



# Submission to the Legislative Council Inquiry into the *Public Health Amendment (Tobacco Free Generation)* *Bill 2014*

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## About the author

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## Executive summary

Establishing by statute a 'tobacco-free generation' is effectively prohibition by stealth, which will separate Tasmanians into two separate classes. Prohibition is ineffective as it strengthens the illicit tobacco market, which has been growing consistently since the introduction of mandatory plain packaging of tobacco products in 2011. This submission has three core areas of focus:

- The effects of enacting a 'tobacco-free generation' in Tasmania;
- The illicit market for tobacco in Australia;
- Prohibition as an example of paternalism.

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## Background

In November 2014, Ivan Dean MLC, introduced a private members bill which intends to establish a 'tobacco-free generation'. The policy would restrict retailers from conducting sales of tobacco products to any member of this newly created class of citizens.<sup>1</sup>

The *Public Health Amendment (Tobacco-free Generation) Bill 2014* ("the bill") was introduced by Dean into the Legislative Council of Tasmania, which subsequently resolved on 24 March 2015 to refer the bill to the Government Administration Committee 'A' for further consideration and report.

The bill seeks to amend the *Public Health Act 1997* (Tas) by inserting Part 4, Division 1B, and would:

- Criminalise the sale or offer of sale any tobacco product to a person born on or after 1 January 2000, who are to be known as *members of the tobacco-free generation*;
- Criminalise the sale, loan, gift or supply from a licenced tobacco seller to a member of the 'tobacco-free generation'; and
- Makes unlawful a member of the 'tobacco-free generation' from using a false identification to procure tobacco products.

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<sup>1</sup> See D Khoo et al, 'Phasing-out tobacco: proposal to deny access to tobacco for those born from 2000' (2010) 19 *Tobacco Control* 355-360.

# The effect of enacting a ‘tobacco-free generation’

## Prohibition by stealth

Since the proposals to establish a tobacco-free generation (“TFG”) were first floated in 2012, the arguments put forth have been at best partially disingenuous.

Dean, who introduced the bill into parliament, has claimed that it is designed to ‘make it harder to buy tobacco product, not ban smoking altogether.’<sup>2</sup> An SBS headline claimed that the bill planned to ‘ban smoking for youth’, while a sympathetic Minister for Children in 2012 requested the state Commissioner for Children to:

Consult with children and young people on promoting a smoke-free generation facilitating a growing sense of ownership and agency by young people in relation to *their* health and well-being, particularly in relation to seeding a youth-led change in attitudes to smoking...<sup>3</sup>

The ban does not apply to just one generation, but to all generations born after 1 January 2000. While the youth of today are the first to be subject to this proposed regime, the ban will apply for the rest of their lives. The policy does not apply only to youth.

Over time, the number of people alive, who are entitled to lawfully purchase tobacco products, will ultimately reduce to zero.

The true nature of this policy is phased prohibition by stealth.

## Second class citizens

The effect of conducting this form of phased prohibition is that it entrenches within the law two classes of citizens. One class, consisting of those born on or before 11:59pm 31st December 1999, are forever unaffected by the new laws. The other class, consisting of those born on or after 12:00am 1st January 2000 are forever affected by the laws, and would in effect never be able to lawfully purchase tobacco products.

The absurd result is that two people born on opposite sides of a randomly selected date will have markedly different rights as consumers.

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<sup>2</sup> Sally Glaetzer, ‘MP’s smoke-free Bill gains support’ *The Mercury* (Hobart), 21 December 2014 <<http://www.themercury.com.au/news/tasmania/mps-smoke-free-bill-gains-support/story-fnj4f7k1-1227163115266>>.

<sup>3</sup> Commissioner for Children, *Smoke Free Tasmania: The views of Children and Young People across Tasmania* (2013) 4 <<http://www.childcomm.tas.gov.au/wp-content/uploads/2015/02/Smoke-Free-Report-.pdf>>

## Prohibition strengthens black markets

This method of tobacco prohibition has not been tested anywhere in the world. However, as noted above, the effect of the TFG is a prohibition much like any other.

Possibly the most famous instance of prohibition policy was the movement to ban the manufacture and sale of alcohol in the earlier decades of the twentieth century. What the implementation of such policies have shown is that a black market will develop to meet demand for illicit products.

Perhaps most famously, the United States of America enacted prohibition of alcohol from 1920 to 1933, with the attitudes of the time very reflective of the moral positions of the anti-tobacco advocates of today:

When the movement to impose alcohol bans at the state level gained momentum during the early 1900s, supporters thought they were ushering in a new era of clean living and economic prosperity that would have had far fewer social problems than had been the case before. Then in 1919, when the nation took the final plunge by adopting the Eighteenth Amendment that imposed national Prohibition, supporters were ecstatic about the “Noble Experiment.” Some went so far as to believe the United States would eventually be alcohol free.<sup>4</sup>

However, total consumption of alcohol products did not cease, due to the huge expansion of illegal alcohol production and smugglers:

Known as “bootleggers,” they realized that since the demand for alcoholic drinks was still high despite the new law, huge profits could be reaped by illegally importing the product from neighboring countries, as well as by operating their own production facilities in the United States. Profits from these illegal activities were so large that “turf wars” soon broke out... in an effort to control alcohol distribution.<sup>5</sup>

This experience was not unique to the United States. For example, the effects of prohibition were quite similar in Finland, where fortified wine was prohibited from 1917 to 1923, and liquor from 1917 to 1927:

Regardless of the total amount of alcohol consumed while prohibition lasted, so much illegal alcohol was drunk that the situation became untenable. The authorities were overwhelmed by a series of escalating and to some extent insoluble problems such as smuggling, illicit distilling, prescription swindles, organized crime, ‘unconventional’ police methods, and indications of corruption. Realists who recognised these problems saw no light at the end of the tunnel.<sup>6</sup>

While it is not possible to calculate the likely effect of the TFG prohibition method, Professor Peter Reuter, Senior Economist at the RAND Corporation notes that ‘Endgame proposals’ involving the restriction of access to tobacco products will ‘create incentives to supply cigarette-like products to

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<sup>4</sup> Thomas E. Hall, *Aftermath: The Unintended Consequences of Public Policies* (Cato Institute Press, 2014) 68-9.

<sup>5</sup> *Ibid*, 69.

<sup>6</sup> Per Ole Johansen, ‘The Norwegian Alcohol Prohibition; A Failure’ (2013) 14 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 46, 62.

those who either face an extremely high legal price... or who are entirely cut off from legal purchase' and is 'likely to create black markets'.<sup>7</sup>

Moreover, this method of prohibition arguably provides the simplest format for a person to enter the black market as a supplier. It is not unlikely that an enterprising individual, born before the 1 January 2000, would find success in lawfully procuring tobacco products from a retailer, and then selling them at a premium to others born after the turn of the millennium.<sup>8</sup>

As I will explain in this submission, there is already a growing market for illicit tobacco which will profit handsomely from restrictions on the lawful sale of tobacco products.

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<sup>7</sup> Peter Reuter, 'Can tobacco control endgame analysis learn anything from the US experience with illegal drugs?' (2013) 22 *Tobacco Control* i49, i49-i51.

<sup>8</sup> Christopher Snowdon, 'Of course it's prohibition, you fool' (4 November 2014) *Velvet Glove, Iron Fist* <<http://velvetgloveironfist.blogspot.com.au/2014/11/of-course-its-prohibition-you-fool.html>>.



## The market for illicit tobacco in Australia

In recent years, the market for black market tobacco has seen a significant increase in consumption levels. Professional services firm KPMG has conducted a number of studies since the Commonwealth introduced mandatory plain packaging of tobacco products in 2011.<sup>9</sup> On 2 April 2014, KPMG's first full year report into illicit tobacco in Australia showed that:

[I]n the twelve months to the end of 2013, the level of illicit consumption grew to 13.9% of total consumption, 2.1 percentage points higher than in 2012, and 0.6 percentage points higher than in the twelve months ending in June 2013.<sup>10</sup>

The next full year report, released on 30 March 2015, showed that:

[F]rom full year 2013 to 2014, the level of illicit tobacco consumption is estimated to have grown from 13.5% to 14.5% of total consumption... If this tobacco had been consumed in the legitimate market, we estimate it would have represented an excise amount payable to Government of [\$]1.35bn at the average excise rate for 2014.<sup>11</sup>

The lesson from the plain packaging experiment is that overly prohibitive legislation will drive consumers to find cheaper tobacco alternatives on the black market.

Similarly, a total prohibition on sales to a class of people will only force that entire class of people seeking tobacco products to do so on the black market. The market already exists, and will not hesitate to meet that demand. Otherwise, a new market will surely be created to meet it.<sup>12</sup>

A TFG policy would most likely assist the growth of the illicit tobacco market in Australia.

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<sup>9</sup> Tobacco Plain Packaging Act 2011 (Cth).

<sup>10</sup> KPMG, 'Illicit Tobacco in Australia: 2013 full year report' (3 April 2014) p 6  
<[http://www.pmi.com/eng/media\\_center/media\\_kit/Documents/Illicit\\_Tobacco\\_in\\_Australia\\_2013\\_full\\_year\\_report.pdf](http://www.pmi.com/eng/media_center/media_kit/Documents/Illicit_Tobacco_in_Australia_2013_full_year_report.pdf)>.

<sup>11</sup> KPMG, 'Illicit Tobacco in Australia: 2014 Full Year Report' (30 March 2015) p 6  
<[http://www.pmi.com/eng/media\\_center/media\\_kit/Documents/KPMG%20Report%20FY%202014%20-%20Illicit%20tobacco%20in%20Australia.pdf](http://www.pmi.com/eng/media_center/media_kit/Documents/KPMG%20Report%20FY%202014%20-%20Illicit%20tobacco%20in%20Australia.pdf)>.

<sup>12</sup> Peter Reuter, 'Can tobacco control endgame analysis learn anything from the US experience with illegal drugs?' (2013) 22 *Tobacco Control* i49-i51.

## Prohibition is an example of paternalism

The concept of prohibition is inappropriate, as it wrongly gives the government the power to remove consumption choices of its citizens. It is deeply illiberal.

Categorising a government action as 'paternalist' is an imprecise task. Whether it is referred to as 'government as by a benign parent',<sup>13</sup> or as the 'iron fist in a velvet glove',<sup>14</sup> it accounts for actions taken by government that intervene in the private decision making of individuals.<sup>15</sup>

The proliferation of such policies has given rise to the "Nanny State". As the IPA has previously noted:

The extent to which governments regulate to protect citizens from themselves and remove risk from the lives of individuals is growing. These developments are not constructive and are creating a 'nanny state' absolving individuals of responsibility.<sup>16</sup>

And on another occasion:

The Nanny State is a concept based on the principle of elitism. It sets up two classes of people. The first class is the self-appointed elite, which makes decisions about acceptable conduct or, in this case, consumption choices, and then uses tools of the state to enforce those decisions. The second class is made up of all those outside the elite. The individuals in this group are stripped of personal autonomy and agency because the elite seem them incapable of making the right decisions about their own lives.<sup>17</sup>

Nanny state policies reverse the liberal-democratic presumption that individuals are the best judge of their own interests.<sup>18</sup> With a preponderance of public information about the dangers of tobacco consumption already widespread, such as regulations requiring graphic health warning labels on cigarette packaging,<sup>19</sup> enacting prohibitionist laws would only show 'deep contempt for ordinary people',<sup>20</sup> who choose to undertake tobacco consumption anyway.

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<sup>13</sup> Simon Blackburn, 'Paternalism', *The Oxford Dictionary of Philosophy* (Oxford University Press, Oxford, 2008) 270.

<sup>14</sup> Christopher Snowden, *Velvet Glove, Iron Fist: A History of Anti-Smoking* (Little Dice, 2009).

<sup>15</sup> Matthew Thomas & Luke Buckmaster, 'Paternalism in social policy – when is it justifiable?' (Research Paper No. 8, 2010-11, Department of Parliamentary Services, December 2010) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22library%2Fprspub%2F434330%22>>.

<sup>16</sup> Julie Novak and Tim Wilson, 'Gambling away perspective? A review of the evidence justifying electronic gaming regulations' *Institute of Public Affairs* (October 2011).

<sup>17</sup> Simon Breheny, 'Plain Packaging myth exposed: Submission to the Siggins Miller post-implementation review – mandatory plain packaging of tobacco products' *Institute of Public Affairs* (March 2015).

<sup>18</sup> Thomas & Buckmaster (2010).

<sup>19</sup> Competition and Consumer (Tobacco) Information Standard 2011 (Cth).

<sup>20</sup> Jonathan Foreman, 'Mike's elitist assault' *New York Post*, 14 October 2002, <<http://nypost.com/2002/10/14/mikes-elitist-assault/>>.

## Conclusion

The TFG proposal is a form of prohibition that intentionally creates a class of citizens deprived of certain rights as consumers. As a form of prohibition, it will most likely strengthen the black market for tobacco, as has been shown since the introduction of mandatory plain packaging of tobacco products.

This paper argues that this approach to tobacco regulation is paternalistic, and a further expansion of the Nanny State, which gives greater power to the state at the expense of individual liberty.