

We would also ask the Commission to consider parental responsibility. In response to binge drinking problems in Milan the city council has introduced a regime involving a euro 900 (NZ\$1800) fine on parents if their under-age children are caught drunk in public. Should such penalties be considered in New Zealand?

- ***Naming and shaming***

We were astonished that the Police were recently reported as trying to prevent publication in newspapers of drink-driving offenders. We regard drink driving as one of the worst alcohol-related crimes and think that it should be met by strong enforcement of the law and the strongest social sanctions. We are pleased that the Minister of Police overruled the Police decision.

Condemnation of drink driving over the past 20-30 years has changed social attitudes towards it. We suggest the Commission explore with media organisations ways of encouraging social opprobrium of other abuses of alcohol.

- ***Banning orders and agreements***

The British government has established a system of Drinking Banning Orders (commonly referred to as booze Asbos) whereby police can ban alcohol-fueled troublemakers from pubs and off-licences, from certain parts of a town, and from drinking alcohol in public, for up to two years. We suggest the Commission should investigate

experience with this targeted measure and consider its merits. Once again it is a measure focused on abusers and is preferable to blanket liquor bans in public spaces.

The Commission could also examine the scope for promoting such arrangements voluntarily with the cooperation of the industry. We understand that there is a similar initiative in place in the entertainment precinct around the Bush Inn area in Christchurch. The liquor outlets (bars and bottle stores and a supermarket) have agreed to collectively ban any individual who displays drunken and anti-social behaviour in any of the outlets. The objective is to curb student drunkenness and associated nuisance behaviour in the area.

- ***Role of universities***

There has been considerable publicity of and reactions to university-related alcohol problems such as orientation weeks and the Undie 500.

Some of it has been misguided in our view. Police and local government representatives, for example, have suggested the Undie 500 is not welcome in Dunedin or, as an alternative, on the West Coast. It is disturbing that law officers seek to interfere with internal freedom to travel. The focus should be on actual or potential harms to third parties.

In our view, universities, as institutions of civil society, have a role to play here. We do not see them as being accountable for the behaviour of students at times when they are not directly associated with the university. Nevertheless, there is a place for stating expectations of student behaviour in codes of conduct, including expectations that students will not bring the name of the university into disrepute. When students are on campus or part of a university team or group, however, we think there is a stronger case for university sanctions in cases of misconduct, including suspensions or expulsions. We think the Commission should discuss this issue with

universities, ask them to develop or consider the extension of policies, and report on the outcome in its final report.

We understand a severe sanction that may have particular relevance to university students is convictions that may prevent them entering certain other countries such as the United States. We think the Commission should examine the issue of whether police diversions should be more restricted and promote publicity about this severe consequence of alcohol-related convictions.

We are aware of the moves by the University of Otago to ban liquor advertising on its campus. We think this is another example of a misguided approach to alcohol problems. It is naïve to think it will be effective in curbing student binge drinking. The action seems to be driven by mistaken views about the effects of advertising on consumption of alcohol which we discussed earlier. An academic institution should be more conscious of the paucity of evidence about the link between bans on liquor advertising and liquor consumption which the Issues Paper notes, notwithstanding the populist campaigns of some academics.⁶

Universities, which rightly wish to protect academic freedom of speech, should apply the same approach to the protection of commercial free speech in respect of lawful products.

- ***ACC, welfare and health services***

The external costs of alcohol misuse take the form of costs met by people other than the abuser. (Other costs are borne by misusers themselves in forms such as lower productivity and lost wages.) An obvious targeted strategy is to sheet home more of those costs to abusers – to ‘internalise’ them, in the economic jargon. The Commission appears to have given little thought to this strategy in the Issues Paper.

⁶ A comment on one such campaign by former *Dominion* editor Karl du Fresne is attached as Annex III.

One such way of strengthening incentives against abusive behaviour (like fights) would be to deny persons with self-inflicted alcohol-related injuries access to ACC earnings-related benefits. We are aware that others, such as Dr Paul Quigley, head of A & E services at Wellington hospital, have made this recommendation to the Commission. It seems well within its terms of reference quoted earlier in this submission – it would create stronger incentives *to minimise offending*. In any case, when it comes to an RIS, examination of “the range of feasible options” for meeting a policy objective is required.

Standard insurance law and practice in New Zealand allow insurers to deny claims (eg in relation to traffic accidents) where alcohol is involved. The government is moving to restrict ACC cover for people who deliberately injure themselves or who injure themselves while committing crimes. We see such restrictions as being equally relevant to self-inflicted alcohol-related injuries and ask the Commission to investigate it thoroughly. The exclusion should also apply to people who knowingly get into a car to be driven by a drunken person. Provision might, of course, have to be made for the payment of sickness or invalid benefits in some cases.

The area of welfare should also be looked at in our view. A possibility might be to make drug and alcohol checks a condition of receiving benefits where excessive alcohol use is suspected, given the association between problem drinking and welfare dependency. Positive findings could trigger stricter case management and perhaps a requirement to have appointed agents to administer available financial assistance. These could be social service providers, charities, churches, appointed guardians, family members, employers (if the beneficiary is a part-time worker), or budgeting services. It should be axiomatic that the state does not give welfare cash to known alcoholics. We think there would certainly be support from some Maori groups for such an approach.

The related problem of taxpayer-funded health services that abusers benefit from is a more difficult one to internalise. However, we think the Commission should explore possibilities with health sector managers. In the United States there are regular accounts of wealthy people (such as celebrities) with alcohol problems checking into clinics for rehab services and the like for which they have to pay. Perhaps a start could be made to strengthen incentives for individual responsibility in the public health system in the case of people who are clearly able to pay for treatment.

- ***Transport options***

The Issues Paper asks a number of questions about road safety and other transport issues but we are unclear whether the Commission is to pursue them.

For completeness, however, we wish to record that in our view tougher action should be taken in serious drink-driving cases. The report attached as Annex IV from the *Sunday Star-Times* of 11 October 2009 states that last year 1500 people convicted of drink driving had four or more previous convictions. This seems a scandalous state of affairs.

Without a convincing cost benefit analysis, we would not support lowering the blood alcohol limit from .08 to .05; we agree with the Sensible Sentencing Trust that it would have little or no effect on the type of offender we want off the road. There may be a case for a zero limit for second offenders and young people. We support the introduction of ignition interlocks, higher penalties for impaired drivers who kill, longer bans for repeat offenders and ineligibility for earnings-related accident compensation for drunk-drivers who injure themselves. We question the right to trial by jury for third offenders.

In our view there is also a strong case for strengthening the powers provided under the Sentencing Act for confiscation of the cars of serial drink drivers. The government has recently taken similar action in respect of boy racers. There are numerous cases where the courts

have declined to enforce the current regime under the so-called 'hardship' grounds contained in the Act. There may be a need for a law change to make it clear to the courts that confiscation should occur in all but the most exceptional cases of serial drink driving.

6. Conclusion

- 6.1 While we believe our suggested approach to problems of alcohol abuse would be much more effective than the main approach taken by the Commission, we think there are other aspects which the Commission should highlight in its report. Many of the problems of alcohol abuse lie much deeper. The fact that a considerable amount of crime is associated with alcohol does not demonstrate that alcohol is the causal factor. The problems often go back to issues of family upbringing, child abuse, poor parenting and welfare dependency. Alcohol abuse in these settings is more likely to give rise to lifelong problems than binge drinking.
- 6.2 In our view, a range of public policies in New Zealand are contributing to these problems. The Commission could provide a useful service if it discussed the root causes of many alcohol-related problems in its report and explained the limited effect on them that supply control and demand reduction policies can have.