



13 May 2016

The Hon Mr Craig Farrell  
Inquiry Chair  
Government Administration 'A'  
Email: jenny.mannering@parliament.tas.gov.au



**Ivan Dean MLC**

Independent Member for  
Windermere  
Legislative Council

Dear Mr Farrell,

As referred on the 18<sup>th</sup> March 2016 please find attached Memorandum of Advice (MOA) relative the Tobacco Free Generation (TFG) Amendment Bill 2014 and provided in response to the 'Letter of Advice' as tabled to the Committee by Dr. Brendan Gogarty.

The MOA has been prepared at my request by Barrister at Law Mr Neil Francey. Mr Francey is highly qualified and well positioned to comment on the work of Dr. Gogarty. A reference of Mr Francey's qualifications is attached. Mr Francey has also published numerous papers and articles in relation to tobacco and smoking and if the committee require a copy of his publications, I should be in a position to provide that information.

While there is concurrence on some of the points raised, other statements and positions espoused by Dr Gogarty are refuted and indeed challenged. Mr. Francey has included considerable footnoting in support of his findings.

A 'critique' of an article completed by Dr. Gogarty titled 'Tasmania's Smoke Free Generation is Undemocratic Discrimination' – The Conversation April 12, 2016, has been completed by Mr. Francey, and is attached as an annexure of the MOA, for information. A copy of the article is also included.

There are anomalies in Dr. Gogarty's 'Conversation Work' that raise concerns with me.

I cannot be assured at this time that those errors may not have impacted on some of his findings, to the Committee. The assumption held by Dr Gogarty that the TFG Amendment Bill will prevent persons born after 2000 from smoking is erroneous.

Dr Gogarty's conclusion to the 'conversation' piece is confusing to say the least. If his statement... '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', is to be accepted, then who could ever pass the TFG Bill or any similar bill? This could be extrapolated to include any decision to end or commence or amend any legislation likely to impact on the next generation. Mr Francey addresses this issue.

Mr Francey references a document completed by Dr Yvette van der Eijk and while the committee may already have a copy of the document, I have included a copy for your information.

Mr Francey makes reference to a Cancer Council Tasmania Survey relative to the TFG Amendment Bill. He has quoted the figure of 70% overall support of the Bill. The latest CCT survey conducted reveals that support of the TFG Bill has increased to 75% - overall.

There is 72% support from current smokers, 75% from former smokers and 76% from non-smokers.

This is heartening and is an indication that the public wants positive action.

I have obtained a further legal opinion from an eminently qualified Professor, Wendy E Parmet – Northeastern University School of Law, Boston, MA, who has focused solely on questions of public health law ethics, rather than positive law or efficacy. A copy of the document is also attached.

I thank you for the opportunity to provide the further information and urge the committee to balance these findings with those of Dr Gogarty. I look forward to receiving a copy of the Committee's findings at the first available opportunity.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized 'I' and 'D' followed by a horizontal line.

*Ivan Dean APM, MLC*  
Independent Member for Windermere

# NEIL FRANCEY

LLB (Qld) LLM Hons (Syd)

Barrister-at-Law

## MEMORANDUM OF ADVICE

### Public Health Amendment (Tobacco-free Generation) Bill 2014

#### INTRODUCTION

This Memorandum of Advice has been prepared at the request of the Hon Ivan Dean MLC for tabling before the Tasmanian Parliament Legislative Council Sessional Committee Government Administration A Inquiry into the Public Health Amendment (Tobacco-free Generation) Bill 2014, specifically in response to the now tabled “letter of advice” obtained by the Committee from Dr Brendan Gogarty, Lecturer, University of Tasmania, of 16 February 2016.

The Memorandum of Advice takes into account:

- The provisions of the TFG Bill
- The Terms of Reference of the Committee, and the need to address the Bill’s “practicality and workability”.
- Submissions to the Committee to date.
- Transcript of the Public Hearings held on 14 September 2015.

It also has regard, not only to the “letter of advice” from Dr Gogarty, but also to the submission of Dr Yvette van der Eijk focussing on the “fundamental/civil/political/rights” arguments advanced by Dr Gogarty.

In addition, the Annexure to this Memorandum of Advice responds to a contribution Dr Gogarty made to the social media website *The Conversation* “Tasmania’s ‘smoke-free generation’ is undemocratic age discrimination”: <https://theconversation.com/tasmanias-smoke-free-generation-is-undemocratic-age-discrimination-57049>

The reasons for taking into account this *The Conversation* piece are set out in the following Summary of Advice and are dealt with in more detail in the Conclusion below (and the Annexure).

## SUMMARY OF ADVICE

In light of the foregoing, and after a consideration of the principal issues involved, it would appear that:

1. There are no significant legal impediments to the Bill (a point conceded by Dr Gogarty).<sup>1</sup>
2. There are no significant constitutional impediments to the Bill's adoption and any creative arguments around Section 92 of the Commonwealth Constitution are "unlikely to succeed" (again, a point conceded by Dr Gogarty).<sup>2</sup>
3. Such challenges as may be raised under the Constitution are unsustainable and weak (likewise a point conceded by Dr Gogarty).<sup>3</sup>
4. Any extraterritorial nature of the Bill, as it relates to online sales of tobacco products, whilst possibly proving difficult to police and enforce, will not "entirely" undermine the operation of the Bill as a whole (stated by Dr Gogarty).<sup>4</sup>
5. The Committee may wish to consider the impact of the Bill on tourism having regard to commercial or passenger vessels entering the State that sell tobacco products e.g. providing a relevant defence (c/f "defense" *sic* - as referred to in Dr Gogarty's "letter of advice" - and discussed in more detail below).<sup>5</sup>
6. The Bill "may" breach "fundamental rights", but these are "non-binding" and Parliament is technically competent to "extinguish" (*sic* - "over-ride"?) them, the question for debate being whether it should.<sup>6</sup>
7. This question for debate is one Dr Gogarty arrogates to himself, based on his subjective and personal view of the policy issues involved - not the legal issues - thereby subverting the right of Parliament to make that decision.<sup>7</sup>

Finally, as is explained in the Conclusion below, and as is exposed in the Annexure, Dr Gogarty abandons a strict legal approach to the TFG Bill and descends into the political arena advocating for an extreme libertarian approach and not leaving the judgement involved to Parliament.

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<sup>1</sup> Gogarty p.1, para 2 heading

<sup>2</sup> Gogarty p.1, para 2

<sup>3</sup> Gogarty p.1, para 6

<sup>4</sup> Gogarty p.2, para 7

<sup>5</sup> Gogarty p. 2, para 8

<sup>6</sup> Gogarty p. 3, para 10

<sup>7</sup> Gogarty p.3-4, paras 12-15

## PRINCIPAL ISSUES

The principal issues arising in respect of the TFG Bill, as identified by Dr Gogarty, are:

- Legal Issues
- Practicality/Workability
- Fundamental Rights

These issues are canvassed below; however any consideration of them needs to proceed against the background to tobacco use leading up to the present day.

### Background

The background to tobacco use, its impact in terms of direct health causes and health & medical costs, tobacco control measures introduced to respond to this impact and tobacco industry conduct to impede these measures are well documented but may be summarised as follows:

#### Impact of tobacco

Tobacco use causes six million deaths annually world-wide<sup>8,9</sup>, an estimated 15,000 deaths in Australia<sup>10</sup> and 500 in Tasmania alone<sup>11</sup>. This is more than total deaths from all other injuries, alcohol, suicide, road vehicles, illicit drugs, assault and fires<sup>12</sup>. Two out of three long term smokers die from tobacco use losing more than ten years of life<sup>13</sup>.

The economic cost of smoking (direct & indirect, including health and medical costs) has been assessed as \$31.5 billion a year in Australia<sup>14</sup> of which the impost in Tasmania is close to \$1 billion (where smoking rates have been consistently the highest of all six States)<sup>15</sup>. This compares to \$8.74 billion in tobacco excise and duties collected by the Federal government Australia-wide in 2012<sup>16</sup>.

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<sup>8</sup> World Health Organization, Press Release 28 May 2015 accessed at:

<http://www.who.int/mediacentre/news/releases/2015/world-no-tobacco-day/en/>

<sup>9</sup> Robert Proctor, The cigarette catastrophe continues. *The Lancet*, March 14 2015: 385, 938-939.

<sup>10</sup> Australian Institute of Health and Welfare: <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs-2013/ch3/>

<sup>11</sup> Dr Mark Veitch, Acting Director of Public Health, Submission to Legislative Council Committee, 14 September 2015, Hansard Transcript, p. 22.

<sup>12</sup> English DR, Holman CD, Milne E and et al. The quantification of drug caused morbidity and mortality in Australia 1995: Part 1 and Part 2.. Canberra: Commonwealth Department of Human Services and Health, 1995.

<sup>13</sup> Emily Banks et al, Tobacco smoking and all-cause mortality in a large Australian cohort study: findings from a mature epidemic with current low smoking prevalence. *Biomedical Central*, 2015:13:38 at <http://www.biomedicalcentral.com/1741-7015/13/38>

<sup>14</sup> Collins D., and Lapsley H., (2008) *The Cost of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05*, Commonwealth of Australia, Department of Health and Ageing, Monograph Series No.64, p 65

<sup>15</sup> Calculated based on Collins and Lapsley with a population of 500,000 in Tasmania and 20 million Australia wide in 2008. Smoking rates in Tasmania have consistently been the second highest state.

<sup>16</sup> <http://www.tobaccoinaustralia.org.au/chapter-13-taxation/13-6-revenue-from-tobacco-taxes-in-australia>

In essence, if facts of this kind were known a hundred or more years ago tobacco would be phased out as occurred with opium in Asia in the 19<sup>th</sup> & 20<sup>th</sup> centuries.<sup>17</sup> Equally, even if cigarettes were to be marketed in Australia for the first time in recent decades the product would be banned as was the case with smokeless tobacco products in the 1980s.<sup>18</sup>

### Tobacco control measures

Because the prevalence of smoking was at a high level in developed countries by the time the causal relationships with adverse health effects were only progressively identified from the early 1950s, the option of a ban on the sale of tobacco products was not feasible and until now even the option of a phase-out of smoking was scarcely considered. Instead other tobacco control measures have progressively been adopted.<sup>19</sup>

It is instructive, therefore, to record these tobacco control measures so they, and the TFG Bill may be considered in context and in a sensible and rational manner; the current suite of effective tobacco control measures being:

1. Education programs, to inhibit the uptake of smoking and encourage cessation<sup>20</sup>.
2. Restrictions on advertising and promotion, to neutralise the “glamorisation of smoking” e.g. the removal of “point of sale” displays and the introduction of plain packaging<sup>21</sup>.
3. Imposition of tax/excise/duties/licence fees<sup>22</sup>, which results in a price increase thereby providing a disincentive to purchase<sup>23</sup>.
4. Reduced access e.g. the increase in the legal age for the purchase of tobacco products from 16 to 18<sup>24</sup> (or, more recently, what seems to be a proposal to increase the legal age in Tasmania to 21 or 25 - Tasmanian plans to lift legal smoking age to 21 or 25).
5. Introduction and extension of smoke free areas, thereby impeding ease of smoking<sup>25</sup>.

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<sup>17</sup> Jennings, John M The Opium Empire: Japanese Imperialism and Drug Trafficking in Asia, 1895-1945

<sup>18</sup> <https://www.productsafety.gov.au/content/index.phtml/itemId/974275>

Re United States Tobacco Company v the Minister of Consumer Affairs and the Trade Practices Commission [1988] FCA 241 (14 July 1988)

Re United States Tobacco Company and Australian Federation of Consumer Organizations v the Minister of Consumer Affairs; the Trade Practices Commission and Australian Federation of Consumer Organizations [1988] FCA 317 (15 September 1988) (discussed further below)

<sup>19</sup> See generally: Tobacco in Australia Scollo, MM and Winstanley, MH. Tobacco in Australia: Facts and issues. Melbourne: Cancer Council Victoria; 2015. Available from [www.TobaccoInAustralia.org.au](http://www.TobaccoInAustralia.org.au)

<sup>20</sup> Quit Tasmania ; Tobacco in Australia Chapter 14

<sup>21</sup> Public Health Act 1997 (Tas) PART 4 Division 2, Tobacco in Australia Chapter 11

<sup>22</sup> Public Health Act 1997 (Tas) PART 4 Division 3; Tobacco in Australia Chapter 13

<sup>23</sup> Tobacco in Australia Chapters 1, 2, 5,

<sup>24</sup> Public Health Act 1997 (Tas) PART 4 Division 1

<sup>25</sup> Public Health Act 1997 (Tas) PART 4 Division 1A

All of these measures contribute to what may be called the “integrated effectiveness of tobacco control measures” and/or the “de-normalisation of smoking” (i.e. counteracting specific tobacco industry objectives of providing “smoker reassurance” and preserving the “social acceptability” of smoking).

Experience suggests that any proposed tobacco control measure, such as the TFG Bill, be considered for the contribution it may make to the overall objectives of tobacco control and not as one to be viewed in isolation. This is necessary to rebut the tobacco industry tactics (discussed above and below) of dissecting these measures (concentrating on them being considered separately and individually), and introducing “red herrings” such as:

- The unlawful sales of tobacco products (something which falls within enforcement of the existing law)
- The controversial subject of e-cigarettes (which is a form of preserving the “social acceptability” of smoking - albeit in the form of a different nicotine delivery device).

#### Tobacco industry conduct

The tobacco industry has long sought to retard tobacco control measures such as those set out above, dating from a meeting of US tobacco companies in December 1953 and a meeting of US and UK tobacco companies in June 1977<sup>26</sup>.

Over time these efforts have moved from disputing that smoking causes various diseases to, amongst other things<sup>27,28,29</sup>, questioning whether tobacco control proposals are practical, workable and effective. These industry tactics have, amongst other things, sought to:

- impede restrictions on advertising and promotion of tobacco products<sup>30</sup>;
- resist the imposition of increased tax/excise on tobacco products<sup>31</sup>;
- hinder the introduction and extension of smoke free areas<sup>32</sup>.

In Australia, these efforts have most recently been directed to opposing plain packaging<sup>33</sup> and now the TFG Bill<sup>34</sup>.

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<sup>26</sup> Kluger, Richard “Ashes to Ashes”, Knopf Publishing (1966); Proctor, Robert “Golden Holocaust”, UC Press (2011); *“Operation Berkshire: The international tobacco companies’ conspiracy”*. BMJ 2000; 321:371 (5 August)

<sup>27</sup> Barnsley, K. (2011, August). Crony Capitalism or Corruption? The Curious Case of British Tobacco and a Tasmanian Government. In *Papers and Proceedings: Tasmanian Historical Research Association* (Vol. 58, No. 2, p. 173). THRA.

<sup>28</sup> Hay, P. R. (1976). *Problems in the analysis of political corruption* (Doctoral dissertation, University of Tasmania).

<sup>29</sup> Hansard, 1997 Parliament of Tasmania, House of Assembly, 10 December, part 2, 38–98.

<sup>30</sup> Tobacco in Australia Chapter 11

<sup>31</sup> Tobacco in Australia Chapter 13

<sup>32</sup> Re Australian Federation of Consumer Organisations Inc v the Tobacco Institute of Australia Limited [1991] FCA 17.

<sup>33</sup> JT International SA v Commonwealth of Australia [2012] HCA 43 (5 October 2012)

<sup>34</sup> Committee Submissions 39, 40, 53.

The industry's opposition now involves conceding that smoking is harmful but dissecting individual tobacco control measures and attacking the contribution they can make in achieving an overall objective of reducing the prevalence of smoking.

In the light of these now exposed tactics it is unsurprising that ever more creative tobacco control measures have been used to reduce the impact of smoking and overcome tobacco industry objectives: graphic warnings<sup>35</sup>, point of sale advertising bans<sup>36</sup> and plain packaging<sup>37</sup> are recent successful examples even if some are novel and of (inevitably) untested effectiveness at the time of being proposed e.g. plain packaging. The TFG Bill is in this same category.

And, as the desirability of any such measure being adopted, it may be noted that these efforts by the tobacco industry may be seen as an attack on "state sovereignty", that is attempting to undermine and pervert the decision making process of Parliaments and Governments to act in the best interests of their constituents.

### **Legal Issues**

The legal issues involved in considering the TFG Bill in two main categories:

- (a) Competence of the Tasmanian Parliament to pass the Bill
- (b) Concerns over the practicality & workability of the Bill

Questions over the desirability of passing the Bill having regard to "fundamental/civil/political rights" are essentially policy ones and not ones which can strictly be regarded as "legal", other than in terms of Parliaments power's to "extinguish" or, less emotively and more accurately, "over-ride" these rights.

These issues are dealt with separately below although the last one is also considered in terms of Tasmanian Parliament's competence to adopt the Bill as a strictly legal matter.

As is apparent from the above Summary of Advice, in respect (a) above, Dr Gogarty has made a number of concessions in respect of the TFG Bill. Notably, Dr Gogarty concedes:

- There are no significant legal impediments to the Bill
- There are no significant constitutional impediments to the Bill
- Any constitutional challenges are "unlikely to succeed"
- It is technically competent for Tasmanian Parliament to "extinguish" (or perhaps less emotively and more accurately "over-ride") relevant fundamental/civil/political rights.

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<sup>35</sup> Tobacco in Australia Chapter 12

<sup>36</sup> Public Health Act 1997 (Tas) PART 4 Division 2

<sup>37</sup> Tobacco in Australia Chapter 12



These concessions by Dr Gogarty appear appropriate and accordingly it would appear the strictly legal issues are not in dispute. It is a matter now to consider the issues of the practicality/workability of the Bill and the questions over the desirability of passing the Bill having regard to fundamental/civil/political rights.

### **Practicality/Workability**

Questions have been raised about the practicality/workability of the TFG Bill, and to some extent these concerns overlap with the likely effectiveness of the Bill (discussed below).

The constitutional competence of the Parliament of Tasmania to pass the TFG Bill has been dealt with above and there seems no significant legal impediment to the Bill's adoption<sup>38</sup>.

Dr Gogarty, in his "letter of advice", has raised "some practical legal issues" and these have also been dealt with above<sup>39</sup> plus will be dealt with in more detail below. For present purposes, issues of practicality/workability arising from the fundamental/civil/political rights aspect will be deferred to the section below dealing specifically with those aspects

As regards the likely effectiveness of the TFG Bill in terms of its practicality/workability, this needs to be considered in the context of tobacco control measures more generally, as discussed above<sup>40</sup>. Essentially, the TFG proposal is currently untested but as discussed above so was the move for "plain packaging" – in the latter case the demonstrated effectiveness proven after the event<sup>41</sup>. However evidence for the proven effectiveness of a phase-out" of an addictive product is also discussed above in relation to opium use in Asia<sup>42</sup>. Suffice it to be said that the decision whether the TFG Bill should be adopted is a matter for the Tasmanian Parliament to decide having regard to all the issues involved, but predominantly the policy judgement involved.

### Dr Gogarty's arguments

Turning to the practical issues raised by Dr Gogarty, there are only two: one relating to online sales and a second relating to the impact on tourism and tourists.

- Online sales

This issue involves a concern that the extraterritorial nature of the Bill, as it relates to online sale of tobacco products, may prove costly and challenging to enforce.

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<sup>38</sup> MOA Summary of Advice p. 2 & p.6

<sup>39</sup> MOA Summary of Advice p. 2 & pp. 7-9

<sup>40</sup> MOA pp. 4-5

<sup>41</sup> Footnote 38 above

<sup>42</sup> Page 4 & Footnote 17

It is not clear that the Bill actually has extraterritorial effect in that the scope of the proposed Section 67J would be read down to the limits of the constitutional power of the Tasmanian Parliament. Accordingly its operation to online sales may not be as Dr Gogarty assumes and in any event, for the sake of clarity, the Bill in its current form could be amended to confine its operation.

Furthermore, as discussed above<sup>43</sup>, Dr Gogarty concedes that these concerns “will not entirely undermine the operation of the Act as a whole” (*sic* – this assumes that the Bill is passed in its current form).

Insofar as the TFG Bill is not totally effective in preventing the sale of tobacco products online to the “tobacco-free generation”, this just involves some leakage in a tobacco control measure – as with warnings not being totally effective and currently the legal age for sale of tobacco products being 18 does not totally prevent those under 18 acquiring cigarettes. On one view this means that the TFG Bill, like current tobacco control measures, does not equate to total “prohibition” – rather it amounts to enhanced regulation, in the present case, introducing a “phase-in” of the authorised age for the sale of tobacco products.

- Impact on tourism and tourists

This issue involves two concerns about commercial or passenger vessels entering the State of Tasmania: one concern relates to, for instance, a cruise-ship selling tobacco products to its passengers suddenly under Tasmanian law where the sale would contravene proposed Section 67J of the TFG; the second concern is where, due to the “unique nature” of the TFG Bill, a passenger on such a vessel would not know that selling a tobacco product to a person “over the age of consent” would be illegal under proposed Section 67J.

On this basis, Dr Gogarty notes that there is no relevant “defense” (*sic* – defence) in the current Bill and suggests that consideration should be given to the possible impact on tourism and tourists in this context.

There are number of responses that may be advanced in relation to these concerns:

First, in terms of the practicality/workability of the TFG Bill - or more relevantly the proportionate impact identified by Dr Gogarty - the concern is miniscule in the overall scheme

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<sup>43</sup> MOA Summary of Advice p. 2 (Point 4)

of things (in all likelihood very few cruise vessels would have large numbers of young people on them<sup>44</sup>).

Secondly, a ship operator is required to comply with the laws of any jurisdiction a vessel may enter and the onus is on the ship operator to know the relevant laws. For example, if the vessel were in US waters presumably the sale of alcohol below the age of 21 would be prohibited.

Likewise if the legal age for the sale of tobacco products in Tasmania were raised to 21, or even 25, the ship operator would be required to comply with that law (unless appropriately exempted<sup>45</sup>).

Thirdly, regarding sales by a passenger, as indicated above this scenario whilst theoretically conceivable is of little practical significance (and, as indicated above, may just represent a small leakage in the total effectiveness of the TFG Bill; also the lack of knowledge about the law in Tasmania on the part of a passenger could - in the remote likelihood that a prosecution eventuated - be grounds for a dismissal of the charge without conviction or for a reduction in penalty)<sup>46</sup>.

Finally, Dr Gogarty's use of the term "age of consent" in this context is inapposite: 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"<sup>47</sup> (see also the relevant Tasmanian law in this regard - age 17, 15 or 12 depending on the circumstances<sup>48</sup>). This is not to be confused with (in Tasmania) the age of majority (18)<sup>49</sup>, age of criminal responsibility (7/10/14)<sup>50</sup>, voting age (18)<sup>51</sup>, drinking age (18)<sup>52</sup>, driving age (16)<sup>53</sup>, taxi licence holder age (20)<sup>54</sup>, age for possession and use of firearms (12/16/18)<sup>55</sup>, marriageable age (18/16)<sup>56</sup>. Doubtless there are other examples.

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<sup>44</sup> Tourism Tasmania Corporate - Cruise Ship Tourism

<sup>45</sup> Just as an exemption is provided for in the Public Health Act with regards to smoke free areas - Section 67B (2) (a).

<sup>46</sup> C/f the obligation on those entering Australia to comply with quarantine laws (e.g. the Jonny Depp/Amber Heard case) and the obligation on Australians to comply with foreign laws (e.g. The Death Penalty in Indonesia; Tara Brown, 60 Minutes crew 'reach a deal' in botched child recovery operation)

<sup>47</sup> <http://www.oxforddictionaries.com/definition/english/age-of-consent?q=age+of+consent>

<sup>48</sup> Criminal Code Act 1924 (No. 69 of 1924) Schedule 1, s. 124. Sexual intercourse with young person

<sup>49</sup> Age of Majority Act 1973 (No. 21 of 1973) s. 3. Age of majority

<sup>50</sup> Criminal Code Act 1924 (No. 69 of 1924) Schedule 1m s.18. Immature age

<sup>51</sup> Electoral Act 2004 (No. 51 of 2004) s.31. Entitlement to enrolment; <http://www.aec.gov.au/enrol/>

<sup>52</sup> Liquor Licensing Act 1990 (No. 44 of 1990) s.70. Liquor not to be sold to young people

<sup>53</sup> Vehicle and Traffic Act 1999 (No. 70 of 1999) s.38. Driver licensing scheme; Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 Division 3 - Issue of driver licence r. 19 Eligibility

<sup>54</sup> Vehicle and Traffic Act 1999 (No. 70 of 1999) s. 38. Driver licensing scheme; Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 Division 3 - Ancillary certificates to drive public passenger vehicles r. 47.

Eligibility to hold ancillary certificate to drive public passenger vehicle

<sup>55</sup> Firearms Act 1996 (No. 23 of 1996) s. 70. Authority of minor's permit

<sup>56</sup> Marriage Act 1961 (Cth) Section 11/Section 12

One thing, at least, that the foregoing examples of age in law illustrate is that persons entering the jurisdiction of Tasmania are subject to a range of laws which may differ in terms of age or date of birth elsewhere in Australia or elsewhere in the world.

#### Other practicality/workability issues

Aside from the practicality/workability issues raised by Dr Gogarty as dealt with above, there are two other issues of this nature deserving attention: the assessment of the Department of Health and Human Services (Tasmania) about the implementation of the TFG Bill and issues about proof of age/date of birth.

- DHHS assessment

The assessment of the Department of Health and Human Services (Tasmania) is that implementation of the TFG Bill is “feasible” albeit not from existing resources<sup>57</sup>. The Department notes that implementation of the Bill would require warnings and information of the kind already in place in relation to existing tobacco product sales law, retailer and public education, changed signage and compliance monitoring. All this involves is a transition from the existing regime to a new one and the cost could be on a full recovery basis through an adjustment to licence fees. Whilst the latter involves a cost benefit/analysis it is notable that Dr Gogarty does not posit this as an impediment. Ultimately it is a matter for Parliament to decide having regard to all the issues involved, not the least being the duty Parliament has for the health of the people of Tasmania.

- Proof of age/date of birth

Proof of age, or date of birth, is already a requirement in many aspects of life. In some instances this can be a relatively informal requirement but in other circumstances in a quite formal way (e.g. when presentation of a full birth certificate is necessary). In some cases the requirement lies between these extremes and flexibility can be provided for as is currently provided for in the Public Health Act<sup>58</sup>.

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<sup>57</sup> DHSS Submission 26 page 3

<sup>58</sup> Public Health Act 1007 s.3 Interpretation in which “proof of age” is defined to mean

(a) a driver's licence; or

(b) a passport; or

(c) a class of document specified in the guidelines for the purpose of this definition (in which regard the Guidelines for the sale of tobacco products provide further types of identification as follows:

(a) a photographic Keypass identification card;

(b) a firearms licence issued under the Firearms Act 1996; or

(c) a Tasmanian Government Personal Information Card.)

[http://www.dhhs.tas.gov.au/data/assets/pdf\\_file/0004/53329/Guidelines\\_for\\_the\\_Sale\\_of\\_Tobacco\\_Products\\_in\\_Tasmania.pdf](http://www.dhhs.tas.gov.au/data/assets/pdf_file/0004/53329/Guidelines_for_the_Sale_of_Tobacco_Products_in_Tasmania.pdf)

In the case of the purchase of tobacco products (or alcohol) the requirement is most often met by a secondary means such as a “Proof of Age” card (generally to show clearly that the holder is age 18+)<sup>59</sup>. Fortuitously (as discussed below), in Tasmania the equivalent is a Personal Information Card (PIC) – which, amongst other things, displays the holder’s date of birth<sup>60</sup>.

Obviously if the relevant age is being sought (e.g. 21 or 25 for the purchase of tobacco products) the task would be to calculate from the date of birth what age the holder was, or some new regime may need to be established to determine whether the sale was legal.

However, in the case of the TFG Bill, evidence that the holder was or was not a member of the tobacco-free generation could (for example) easily be established by the year of birth being coloured in red (2000 onwards) for the former and black for the latter (1999 and before). This would just involve an administrative change to the way PICs are issued in Tasmania, and an education campaign of the kind identified above for retailers and the public.

One final observation on the practicality/workability of the TFG Bill, and for that matter on the overall question of whether the Bill should be passed, involves the concept of “grandfathering” legislation of the kind here under consideration. The greatest impediment to such legislation is probably best expressed as follows:

“It is often the transition that trips up politicians rather than the agreement about the end point ... changing the status quo is actually often the biggest problem rather than an eventual alternative prescription: how you “grandfather” an existing population.”<sup>61</sup>

In the case of the TFG Bill, my opinion is that the answer involves the Committee in the first instance, then the Legislative Council and Parliament as a whole, deciding what is in the best interests of the public health of Tasmanians: something quintessentially for them to decide.

However, on this aspect, there are many examples of “grandfathering” or “phase-out” legislation or public policy. One identified above is the experience with opium in Asia<sup>62</sup>. Another particularly pertinent example is the reduction in Federal politician’s retirement benefits: superannuation, travel etc<sup>63</sup>. Numerous others may be found from a simple Google search<sup>64</sup>. Moreover, even if the legal age for the sale of tobacco products were to be raised to 21, or 25, presumably there would need to

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<sup>59</sup> <http://www.australia.gov.au/content/proof-of-age-card>

<sup>60</sup> [http://www.service.tas.gov.au/personal\\_information\\_card/](http://www.service.tas.gov.au/personal_information_card/)

<sup>61</sup> Laura Tingle, Political Editor, *The Australian Financial Review* 20/2/15.

<sup>62</sup> Page 4, Footnote 17

<sup>63</sup> Superannuation benefits for senators and members

<sup>64</sup> <https://www.google.com.au/#q=grandfathering+legislation>

be a “grandfathering” or “phase-out” period, in the former case 3 years and in the latter case 7 years. In comparison, under the TFG Bill the “grandfathering” or “phase-out” period would be incremental year by year.

### **“Fundamental Rights”**

Dr Gogarty, in his “letter of advice”, under the heading “The Bill breaches (non-binding) fundamental rights”:

- Asserts that the TFG Bill “...breaches a range of civil and political rights”.
- Identifies six such “rights”, also explaining why they are not binding, noting “...none (he) can think of are constitutionally mandated”.
- Concedes, as already pointed out in the above Summary of Advice, that Parliament “is technically competent to extinguish (sic – perhaps less emotively, and more accurately, “over-ride”) these rights” (Point 6).
- Poses as “the question for debate” as being “whether (Parliament) should” extinguish/over-ride such rights”.

Dr Gogarty then claims that, in the absence of a Bill of Rights or Charter of Rights, a special duty is placed on Parliament when considering a Bill which “limits” or “extinguishes” rights. It may be noted that here Dr Gogarty moderates his language to refer to a Bill that merely “limits” so-called “rights” rather than the more draconian use of “extinguish” - perhaps to engage debate on the proposed legislation that is less onerous, but at least allowing for the possibility that the balancing task Parliament should undertake regarding the offset may be between the expected good from that legislation and provisions which merely limit so-called rights, as compared to the more draconian alternative.

So much of Dr Gogarty’s “letter of advice” may be accepted, however Dr Gogarty then devotes the balance of his “letter of advice” to arguments he advances in opposition to the TFG Bill being adopted under the conclusionary heading “The Bill is disproportionate (irrational and unjustified)”. In this respect Dr Gogarty, whilst conceding “Parliament is the sole and final arbiter of rights in our system”, arrogates to himself a judgement on the TFG Bill, based on his personal layman view of the policy issues involved - not the legal issues - thereby supplanting the right of Parliament to make that decision (Summary of Advice Point 7).

To the extent that Dr Gogarty descends into the policy issues it is necessary to respond to the arguments he advances in order to provide some perspective, but first it is necessary to identify the whole range of “fundamental/civil/political” so-called “rights” involved lest there be an inadequate foundation from which the political/policy debate proceeds.

### Range of fundamental/civil/political rights involved

Dr Gogarty lists the range of fundamental/civil/political rights involved, in his view, in a table at pages 2-3 of his “letter of advice”. He also sets out in the table the reasons why they are not binding. Notably, here Dr Gogarty specifies the *Age Discrimination Act 2004* (Cth) citing “ss 14, 28” but says “Both Acts (*sic* – Sections?) “permit such discrimination if it is done in compliance with the law of the states”; however his footnote reference for this proposition refers to the *Age Discrimination Act 2004* (Cth), s 39 (4) and the *Anti-Discrimination Act 1998* (Tas), s 24. In this respect it is also of note that the Tasmanian Anti-Discrimination Commissioner, Robin Banks, provided a Briefing Note to the Attorney-General and Minister for Justice dated 23 March 2015 in essentially the same terms as Dr Gogarty’s view<sup>65</sup>.

Beyond this, Dr Gogarty’s table of fundamental/civil/political rights includes a number which extrapolate from general principles of “equality” and “personal liberty” but even then Dr Gogarty concedes that these are “not directly binding” or “can be limited by express legislation”.

The exception is the *Toonen* case<sup>66</sup>, a matter involving the *International Convention on Civil and Political Rights*, particularly with respect to “status” including “age status”, but even then Dr Gogarty concedes that the *ICCPR* is “not directly binding on states” although he leaves open the possibility of the Commonwealth being exposed to an international challenge (in much the same way as the Commonwealth has faced challenges in respect of “plain packaging”).

In comparison with the range of rights identified by Dr Gogarty, a submission to the Committee by Dr Yvette van der Eijk identifies others untouched by Dr Gogarty. These include:

- The right to life (*Universal Declaration of Human Rights, Article 3*)
- The right to health (*International Covenant on Economic, Social and Cultural Rights, Article 12*) which explicitly states that everyone has: “a right to enjoyment of the highest attainable standard of physical and mental health”
- Children’s right to life and healthy development (*Convention on the Rights of the Child, Article 6*), which explicitly states that: “governments should ensure that children survive and develop healthily”
- Children’s right to a clean and safe environment (*Convention on the Rights of the Child, Article 24*)

<sup>65</sup> Committee Transcript – Monday 14 September 2015: Hon Ivan Dean MLC p.3

<sup>66</sup> Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

As Dr van der Eijk points out, any so-called “right to smoke” cannot be construed as a “liberty right” for a number of reasons including the fact that this “right” may clash with other rights and trade-offs are necessary “to protect the well-being and progress of others and society”. In support of this proposition Dr van der Eijk cites the *Universal Declaration of Human Rights, Article 29*, in which it is stated ‘rights’ may be restricted in order to: “*respect...the rights and freedoms of others and... [to meet] the just requirements of morality, public order and the general welfare in a democratic society*”. Regulation of smoking in public places<sup>67</sup> is just one example of where such “trade-offs” are made, and the same is true of the current legal age for smoking and other activities<sup>68</sup>.

As Dr Gogarty points out, where these “trade-offs” lie is a matter for Parliament, and a matter which should be approached in a “cautious, measured” way. However, as stated above, in his “letter of advice” Dr Gogarty goes on to advance his personal views on where the balance lies so it becomes necessary to consider the arguments he advances.

#### Assessment of the “balance”, or proportionality of the TFG Bill

Under the heading “The Bill is disproportionate (irrational and unjustified)”, Dr Gogarty concedes:

- That he “personally support(s) the public health basis of the Bill”.
- That “tobacco products present a serious public health risk”.
- That he wholly supports “the protection of public health by statutory means”.

However he concludes that “the protection of fundamental rights is a more significant consideration”.

Aside from Dr Gogarty’s inadequate expression of “fundamental rights”<sup>69</sup>, this is where Dr Gogarty descends into the realm of political judgements – advancing a number of subjective assertions rather than arguments in support of his conclusion. These, which essentially can be reduced to four, are easily dismissed:

1. First, Dr Gogarty asserts that the “legal basis (*of the Bill*) is irrational and unjustified” and that there is “an inequality in the application of the (*proposed*) law”. These assertions are not supported by any authority (other than arguments previously advanced and exposed as flawed)<sup>70</sup> and is illustrated only by an example, which Dr Gogarty claims has “no justifiable reason”

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<sup>67</sup> Page 4, Footnote 25

<sup>68</sup> Page 4, Footnote 24

<sup>69</sup> Page 13

<sup>70</sup> Pages 11-12



The example makes the comparison, at 1 January 2030, of “a 29 year old person - born 31 December 1999 - (*who*) can purchase cigarettes, but a 30 year old person – born a day later on 1 January 2000 – (*who*) cannot”. On this basis Dr Gogarty claims the proposed law “cease (*sic* - ceases) being about public health and can only be justified by age difference”.

However, as illustrated above<sup>71</sup>, there are many examples where the law may, for practical and policy reasons, distinguish a person by age. Likewise Dr Gogarty’s twice referred to “age of consent” argument is fundamentally flawed<sup>72</sup>.

Moreover, the TFG Bill does not discriminate on account of age: rather phases in a protection that everyone deserves (not to be sold a highly addictive and deadly product) while not (through “prohibition”) requiring smokers who became addicted after legally purchasing cigarettes to go “cold turkey”. It enhances free choice and autonomy to the extent that addiction destroys those values. It will have minimal immediate impact on retailers and manufacturers, reducing sales by less than 2%/year. Yet at the same time it will eventually save thousands of Tasmanian lives per year, and eliminate from the marketplace a product that would never have been permitted in any civilized country had the authorities understood its addictive and lethal nature.

2. Secondly, Dr Gogarty asserts that the TFG Bill “will create a new category of persons treated unequally based solely on age”. Again, this assertion is unsupported by any authority but Dr Gogarty does concede that “the High Court has refused to impose a general constitutional right of equality...because society has historically permitted some specific categories of inequality to be built into our legal system”. Dr Gogarty claims, however, that “those affected by the Bill will (when they become of age) not be members of ... historical categories”.

In support of his assertion, Dr Gogarty gives several examples of those “historical categories” - including “prisoners, children, intellectually incompetent persons, or people of a special race (*citing aboriginal persons*)”. However the TFG Bill would protect “children” in accordance with international Conventions (see above<sup>73</sup>), intellectually challenged people

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<sup>71</sup> Footnotes 48-56

<sup>72</sup> Page 9

<sup>73</sup> Page 13

(smoking rates for these people are higher than the norm<sup>74</sup>) and indigenous Australians (where again smoking rates are higher than the norm<sup>75</sup>). These are policy matters to be taken into account in considering the desirability of adopting the TFG Bill.

3. Thirdly, although Dr Gogarty concedes that “Parliament is the final arbiter of rights in our system”, he goes on to assert that:

- People should not be deprived of “rights” for “arbitrary reasons”.
- “Tasmanians should not, once they have reached the age of consent (*sic*) be treated unequally by their peers”.
- “They (Tasmanians) should not be deprived rights other citizens have”.
- “We should not be segregating our society based only on the fortune or misfortune of the day they were born”.

Again, these assertions are unsupported by any authority, other than the flawed balance of Dr Gogarty’s “letter of advice”.

As the last paragraph in Dr Gogarty’s “letter of advice”, these assertions represent his conclusionary personal opinions, usurping the role properly that of Parliament. And, the deficiencies in these opinions are adequately dealt with above.

4. Finally, and significantly, in the penultimate paragraph of his “letter of advice”, Dr Gogarty - whilst conceding “that tobacco products present a serious public health risk” and that they “wholly support(s) the protection of public health by statutory means” – expresses his “belief” that “the protection of fundamental rights is a more significant consideration”.

Unsurprisingly this “belief” is unsupported by authority and can only rely on the previously advanced personal opinions the flaws in which are exposed as set out above<sup>76</sup>.

Likewise Dr Gogarty’s further contention, “In this case the obligation to protect civil rights, pursuant to the conventions of responsible government and the rule of law, are undermined by the manner and form in which this otherwise laudable endeavour has been framed” is unsupported by any authority and can only be supported by his previously advanced flawed personal opinions.

This leaves it for Dr Gogarty’s “letter of advice” to be considered against the foregoing.

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<sup>74</sup> Page 9

<sup>75</sup> Tobacco in Australia Chapters 1&2

<sup>76</sup> Tobacco in Australia Chapters 1&2

## CONCLUSION

As set out in the Tasmanian Government Submission to the Committee:

“...new regulations are not something that should be taken lightly and in each case, we must seriously consider whether they are realistically likely to be practical and effective”<sup>77</sup>

Again, so much may be accepted and Dr Gogarty’s “letter of advice” also may be accepted as a contribution to the deliberative process involved. Dr Gogarty’s “letter of advice”, however, must be critically evaluated and hopefully the foregoing analysis assists in that regard.

In addition, a critical evaluation must be made in respect of Dr Gogarty’s contribution to the social media website *The Conversation* “Tasmania’s ‘smoke-free generation’ is undemocratic age discrimination”:

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

The Annexure to this Memorandum of Advice provides a critique of his *The Conversation* piece but it also should be noted that his Disclosure statement to the piece is as follows:

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.

In this way Dr Gogarty elevates his status by reference as “a Committee-appointed lawyer”, thereby creating the impression that his views should be given greater weight than otherwise might be the case yet his piece is of an even more “libertarian” nature than his more moderate “letter of advice”. As such, Dr Gogarty may be regarded as someone who has moved beyond merely providing dispassionate, independent and objective advice to someone who is an advocate for his extreme libertarian views and this means his “letter of advice” needs to be evaluated accordingly.

Distilling Dr Gogarty’s views as expressed in both his “letter of advice” and his contribution to *The Conversation* to their essence, and the points made in this Memorandum of Advice and Annexure, there are strong grounds to support the following summary points:

1. The TFG Bill has no significant legal impediments.  
So much has been conceded by Dr Gogarty<sup>78</sup>.

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<sup>77</sup> Committee Submission 62 p.7

<sup>78</sup> MOA Summary of Advice p. 2 (Point 1)

2. The TFG Bill does not breach “fundamental/civil/political” rights.  
Or, if it does, there are “trade-offs” to be made with other such rights<sup>79</sup>.
3. The TFG Bill is not discriminatory.  
The Bill must be viewed in a proper context<sup>80</sup>.
4. The TFG Bill is not undemocratic.  
Again, the Bill must be viewed in a proper context<sup>81</sup>.
5. The TFG Bill is not disproportionate (irrational and unjustified).  
Arguments, or rather assertions, to the contrary by Dr Gogarty are unsupported and unsustainable<sup>82</sup>.

Finally, it must be noted that the fate of the TFG Bill is one ultimately for Parliament to decide. In this regard, Dr Gogarty agrees; however, as is demonstrated by his contribution to *The Conversation*, Dr Gogarty has become an advocate for his views and does not present - as stated above - as someone providing a dispassionate, independent and objective view.

**Neil Francey  
Chambers  
3 May 2016**

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<sup>79</sup> Of note here is that the TFG Bill gives due priority to the importance of protecting the health of future generations over the sale of a lethal product. Similar action was recently taken by governments around Australia to shut down solarium as a protection against skin cancer.

<sup>80</sup> Pages 13-14

<sup>81</sup> Notably, a bill which is passed by both Houses of a properly elected bicameral Australian Parliament cannot be termed ‘undemocratic’. Furthermore Cancer Council Tasmania surveys show around 70% support for the TFG Bill: Annual Report 2015 - Cancer Council Tasmania, p. 25. Trainer, E. & Terry, K. (2015). *The Tasmanian smoking survey: Findings from the 2013 population survey*.

<sup>82</sup> Pages 14-16

**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 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 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 and public health organisations 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 obesity, dangerous driving, family violence, depression and suicide. 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. It remains true of the continued legal prohibition on narcotics.

*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 18<sup>th</sup> 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, 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 19<sup>th</sup> and 20<sup>th</sup> 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:

**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.

*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, 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, but state parliaments can technically extinguish 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 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>

*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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You have asked me to comment on Dr. Brendan Gogarty's opinion relating to the proposed Bill to Amend the Existing Public Health Act to include the Tobacco Free Generation Amendment Bill (TFGA) of 2014. Please note that for the purposes of this letter, I accept Dr. Gogarty's conclusion that the proposed bill would be lawful. I also do not consider his claims that the TFGA would interfere with trade, or be ineffective. My comments focus solely on questions of public health law ethics rather than positive law or efficacy. I base my comments upon my more than thirty years of experience as a researcher, scholar and teacher of public health law, health law, and bioethics. As Matthews Distinguished Professor of Law and Professor of Public Policy and Urban Affairs at Northeastern University, as well as the Associate Dean for Interdisciplinary Education and Research Support, I direct the University's Program on Health Policy and Law. I have written over 80 scholarly articles and book chapters, as well as 4 books relating to public health law and ethics. The opinions expressed below are my own and do not represent those of my University.

As I understand it, if enacted, the TFGA will bar Tasmanian tobacco sellers from selling tobacco products to individuals who were born on or after 1 January 2000 (the cohort). Dr. Gogarty raises two major objections to this Act (in addition to the claim that it will be ineffective). I consider both in turn.

I. Does the Act violate- non-binding "fundamental rights" of persons born on or after 1 January 2000?

In his opinion letter, Dr. Gogarty argues that the TFGA breaches the cohort's "fundamental rights." Among those rights he lists are those against age discrimination and of equality, as well as rights of "personal liberty." His claim that the TFGA would violate norms of equality by discriminating on the basis of age is discussed below. Here I consider Dr. Gogarty's contention that the TFGA would infringe upon a fundamental right by limiting personal liberty.



Initially it should be noted that the TFGA would impose no legal restriction on any individual on the basis of age or date of birth. The Act would not bar members of the cohort from smoking or from possessing cigarettes. Thus the only persons or entities whose liberty would be directly restrained would be tobacco sellers, but clearly they have no fundamental right to sell a dangerous product.<sup>1</sup> All states ban or limit the sale of certain dangerous products (firearms, fireworks, narcotics, biological weapons). In the case of cigarettes, the World Health Organization's Framework Convention on Tobacco Control (which Australia has ratified) requires states to regulate tobacco sales. Whether such regulations are effective is an empirical question, but there is no basis for the claim that a seller has a fundamental right to sell a product that can harm others.

It is true that even though the TFGA would impose a legal restraint only on sellers of tobacco products, it would make it harder for members of the cohort to obtain cigarettes, and therefore smoke. In this sense, one could say that the TFGA would impose an indirect impediment on the liberty of members of the cohort. That does not mean, however, that the TFGA would violate their fundamental rights.

Critically there is no fundamental right to exercise all of one's choices without any, even indirect, legal hurdles. If that were the case, cigarette taxes, which also make it harder for some people to exercise their choice to smoke by raising the cost of cigarettes would also violate individuals' fundamental rights. Indeed, all public health laws would violate someone's fundamental right, as all impose some roadblocks on individual choice. (A law requiring a prescription to obtain a narcotic makes it harder for the patient in pain to get the drug without seeing a physician; laws requiring restaurants and bars to have liquor licenses likewise make it harder for people to have unrestrained access to alcohol). In debating the wisdom of any particular public health law, it is important not to confuse the question of whether the benefits conferred by the law outweigh the inconveniences and hurdles it imposes, with the question of whether it violates recognized fundamental rights, such as the right to bodily integrity or free speech.

That the TFGA would not violate any fundamental right is further supported by three additional points. First, the liberty that Dr. Gogarty presumes is fundamental is the liberty to engage in a behavior, purchasing and smoking cigarettes, that has harmful effects on others, most obviously via second-hand smoke. Even adamant libertarians, however, concede that states may restrain liberty to prevent harm to others.

Second, although the TFGA would, as described above, impose some indirect limitations on the cohort's liberty, it would also, assuming it were effective, support their liberty by reducing their risk of becoming addicted to cigarettes. Most people who smoke cigarettes want to stop smoking. Many find that difficult to do because they are addicted. Thus

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<sup>1</sup> Sellers may have a fundamental right to sell a product when other fundamental rights are implicated. For example, a newspaper may have a fundamental right to sell its paper because barring the sale implicates rights of free expression.



smoking acts as a restraint on smokers' liberty. By making it more difficult for members of the cohort to obtain cigarettes and become addicted, the TFGA would therefore enhance their liberty as much as it would restrain it. Or, to put it another way, once we recognize that individuals also have a right to health, as they do under Article 12 of the International Covenant on Economic, Social and Cultural Rights, and that the TFGA would, if effective, support that right, it is hard to say that the Act would undermine liberty or individual rights more than it would support them. This is why the question of whether or not the Act should be passed should be debated on the merits; not on the rhetorical claim that it violates fundamental rights.

Third, Dr. Gogarty's fundamental right argument depends upon an implicit acceptance of the idea that individual choices as to whether or not to smoke are individually-determined. We know, however, that this isn't the case. Many people, especially teens and young adults, decide to smoke precisely because others within their peer group smoke. Once we understand that smoking, like other risky behaviors, is at least in part determined on a population level, it becomes clear that laws that impede a population's access to a dangerous product alter individuals' preferences. In this sense, the TFGA is quite similar to regulations of cigarette marketing. Both alter the attractiveness of smoking across populations, and thereby the preferences of individuals within those populations.<sup>2</sup> Hence these laws alter the construction of individual choice as much as they limit the exercise of choice.

## 2. Does the TFGA Discriminate against the Cohort

As I read Dr. Gogarty's opinion, it is clear that his claim that the TFGA would violate fundamental rights is inextricably linked to his contention that the Act would violate norms of equality by discriminating on the basis of age status. This argument merits careful consideration, as it is always important to ensure that public health laws do not reflect invidious discrimination.

To begin it is important to note that all public health laws, indeed all laws, have a disparate impact on different classes. For example, a law banning sales of cigarettes to minors will impact them more than adults. And a law that bans all cigarettes sales will be more burdensome to adults who are addicted than to younger cohorts who have yet to acquire the habit.

The question, therefore, cannot be whether a public health law will have a disparate impact, but whether its impact is invidious or based upon a rational assessment of the

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<sup>2</sup> In this sense, even marketing laws, such as point-of-sale regulations or plan packaging requirements, make it harder for some people to buy cigarettes, by making their availability less apparent, or by reducing the rate of smoking within a population and hence the number of sellers featuring cigarettes.



public health risks and benefits. In the case of the TFGA, the law's discriminatory impact on the cohort would be far from invidious. To the contrary, rather than reflect any socially-ingrained stereotyping or deeply-held antipathy towards members of the cohort, (as is typically apparent in cases of age discrimination which are often motivated by erroneous stereotypical judgments about older members of the community), the TFGA aims to benefit the cohort's health.

Further, although cohort-based laws are less common than age-based laws, they are far from unprecedented. Social benefit programs, such as the National Disability Insurance Scheme, sometimes set eligibility based on whether one was born before or after a certain date. In effect, legislatures sometimes phase-in benefits. Alternatively, legislatures often grandfather in older classes, relieving them of the obligation to follow new regulations.

The use of a cohort-based strategy is especially well-suited to the case of tobacco control. Australian law currently bars the sales of cigarettes and other tobacco products to minors, as is required by Article 16 of the Framework Convention. An extension of such a ban to the entire population, however, would be highly problematic because of the addictive nature of cigarettes. In effect, a blanket prohibition on cigarettes would create significant hardships for those who are addicted (and would likely result in a black-market).

The TFGA tries to relieve the burden on those who are addicted by grandfathering sales to them. This would ensure that current purchasers continue to have a ready supply of cigarettes; while barring sellers from inducing younger people to acquire the addiction.

Whether the TFGA would achieve its aims, and whether the hurdles it would impose are warranted, are empirical and value questions that merit debate by the legislature and the citizens of Tasmania. These questions, however, should not be obscured by the rhetoric of fundamental rights and inequality.

Thank you very much for the opportunity to express my views on the TFGA.

Sincerely,

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## On Gogarty's legal analysis of the Public Health Amendment (Tobacco Free Generation) Bill 2014

I would like to submit a response to Gogarty's legal analysis of the Public Health Amendment (Tobacco Free Generation) Bill 2014. In particular, I would like to focus on his conclusion that: "*the Bill breaches fundamental civil rights and should be approached cautiously by the Committee, which, as part of the Parliament, is a constitutional guardian of such rights.*"

I absolutely agree with Gogarty that the Committee should guard human rights when making decisions about the Tobacco Free Generation (TFG) proposal, and for that very reason I give the TFG proposal my full support. In October 2013, along with a legal human rights expert at the University of Edinburgh (Gerard Porter), I published what is, to our knowledge, the first human rights analysis of the TFG proposal. We looked very critically at the TFG proposal's impact on various human rights, referring to United Nations human rights treaties. Like Gogarty, we looked at rights to liberty and equality but we went beyond Gogarty's analysis by also looking at other fundamental rights such as rights to privacy, life, health, and children's rights. Our conclusions may be briefly summarised as follows:

1. The TFG proposal will save lives by protecting an entire generation of people from smoking initiation, addiction, and subsequent tobacco-related disease and death. In the long run, it will completely protect others, especially children, from the harmful effects of second-hand smoke. No-one, especially young people, should be subjected to these harms on any level. For this reason, the TFG proposal supports fundamental rights including:

- The right to life (*Universal Declaration of Human Rights, Article 3*)
- The right to health (*International Covenant on Economic, Social and Cultural Rights, Article 12*) which explicitly states that everyone has: "*a right to enjoyment of the highest attainable standard of physical and mental health*"
- Children's right to life and healthy development (*Convention on the Rights of the Child, Article 6*), which explicitly states that: "*governments should ensure that children survive and develop healthily*"
- Children's right to a clean and safe environment (*Convention on the Rights of the Child, Article 24*)

2. The argument that there is a 'right to smoke' is usually based on the right to liberty or the right to privacy. Smoking cannot be defended as a 'liberty right' for the following reasons:

- Smoking is highly addictive. The vast majority of smokers are addicted and very few (~5%) unaided quit attempts are successful. The decision to start smoking is usually made in childhood. Thus smoking is, for most adults, not an exercise of liberty but an addiction that developed as a result of the state's failure to protect young people from smoking initiation.
- Smoking exposes others, particularly children, to second-hand smoke. This often results in serious health impacts, killing 600,000 people globally each year. The 'freedom' to smoke should be weighed against this.
- The 'freedom' to smoke should also be weighed against the burdens to the economy, society, healthcare systems, the environment and families.

- So where rights appear to clash, trade-offs are necessary to protect the wellbeing and progress of others and society. In the *Universal Declaration of Human Rights, Article 29*, ‘rights’ may be restricted in order to: “*respect... the rights and freedoms of others and... [to meet] the just requirements of morality, public order and the general welfare in a democratic society*”

In other words, it is highly unlikely that, given the toxic and addictive nature of smoking, it can be defended as a liberty *right*. Even if it were, this activity must be considered in light of its violations of other fundamental rights such as rights to health, life, and children’s rights. These points are essential to a human rights review for any kind of public health intervention, but were missed out of Gogarty’s analysis.

3. Smoking can also not be defended as a privacy right, as privacy rights are intended to protect private life insofar as it contributes to the integrity of identity, development of personality, or the ability to develop and establish relationships with others. In previous lawsuits of this kind, smoking was not seen as contributing to these and therefore could not be considered as a privacy right.

4. Like Gogarty, we also considered equality rights, notably that all are equal before the law (*Universal Declaration of Human Rights, Articles 2 and 7*). The TFG proposal does result in differential treatment based on one’s date of birth, though this does not strictly violate equality rights if the state had a reasonable and objective justification for doing so. This is, quite simply, to protect future generations from the devastating impacts of smoking. The differential treatment is necessary; if tobacco sales were denied to everyone, current smokers would be forced into withdrawal.

It should also be noted that the tobacco industry has a long and well-known history of targeting society’s most disadvantaged groups of people such as racial minorities, homeless people, female victims of domestic abuse, people with mental illness, and people on low incomes. In many high-income countries, disparities in smoking prevalence are responsible for massive differences in life expectancy between society’s most affluent and disadvantaged groups. In the spirit of equality rights, it should be borne in mind that the TFG proposal would, in the long run, phase out these disparities.

Gogarty concludes that: “*I wholly support the protection of public health by statutory means. However, I believe the protection of fundamental rights is a more significant consideration.*”

I would like to highlight that the protection of fundamental human rights and of the public’s health are not separate issues. A state’s failure to protect the health of its people *is* a human rights issue. Too often, when thinking of human rights in public health, focus is on so-called liberty rights to engage in destructive, ‘self-chosen’ activities such as smoking. This is also true in the context of tobacco control. One important reason behind this is the tobacco industry’s use of ‘human rights’ front groups to promote smoking as a liberty right in order to evade smokefree legislations. Yet, as our analysis shows, this is a very narrow—and arguably incorrect—application of human rights. In the *WHO Framework Convention on Tobacco Control*, to which Australia is legally bound, it is also clearly stated in the preamble that tobacco control measures protect human rights to health, equality, and children’s rights.

Young people in Tasmania continue to take up smoking. More can and should be done to protect them, to promote better health and the overall progress of Tasmanian society. The TFG proposal is an opportunity to truly realize this as it protects an entire generation of young Tasmanians from an addictive and destructive activity. This does not unduly violate liberty, privacy or equality rights, and rather supports a number of fundamental human rights.

Yours,



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\*Disclaimer: these views expressed are my own, based on my own research and do not necessarily reflect the views of the organizations with which I am involved.

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# Tasmania's 'smoke-free generation' is undemocratic age discrimination

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Brendan Gogarty

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Tasmania is considering legislation to create a "tobacco-free generation" by banning sales to persons born after July 1, 2000. It is a tobacco prohibition law, albeit one whose endgame will play out for future generations only. That is concerning, as it's unlikely to achieve its aims, but also because it undermines civil rights and representative government.

The "tobacco-free generation" proposal reflects an increasingly interventionist approach by state governments and public health organisations in the name of public health. The frustration of those on the tobacco front line is understandable; the drug represents a significant social danger.

But so do obesity, dangerous driving, family violence, depression and suicide. Our legal response to these social risks must be evidence-based and considerate of constitutional limits and civil rights.

## 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. It remains true of the continued legal prohibition on narcotics.

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.

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, 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.

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".

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

*They have been locked out 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.*

## **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.

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.

Tobacco risk-reduction measures are working, 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.

## **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.

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.

Commonwealth, state and international law prohibits age discrimination, but state parliaments can technically extinguish these rights if they choose.

There would be some irony if baby-boomer lawmakers – who come from the generation most reliant on age-discrimination laws – choose to deprive the next generation of such rights protections.

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.

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.

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.

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