**Annexure**

**NEIL FRANCEY - MEMORANDUM OF ADVICE**

**Public Health Amendment (Tobacco Free Generation) Bill 2014**

**Critique – “Tasmanian’s ‘smoke-free generation’ is undemocratic discrimination”**

**Brendan Gogarty – The Conversation April 12, 2016**

<https://theconversation.com/tasmanias-smoke-free-generation-is-undemocratic-age-discrimination-57049>

**Introduction** *(Heading added)*

Tasmania is considering [legislation](http://www.parliament.tas.gov.au/bills/pdf/40_of_2014.pdf) to create a “tobacco-free generation” by banning sales to **persons born after July 1, 2000**.

*This suggests that Dr Gogarty does not have a good comprehension of the TFG Bill, which defines a “member of the tobacco-free generation” to mean “****a person born on or after 1 January 2000****” (proposed Section 67I). It may be excused as a typographical error except that the mistake is repeated in the section under the heading “Unjustified discrimination” (see page 24 below).*

**It is a tobacco prohibition law**, albeit one whose [endgame will play out for future generations](https://theconversation.com/whats-next-for-tobacco-control-a-smoke-free-generation-42248#comment_680335) only.

*This is an exaggerated characterisation of the TFG Bill, as is effectively conceded by Dr Gogarty, because it will only apply progressively year by year. This is distinct from outright prohibition, of the kind introduced and abandoned in the USA between 1919 and 1933 in respect of the manufacture or sale of alcohol, to which Dr Gogarty refers below under the heading “Prohibition doesn’t work”. It is conceptually wrong to equate the two as the practicality of implementation is different as is the claimed impact on future generations (as elaborated upon by Dr Gogarty below).*

That is concerning, as it’s **unlikely to achieve its aims**, but also because it **undermines civil rights and representative government**.

*This single sentence conflates a number of ideas: the assertion that the Bill is “unlikely to achieve its aims”; the assertion that the Bill undermines “civil rights”; and the assertion that the Bill undermines “representative government”. Dr Gogarty presents no evidence as to the first of these and presents flawed arguments as to the latter two as dealt with in more detail below. His statement that “This is concerning” flows from the exaggerated characterisation of the Bill as set out above and is not sustained by evidence or cogent and coherent argument.*

The “tobacco-free generation” proposal reflects an **increasingly interventionist approach** by [state governments](https://www.themonthly.com.au/issue/2016/march/1456750800/richard-cooke/boomer-supremacy) and [public health organisations](http://www.crikey.com.au/2016/04/04/medical-submission-exposes-the-misogyny-in-nanny-statism/) **in the name of public health**. The frustration of those on the tobacco front line is understandable; **the drug represents a significant social danger**.

*This paragraph also involves an assertion, the judgmental characterisation of the TFG proposal as an “increasingly interventionist approach” (if this is meant to refer to progressively stringent tobacco control measures the answer lies in the analysis in the MOA section dealing with the Impact of tobacco). It is also another situation where Dr Gogarty conflates the status of “state governments” and (un-specified) “public health organisations”. The latter are entitled in a free society to advance what they see is best practice public policy and it is a matter for them to persuade governments at any level to act accordingly. The reference to “in the name of public health” rather implies that the measures adopted are disingenuous whereas it has been demonstrated that tobacco control measures adopted over the years have been effective in protecting the public good (again see the section in the MOA dealing with the Impact of tobacco and especially the effectiveness of a variety of tobacco control measures). Notably Dr Gogarty concedes that nicotine laced tobacco “represents a significant danger” but rather condescendingly “sympathises” with “the frustration” of “those on the tobacco front line” as being “understandable” – were Dr Gogarty only to confine himself to the real motivation behind the TFG Bill and approach things in a balanced way perhaps some of the frustration to which he refers would be removed: instead Dr Gogarty seems intent on pursuing an extreme and untenable “libertarian” approach as exposed in this critique.*

But [so do obesity, dangerous driving, family violence, depression and suicide](http://www.aihw.gov.au/deaths/leading-causes-of-death/#leading-age). Our legal response to these **social risks** must be **evidence-based** and **considerate of constitutional limits and civil rights**.

*Here, Dr Gogarty equates the “social risks” of smoking with a diverse range of other social issues, but as demonstrated in the MOA section on the Impact of tobacco smoking causes more deaths and harm than many other factors combined. As to the proposition that the legal response to “social risks” must be “evidence-based”, so much may be accepted, but as demonstrated in the MOA there is evidence to support progressively stringent tobacco control measures – in comparison Dr Gogarty presents no evidence to the contrary, only philosophical views. Regarding the legal response being “considerate of constitutional and civil rights”, the MOA records Dr Gogarty’s concessions that the Tasmanian Parliament is competent to implement the TFG Bill, leaving only the “policy issue” alive. This is where Dr Gogarty’s extreme libertarian views are in conflict with “state sovereignty” as alluded to in the MOA.*

## Prohibition doesn’t work

Laws that rely on prohibition to reduce the prevalence and harm from drugs **generally** fail to achieve their aims. That was true of historic [alcohol prohibition laws](https://en.wikipedia.org/wiki/Prohibition). It remains true of the continued legal [prohibition on narcotics](https://theconversation.com/what-works-best-in-the-war-on-drugs-31015).

*In this paragraph, Dr Gogarty makes the assertion that laws “that rely on prohibition to reduce the prevalence and harm from drugs …fail in their aims” but concedes that this proposition is only “generally” true, thereby allowing for the possibility that some such laws may succeed - at least to some degree. Aside from the invalid comparison with the blanket prohibition of the manufacturing or sale of alcohol effected by the 18th amendment to the US Constitution as set out above, and the vexed issue about the prohibition on narcotics, both of these examples have led to a position where sale of alcohol is heavily regulated as is the use of narcotics e.g. the medicinal use of morphine and marijuana (and even possession of marijuana for personal use). Given the TFG Bill proposes only a progressive overlay on the sale of tobacco products in respect of an already heavily regulated product equating these two other commodities is an inappropriate comparison - especially given the history of tobacco use, its impact, tobacco industry conduct and measures for tobacco control as set out in the MOA.*

Prohibition is **rarely successful** for **many reasons**. An important one is that regulatory compliance is best achieved with **co-operation rather than coercion**. Effective regulation encourages the “buy-in” of those regulated and facilitates **self-regulating conduct**, even when **the state isn’t looking over their shoulder**.

*Again, Dr Gogarty concedes that whilst prohibition (using that term in the misconceived way Dr Gogarty does, as exposed above) may not be successful his claim carries the qualification that this is “rarely” so, thus allowing for the possibility that in a particular instance it may succeed – at least to some degree. As to the “many reasons” advanced in support of this claim, distilled down what Dr Gogarty seems to be supporting is “self-regulation” or “co-operation” rather than “coercion”. Whilst superficially appealing to someone of a libertarian bent, the proposition is patently simplistic: citing the general criminal law and the penal consequences it entails is enough in itself to expose the weakness of this argument; and that is not where it ends e.g. Clive Palmer’s ASIC exposure and ACCC price-fixing proceedings are two others. In the real world, “coercion” in the law exists and “self-regulation” is a lame response. As for the state “looking over their shoulder” approach, this equates to the deprecatory “nanny-state” branding - long pursued by the tobacco industry (see the MOA section on tobacco industry conduct). Essentially this approach would have Parliaments not exist on the basis of the forlorn hope that society would survive on the basis of “co-operation”.*

However, **if people view a law as unjust or unfair** they will be much less likely to comply with it. “Buy-in” is vital to [drug regulation](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311664), which obliges people to stop using otherwise enjoyable things. It is also relevant to the Tasmanian bill, **under which the lawmakers' generation will always be able to smoke, but those who come later (who, notably, cannot yet vote) will never be able to**.

*This paragraph again exposes Dr Gogarty’s confusion over the scope of the TFG Bill – it does not prohibit members of the TFG from smoking: it merely prevents the sale of tobacco products to such persons. Equally confused is the assertion that the Bill will affect those “who … cannot vote”: in fact, if the TFG Bill is passed, as each year passes those over 18 will be entitled to vote and could campaign for a repeal of such legislation. As to the concern over people who “view a law as unjust or unfair”, hence leading to non-compliance, “the TFG Bill does not apply to purchasers – only sellers” (and the judgement here is one for Parliament to decide).*

Targeting laws at people who cannot hold lawmakers to account at the polls is **undemocratic**. It is also **unfair** to have one generation telling the other to **“do as I say, not as I do”**.

*Again, this paragraph confuses/distorts the issues involved. As indicated above, if the TFG Bill is passed those who year by year gain the right to vote can campaign for its repeal – hence it is a stretch to say the Bill is “undemocratic”. Relevant in this regard is that the TFG Bill provides for “review” in 2021 and 2025 (proposed Section 67L). In any event it is unlikely that any repeal would eventuate given that currently Cancer Council surveys indicate that there is around 70% support for the TFG Bill in its present form. The claim the Bill is “unfair” is yet another judgement call, tethered to the elusive concept of being “unfair”, and in any event the “do as I say, not as I do” contention is a non sequitur in that it is hardly apposite to what is involved in considering whether or not the TFG Bill should be passed by the Tasmanian Parliament. Moreover, as regards the contention that it is ‘undemocratic” for one generation to bind another, there are ample examples of “grandfathering” or “phase-out” legislation – some being the experience with opium in Asia in the 19th and 20th centuries and the reduction in Federal Parliament’s Members and Senators post-retirement benefits (e.g. superannuation entitlements).*

This **unfairness will undermine regulatory “buy-in”**, particularly in a society where new generations already feel disadvantaged by their predecessors. As Richard Cooke [wrote of the NSW lockout laws](https://www.themonthly.com.au/issue/2016/march/1456750800/richard-cooke/boomer-supremacy):

**They have been locked out disadvantaged by their predecessors of the housing market, locked out of affordable education, locked out of the welfare system and secure employment. They have seen their political power and their real wealth shrivel. And now the one area where their expectations had not been curtailed – recreation – is being destroyed as well.**

*Dr Gogarty here reverts to his extreme “libertarian” self-regulatory model, previously dealt with, and cites an example of an unrelated nature which is a recent development the subject of varying policy responses in different States. The quote, taken from a “social media” source, and the subject-matter itself would require an analysis so divorced from the objective of the TFG Bill as to not warrant examination in detail in this critique. Suffice it to say that smoking is overwhelmingly not a recreation but an addiction; most adult smokers regret that addiction, try to quit, and die prematurely.*

## Lawmaking must be evidenced-based

Like “zero tolerance” laws that promise (and **usually fail**) to reduce crime, drug prohibition laws focus on **rules rather than outcomes**, and **belie the complexity of the underlying social issue**.

*In this paragraph, Dr Gogarty again draws an inappropriate comparison: “zero tolerance” laws seem to have no relevance to the TFG Bill proposal; yet again concedes that such laws “usually fail” implying that some such laws may succeed. He also resorts to the inappropriate comparison with “prohibition” so his claim about the focus being on “rules rather than outcomes” is likewise inappropriate; moreover his suggestion that efforts of those advocating tobacco control measures such as the TFG Bill “belie the complexity of the underlying social issue” suggests he believes his capacity to consider the matters involved is superior to many extremely well-qualified people who have decades of experience in successfully reducing the acknowledged devastating impact of tobacco (see MOA section on Tobacco control measures). In his “Disclosure statement” to the contribution under critique Dr Gogarty says:*

**Brendan Gogarty was a Committee-­appointed lawyer to the Legislative Council Sessional Committee Government Administration A for the Tobacco Free Generation Bill (Tas). Brendan is a life-long non-smoker. He has never received any form of contribution or support from the tobacco industry or anti-smoking lobby. All opinions here are his own.**

*On this basis it is difficult to discern what, if any, special expertise Dr Gogarty brings to the discussion of the public health and ethical ramifications of the TFG Bill, as distinct from his conspicuous extreme “libertarian” outlook.*

The reality is that successfully modifying entrenched social behaviour requires a range of regulatory approaches, applied consistently and incrementally across generations. That is certainly the case for tobacco: educative, policy and economic measures tend to have a more sustained impact than [legal measures alone](http://www.aihw.gov.au/publication-detail/?id=60129549469&tab=3).

*The MOA provides a complete response to this paragraph. Essentially the approach advocated by Dr Gogarty in this regard is what has been adopted in tobacco control measures for decades, and the TFG Bill is just another step along the way (and more subtle than blanket prohibition – as discussed above). The main reason for the expectation that the TFG Bill will be a success (and for the opposition from the tobacco industry and its surrogates) is precisely the compelling message that smoking* ***is not*** *a “grown-up” activity but is dangerous at any age.*

Tobacco [risk-reduction measures are working](http://www.dhhs.tas.gov.au/publichealth/tobacco_control), albeit slower than many would like – but that is the nature of facilitated, rather than forced, generational change. Intergenerational risk reduction requires the patience and trust in future generations to make the right decisions for themselves.

*Again, the MOA provides a complete response to this paragraph. It is as if Dr Gogarty is providing his opinions in a complete vacuum as to the history of tobacco control measures over the past half-century.*

## Unjustified discrimination

Beyond the regulatory issues, the proposed law is discriminatory. The nominal date of **July 1, 2000**, adopted by the Tasmanian bill is **unjustified**, and will only become more so as time goes on.

*Here, Dr Gogarty again makes the error in his first paragraph – referring to “July 1, 2000” instead of January 1, 2000 as in proposed Section 67I (the mistake is to some degree corrected in the next paragraph but in a somewhat confused way). And, again, Dr Gogarty employs his own flawed view that the TFG Bill is “discriminatory” and “unjustified” – the argument gets no better from repetition.*

There is no rational reason why, at January 1, 2030, a 30-year-old person can buy cigarettes, but a 29-year-old person (**perhaps born only an hour earlier**) cannot. Both are otherwise competent adults, but only one is legally allowed to buy tobacco. The legal distinction has **no public health basis** and is solely concerned with their age.

*Whilst in this paragraph Dr Gogarty refers to the correct date of January 1, his comparison between a 30-year-old person and a 29-year-old person seems confused in that he adds that the latter person may be “perhaps born only an hour* ***earlier****” (query exactly what is the point being made as on January 1, 2030 both persons would be 30 years of age). At all events, this is a date proposed for the TFG Bill to take effect and whatever date may be adopted arguments about differential treatment could be advanced. This, however, is not uncommon in policy implementation e.g. the National Disability Insurance Scheme treats Australians differently according to whether they were born before or from 1 July 1948. Like the commencement of the NDIS, for a proposal such as that under the TFG Bill a date must be selected and at least January 1, 2000 allows time for adjustment from a practicality & workability point of view: to say, baldly, that the date has “no public health basis” is breathtakingly dismissive.*

[Commonwealth, state and international law prohibits age discrimination](https://www.humanrights.gov.au/know-your-rights-age-discrimination), but state parliaments [can technically extinguish](http://www.parliament.tas.gov.au/ctee/Council/Submissions/GAA%20TFG/160212%20UTas.pdf) these rights if they choose.

*In this respect, Dr Gogarty’s view ignores the fact that whereas the law in some cases prohibits age discrimination (e.g. in employment) in many other cases (as pointed out in the MOA – page 9, footnotes 48-56) age is a factor (see also the point reiterated below). Dr Gogarty’s point may perhaps have been expressed using the less emotive and more accurate term “over-ride” rather than “extinguish” (as this invokes the judgement Parliament makes in many situations). The former term is legally correct, the latter is not: the rights remain but in this particular context are set to one side.*

There would be some irony if baby-boomer lawmakers – who come from the generation [most reliant](http://www.smh.com.au/national/older-men-on-average-income-targets-of-work-discrimination-20120129-1qnzj.html) on age-discrimination laws – choose to deprive the next generation of such rights protections.

*This observation may be treated as a passing comment; in any event, minors are protected by a raft of laws albeit numerous impositions, as discussed below.*

The very laudable public health ends the proposed Tasmanian legislation seeks to achieve **do not justify** the means it adopts. Citizens should not, once they have passed the **age of consent**, be treated unequally to their peers. We should not be segregating our society based only on the fortune or misfortune of the day they were born.

*This is yet another example of Dr Gogarty making an unsubstantiated assertion – “do not justify”. More significantly, the argument he advances to support the proposition is fatuous. The “age of consent”, according to the Oxford Dictionary, is “The age at which a person’s consent to sexual intercourse is valid in law”:* [*http://www.oxforddictionaries.com/definition/english/age-of-consent?q=age+of+consent*](http://www.oxforddictionaries.com/definition/english/age-of-consent?q=age+of+consent)

*This is not to be confused with (in Tasmania) the age of majority (18), age of criminal responsibility (7/10/14), voting age (18), drinking age (18), driving age (16), taxi licence holder age (20) etc. Clearly the law provides for the date of birth to be central in a number of aspects.*

Strengthening existing measures, or even banning tobacco sales outright, may be politically risky. But it is a legitimate way to make laws in our system. Passing discriminatory laws that target only the part of the population that can’t vote is not.

*Oddly, in this paragraph - contrary to previous arguments - Dr Gogarty seems to favour blanket prohibition over a progressive phase out of the sale of tobacco. No more need be said.*

If there is to be a tobacco “endgame” then the decision should be left to the generation standing on the field, not the one that came before.

*As a conclusion to this piece, another confused - or at least confusing - proposition is advanced: if the present generation can’t pass the TFG Bill who can? Were Dr Gogarty’s proposition to apply the issue would be interminable. In reality, if every generation left it to the next one then nothing would ever happen; hopefully lawmakers are more enlightened than that.*

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