



2016

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## Parliament of Tasmania

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### LEGISLATIVE COUNCIL GOVERNMENT ADMINISTRATION COMMITTEE "A"

# REPORT

ON

## PUBLIC HEALTH AMENDMENT (TOBACCO FREE GENERATION) BILL 2014

**Members of the Committee Inquiry:**

**Hon Robert Armstrong MLC**

**Hon Craig Farrell MLC (Chair)**

**Hon Ruth Forrest MLC**

**Hon Leonie Hiscutt MLC**

**Hon Tony Mulder MLC**

**Hon Rob Valentine MLC**

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# KEY FINDINGS

The Committee makes the following key findings:

1. There does not appear to be any significant legal impediment to the operation of the Bill in delivering the policy intent.
2. The Parliament should take a measured and cautious approach in considering a Bill which could limit or 'extinguish' fundamental rights relating to age, equality and liberty.
3. The Bill raises some practical legal issues in relation to online sales and the impact of the Bill on tourism/tourists. The proposer of the Bill may wish to give consideration to amendment of the Bill to avoid negative impacts on tourism.
4. Should the Bill be supported, appropriate education programs would be required to effectively implement the Bill. This would incur a cost and would be a matter for the Government of the day.

# EXECUTIVE SUMMARY

1. Government Administration Committee “A” (the Committee) was established by resolution of the Legislative Council and its operation is governed by Sessional Orders agreed to by the Council.
2. By resolution of the Legislative Council on 24 March 2015, the *Public Health Amendment (Tobacco Free Generation) Bill 2014 (No. 40)* was referred to the Committee for Inquiry and report (the terms of reference).
3. In conducting the Inquiry, the Committee has not been required to consider the impact of smoking or the merits of smoking cessation. Rather, the Inquiry is intended to scrutinise the private members Bill as introduced to the Legislative Council by Hon Ivan Dean MLC.
4. This report intends to inform individual Members of the Legislative Council as part of the debate on the Bills and any amendment to the Bill that may be required.
5. The Committee has undertaken the task of Inquiry by scrutinising the Bill, gathering evidence, considering the workability and practicality of the Bill as proposed.
6. Tasmania is the first State of Australia to consider the introduction of Tobacco Free Generation legislation. The notion of a Tobacco Free Generation was first mooted to the global community in the 15<sup>th</sup> World Conference on Tobacco and Health held in Singapore in 2012 and by the 16<sup>th</sup> World Conference on Tobacco and Health held in Abu Dhabi in 2015. The notion of a Tobacco Free Generation has gained further international support with Dr Margaret Chan, Director General of the World Health Organization, approving of the notion.<sup>1</sup>
7. The Committee called for public submissions as part of the Inquiry process and sixty-four submissions were received and considered by the Committee. Further information in relation to the written submissions received can be found at **APPENDIX A**.

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<sup>1</sup> <http://www.tobaccofreegen.com/international-support/>

8. The Committee sought to receive evidence from a select group of witnesses that would assist the Committee in its deliberations regarding the effectiveness of the Bill in terms of its workability and practicality.
9. The Committee wishes to thank the witnesses for their time and valuable contributions in relation to this Inquiry.
10. Although there are a range of issues that have been identified by the Committee in relation to the Bill that are considered further in this report, there does not appear to be any significant legal impediment to the operation of the Bill.
11. There may be some practical legal issues as a result of the extraterritorial nature of the Bill as it relates to online sales of tobacco products.
12. The Bill raises significant considerations in relation to the breaches of (non-binding) fundamental rights, including age discrimination and raises a question as to whether Parliament is competent to extinguish these rights.



**Hon Craig Farrell MLC**  
**Committee Chair**  
**1 July 2016**

# ABBREVIATIONS

<b>ICCPR</b>	International Convention on Civil and Political Rights
<b>TFG</b>	Tobacco Free Generation
<b>UTAS</b>	University of Tasmania
<b>WHO</b>	World Health Organization

# INTRODUCTION

13. On Tuesday 24 March 2015, the Legislative Council resolved that the Public Health Amendment (Tobacco Free Generation) Bill 2014 (No. 40) be referred to Government Administration Committee "A" for further consideration and report.
14. Sixty-four submissions were received by the Committee. Targeted public hearings were held in Hobart on Monday 14 September 2015. The following groups or individuals gave verbal evidence to the Committee at these hearings:
  - Hon Ivan Dean MLC (supported by Ms Kathryn Barnsley, Dr Adrian Reynolds Policy Head Royal Australasian College of Physicians and Mr Neil Francey Legal Adviser); and
  - Dr Mark Veitch, Acting Director of Public Health.
15. The Hansard transcripts of these hearings are available at [http://www.parliament.tas.gov.au/ctee/Council/GovAdminA\\_tfg.htm](http://www.parliament.tas.gov.au/ctee/Council/GovAdminA_tfg.htm). The transcripts should be read in conjunction with this report.
16. The Committee invited legal analysis of the Bill from the Tasmania Law Reform Institute, the Law Society of Tasmania and legal academics from the University of Tasmania.
17. Legal opinion was received from Dr Brendan Gogarty (Lecturer/Coordinator Constitutional Law, UTAS and Convenor, Tasmanian Chapter, Australian Association of Constitutional Law) on 16 February 2016. The legal opinion of Dr Gogarty was published on the Committee's webpage in February 2016.
18. In response to the legal opinion provided by Dr Gogarty, a submission was provided to the Committee on 12 April 2016 by Dr Yvette van der Eijk, Public Health Analyst, Newcastle City Council UK/Freelance Consultant WHO Regional Office for Europe.
19. Mr Neil Francey (LLB, LLM (Hons)) and Professor Wendy Parmet, Northeastern University, provided advice on behalf of Hon Ivan Dean MLC on 13 May 2016.
20. This Report provides a summary of the key findings contained in evidence presented during the Committee through the legal analyses, written

submissions and verbal evidence provided to the Committee during the public hearings.

# LEGAL ANALYSIS AND EVIDENCE

21. The Committee invited legal analysis regarding the workability and practicality of the Bill from the Tasmania Law Reform Institute, the Law Society of Tasmania and legal academics from the University of Tasmania.
22. Legal opinion was received from Dr Brendan Gogarty (Lecturer/Coordinator Constitutional Law, UTAS and Convenor, Tasmanian Chapter, Australian Association of Constitutional Law) on 16 February 2016.
23. In response to the legal opinion provided by Dr Gogarty, a submission was provided to the Committee on 12 April 2016 by Dr Yvette van der Eijk, Public Health Analyst, Newcastle City Council UK/Freelance Consultant WHO Regional Office for Europe.
24. Mr Neil Francey (LLB, LLM (Hons)) provided a memorandum of advice and Professor Wendy Parmet, Northeastern University provided advice on behalf of Hon Ivan Dean MLC on Friday 13<sup>th</sup> May 2016. The memorandum of advice provided a response to the legal opinion of Dr Gogarty, also taking into account the provisions of the TFG Bill, the terms of reference of the Committee and the need to address the Bill's workability and practicality; submissions received by the Committee and the Transcript of the public hearings held on 14 September 2016.

## LEGAL IMPEDIMENTS TO THE BILL

25. According to Dr Gogarty, there are no significant legal or constitutional impediments to the Bill:

*I have scrutinised the Bill and spent a great deal of time thinking about how it might be legally challenged. My conclusion is that there are no significant constitutional impediments to its adoption, bar some creative arguments around section 92 of the Commonwealth Constitution which I believe are unlikely to succeed.<sup>2</sup>*

26. Dr Gogarty outlined a concern that the Bill disrupts national unity in the Tobacco Trade:

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<sup>2</sup> Mr Brendan Gogarty, *Legal Opinion*, 12 February 2016, p. 1.

*At present, the Bill ostensibly prescribes (sic) any person selling to any person of the Tobacco Free Generation (TFG) wherever either is located. However common law rules relating to extraterritorial state law, limit the operation of the Bill to sales which have a real connection to Tasmania<sup>3</sup>. That would likely mean that tobacco sellers in other states would be precluded from selling to TFG Tasmanians. It would also mean that Tasmanian tobacco sellers would be precluded from selling to TFG citizens of other states, notwithstanding those states permit such individuals to purchase tobacco products.<sup>4</sup>*

*Section 92 of the Constitution requires that 'trade commerce and intercourse among the States ... be absolutely free.' There are two potential arguments based on this provision:*

- Precluding Tasmanian Tobacco sellers from online sales to TFG customers in other states is discriminatory because tobacco sellers in other states are no (sic) similarly precluded.*
- Online retailers in other states will now have to make special provisions to identify Tasmanian TFG purchases (i.e the interoperation of a geolocator AND an age restriction access system). It will arguably discriminate against interstate online vendors by placing them at a competitive disadvantage to Tasmanian vendors selling domestically.<sup>5</sup>*

*While I cannot say definitively that such arguments would fail, I think them to be unsustainable and weak. That is because the High Court has made it clear that for a law to breach Section 92 it must, in effect, 'discriminate in favour of intrastate trade.' As a result it does not appear to be discriminatory. The Bill makes no distinction between inter and intrastate trade and treats all persons equally no matter where situated. However, given the interests at stake a challenge on these grounds might be made which would involve costs implications for the state.<sup>6</sup>*

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<sup>3</sup> Peare v Florenco (1976) 135 CLR 507, 518; Union Steamship Co Australia Pty Ltd v King (1988) 166 CLR 1, 14.

<sup>4</sup> Dr Brendan Gogarty, *Legal Opinion*, 12 February 2016, p. 1.

<sup>5</sup> *Betfair Pty Ltd v Western Australia* (2008) 244 ALR 32

<sup>6</sup> Dr Brendan Gogarty, *Legal Opinion*, 12 February 2016, p. 1.

## **PRACTICALITY AND WORKABILITY**

27. According to Dr Gogarty, the Bill raises some practical legal issues in relation to online sales and the impact on tourism/tourists.

### **Online Sales of Tobacco Products**

28. In relation to online sales, Dr Gogarty commented:

*I believe that the extraterritorial nature of the Bill, as it relates to online sales of tobacco products, may prove costly and challenging to police and enforce, but they will not entirely undermine the operation of the Act as a whole.*

29. In response, Mr Neil Francey commented:

*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.<sup>7</sup>*

### **Impact on Tourism/Tourists**

30. Dr Gogarty noted the impact of the Bill on tourism:

*Additionally I understand that commercial or passenger vessels enter the state that sell tobacco products. Clause 67J would appear, for instance, to cover a cruise ship anywhere in Tasmania that sold tobacco products to its passengers (regardless of its flag). It would also proscribe the sale of tobacco products by those passengers to Tasmanians. Given the unique nature of this law, it is reasonable to assume that a passenger would not know that selling such a product to a person over the age of consent would be illegal. There is no relevant defense included in the current Bill. The Committee may wish to consider the impact on tourism and tourists who may have less enlightened views about tobacco who enter the state.<sup>8</sup>*

31. In response, Mr Neil Francey commented there are a 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 of things (in all likelihood very few cruise vessels would have large numbers of young people on them).*

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<sup>7</sup> Neil Francey, *Memorandum of Advice*, 13 May 2016, p. 8.

<sup>8</sup> Dr Brendan Gogarty, *Legal Opinion*, 12 February 2016, p. 2.

*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).*

*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).*

*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" (see also the relevant Tasmanian law in this regard - age 17, 15 or 12 depending on the circumstances). 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), age for possession and use of firearms (12/16/18), marriageable age (18/16). Doubtless there are other examples.*

*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.<sup>9</sup>*

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<sup>9</sup> Neil Francey, *Memorandum of Advice*, 13 May 2016, pp. 8-10.

## BREACHES OF FUNDAMENTAL/CIVIL/POLITICAL RIGHTS

32. According to Mr Gogarty, the Bill breaches a number of civil and political rights, albeit none that are constitutionally mandated:

The source of civil rights	Why not binding
<i>Age discrimination</i>	
<ol style="list-style-type: none"> <li>1. The <i>Age Discrimination Act 2004</i> (Cth), ss 14,28 and the <i>Anti-Discrimination Act 1998</i> (Tas) ss, 14-16 prohibit treating a person less favorably because of age, or refuses to sell or make goods available because of age; and</li> <li>2. The <i>International Convention on Civil and Political Rights</i> (ICCPR), Art 2(1) &amp; 26, prohibit distinction based on ‘status’, which has been interpreted to include age status.<sup>10</sup></li> </ol>	<ol style="list-style-type: none"> <li>1. Both Acts permit such discrimination if it is done in compliance with a law of the state.<sup>11</sup></li> <li>2. The ICCPR is not directly binding on states, although it does leave the Commonwealth exposed to an international challenge similar to the case of <i>Toonen</i>.<sup>12</sup></li> </ol>
<i>Legal equality</i>	
<ol style="list-style-type: none"> <li>3. Our constitutional and common law system are premised on the rule of law, which by convention includes “equality before the law or the <i>equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts</i>”.<sup>13</sup></li> <li>4. The High Court has noted that “equality before the law ... [is]the starting point of all other liberties”.<sup>14</sup></li> <li>5. ICCPR Article 5 guarantees “equality before the law” and requires states ensure that all citizens are afforded that right.</li> </ol>	<ol style="list-style-type: none"> <li>3. The common law convention has been found not to amount to a prescribed general constitutional limit on legislative power, because there are times that the constitution has permitted citizens to be treated equally, specifically legal guardianship (children / intellectual impairment), (aboriginal) race, incarceration for an indictable offence etc.<sup>15</sup></li> <li>4. As a common law right, legal equality can be limited by express legislation.</li> <li>5. As above, this is not directly binding, but may result in Commonwealth intervention if an international complaint is brought.</li> </ol>
<i>Personal liberty</i>	
<ol style="list-style-type: none"> <li>6. Personal liberty is “jealously guarded by the common law” and forms the basis for property rights, freedom of movement, freedom of association, freedom of speech and, arguably freedom to purchase and consume such things that are not prohibited by law.<sup>16</sup></li> </ol>	<ol style="list-style-type: none"> <li>6. As a common law right it may, quite clearly, be limited by a legal prohibition.</li> </ol>

<sup>10</sup> *Love v Australia, Communication No 983/2001* (25 March 2003).

<sup>11</sup> *Age Discrimination Act 2004* (Cth), s 39(4) and *Anti-Discrimination Act 1998* (Tas), s 24,

<sup>12</sup> *Human Rights Committee Communication No. 488/1992* (*Toonen v Australia*).

<sup>13</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution*, (7th ed (1908)) at 198.

<sup>14</sup> *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462, per French CJ & Kiefel J.

<sup>15</sup> *Leath v Commonwealth* (1992) 174 CLR 455; *Kruger v Commonwealth* (*Stolen Generations Case*) (1997) 190 CLR 1.

<sup>16</sup> *Kruger v Commonwealth* (*Stolen Generations Case*) (1997) 190 CLR 1.

33. Dr Gogarty questioned whether the Parliament should have the power to 'extinguish' these fundamental rights relating to age, equality and liberty:

*A Bill such as this would, arguably, not be permitted in other jurisdictions with Bills or Charters of rights. In our case, we have resisted a bill/charter of rights both at the state and federal level because we believe that Parliament is the most appropriate body to represent the rights and interests of citizens at any one time. This places a special duty on any Parliament considering a Bill which limits or extinguishes rights to be cautious and measured in shaping or adopting that law.<sup>17</sup>*

34. Dr Yvette van der Eijk, Public Health Analyst Newcastle City Council UK and Freelance Consultant, WHO Regional Office for Europe, provided the Committee with a response to Dr Gogarty's legal analysis of the Bill. Dr van der Eijk focused on Dr Gogarty's 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.'*<sup>18</sup>

*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.<sup>19</sup>*

35. Dr van der Eijk asserted that the TFG proposal in the long run will completely protect others, especially children, from the harmful effects of second-hand smoke, and for this reason the TFG proposal supports the following fundamental rights:

- *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*

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<sup>17</sup> Dr Brendan Gogarty, *Legal Opinion*, 12 February 2016, p. 3.

<sup>18</sup> Dr Brendan Gogarty, *Legal Opinion*, 12 February 2016, p. 1.

<sup>19</sup> Dr Yvette van der Eijk, *Submission*, 26 April 2016, p. 2; van der Eijk Y, Porter G (2013) Human rights and ethical considerations for a tobacco-free generation. *Tobacco Control*: <http://tobaccocontrol.bmj.com/content/early/2014/12/31/tobaccocontrol-2013-051125>

*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”; and*
- *Children’s right to a clean and safe environment (Convention on the Rights of the Child, Article 24).<sup>20</sup>*

36. Dr van der Eijk addressed the argument that there is a ‘right to smoke’, which is usually based on the right to liberty or the right to privacy. Dr van der Eijk argued:

*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.*

*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.*

*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.<sup>21</sup>*

37. Dr van der Eijk concluded that the TFG Proposal does not unduly violate liberty, privacy or equality rights and rather supports a number of fundamental human rights:<sup>22</sup>

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<sup>20</sup> Dr Yvette van der Eijk, *Submission*, 26 April 2016, p.2.

<sup>21</sup> Dr Yvette van der Eijk, *Submission*, 26 April 2016, p.2.

<sup>22</sup> Dr Yvette van der Eijk, *Submission*, 26 April 2016, p. 3.

*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.<sup>23</sup>*

38. Dr Gogarty concluded by saying that while in support of the public health basis for the Bill, its legal basis is irrational and unjustified:

*There is no justifiable reason why, at 1 January 2030 a 29 year old person – born 31 December 1999 – can purchase cigarettes, but 30 year old person – born a day later on 1 January 2000 – cannot. Both persons are otherwise autonomous, competent adult individuals, but one has liberty to legally purchase a product and the other doesn't. In those circumstances the rational basis for the law cease being about public health and can only be justified by their age difference. There is an inequality in the application of the law.*

*I note that the reason the High Court has refused to impose a general constitutional right of equality is because society has historically permitted some specific categories of inequality to be built into our legal system. However, those affected by the Bill will (when they come of age) not be members of those historical categories (by design at least). That is, the Bill is not targeted at prisoners, children, intellectually incompetent persons, or people of a special race (none of which are included within the exception now the racist provisions of the Commonwealth Constitution have been removed). This Bill will create a new category of persons treated unequally based solely on their date of birth. This discriminatory treatment will apply to those persons for the rest of their lives (unlike an age of consent threshold).*

*I agree that tobacco products present a serious public health risk. I wholly support the protection of public health by statutory means. However, I believe the protection of fundamental rights is a more significant consideration. In this case the obligation to protect civil rights, pursuant to*

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<sup>23</sup> Dr Yvette van der Eijk, *Submission*, 26 April 2016, p. 2.

*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. Another approach to achieving the aims of this Bill must be found.*<sup>24</sup>

39. Mr Francey replied to the assertion that the Bill is disproportionate and unjustified:

*These assertions are not supported by any authority (other than arguments previously advanced and exposed as flawed) and is illustrated only by an example, which Dr Gogarty claims has “no justifiable reason.” 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”.*

*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.*<sup>25</sup>

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<sup>24</sup> Dr Brendan Gogarty, *Legal Opinion*, 12 February 2016, pp. 3-4.

<sup>25</sup> Neil Francey, *Memorandum of Advice*, 13 May 2016, pp. 14-15.

## ALTERNATIVE SUPPLY AND BLACK MARKET SALES

40. Dr Mark Veitch, Acting Director of Public Health, noted the issue of alternative supply of tobacco to people in the tobacco free generation:

*I will observe that we know that the most frequent source of tobacco for people in their teens, and unfortunately about 15 per cent of 16- and 17-year-olds are smokers, so they are getting cigarettes from somewhere and the most common source is family and friends. There is clearly a leakage to people who current legislation precludes from purchasing cigarettes or having cigarettes sold to. That is a problem.*

*It is likely, however, that as the tobacco-free generation expands, most people just entering it at age 18 are going to find it slightly harder to find a peer who can legally have cigarettes sold to them. The impact of the Tobacco-Free Generation Bill on that side stream supply of cigarettes to people who are otherwise ineligible is likely to be relatively small at first but may become more consequential as years go by.*

*The second thing I want to note, and it has been noted before, is that the internet is a very easy way of purchasing cigarettes. We do not have a good handle on how much tobacco is purchased via the internet. While that remains a legal option for an 18- or a 19-year-old to purchase tobacco products, that again is a worrying source of mitigation of the effects of the tobacco-free generation. Those aspects of alternative supply are important to consider in terms of the likely outcome in implementing a bill such as this.<sup>26</sup>*

41. Mr Dean discussed the potential for black market activity to flourish once the Bill has passed:

*In relation to black markets, one would hope that situation in Launceston is now being policed. In Tasmania, about 800 to 900 Tasmanians turn 18 in any one year with our current numbers; it might be slightly more than that. Of that number, you might have around one-fifth of those people wanting to take up smoking. It could even be less than that; I am hoping it is going to be less with the price rises recently occurring. Could a black market develop further on the back of, in the first years, a number of around 150 to 200 people coming online who want to smoke and who would be stopped from purchasing through a retailer? Would a black market flourish? Would a black market grow on those figures? I would say it is highly unlikely.<sup>27</sup>*

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<sup>26</sup> Dr Mark Veitch, *Transcript of Evidence*, 14 September 2015, pp. 22-3.

<sup>27</sup> Ivan Dean MLC, *Transcript of Evidence*, 14 September 2015, p. 15.

## RISK OF LITIGATION

42. Dr Veitch suggested that it would be prudent to contemplate the risk of litigation by tobacco companies against this Bill:

*While I do not say that from a point of view of legal advice, I just say that from the point of view of understanding what tobacco companies have done in plain packaging and the like. The consequences of that could be quite considerable. It would be a bad thing to embark upon implementing a bill, with all the attendant costs, then to fight a legal battle and lose, and it could be expensive to fight a legal battle and win. I think that is a contingency that probably ought to be kept in mind when considering what might happen if this bill was passed.<sup>28</sup>*

## EVALUATION

43. Dr Veitch commented that there needs to be an evaluation built into the Bill where the director is to evaluate it in 2021 and 2025:

*It should not be a simple one-dimensional evaluation, it should be a thorough examination of how the bill succeeded, failed, how various aspects of other smoking-related behaviour played out during the implementation of the bill. I think that here I am not arguing against evaluation, I am arguing for the fact that it should be a very thorough evaluation. That will cost money and that needs to be taken into account. I did notice in the submission by the University of Tasmania that they are considering ways to evaluate the bill, and it is my expectation that they would be looking at a multi-dimensional evaluation of the bill, not just as simple as, for example, smoking rates by age.<sup>29</sup>*

## IMPLEMENTATION

44. Dr Veitch raised the issue of implementation of the Bill including the unquantifiable costs:

*I have mentioned the last part of the submission relates to implementation and in implementation, I mention a number of elements, some of which will raise costs to do, such as retailer education, signage and some aspects of compliance. As was discussed earlier, most of those things can be built into fees, so there will be cost recovery for those. You do get into an interesting cycle where when you raise the cost of tobacco fees particularly, if they were raised by as much as a couple of hundred dollars, then you actually start to have people give up their tobacco licences. You run the risk of running into*

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<sup>28</sup> Dr Mark Veitch, *Transcript of Evidence*, 14 September 2015, p. 2.

<sup>29</sup> Dr Mark Veitch, *Transcript of Evidence*, 14 September 2015, p. 24.

*a rather awkward spiral where the cost of the licence escalates. You can argue that is a good thing but I am sure there is a break point where that resolves itself.*

*Some aspects of the implementation, however, have not been costed. The one in particular I want to draw attention to is the matter of public education to accompany such a bill. Any public education that accompanies such as (sic) bill would need to target adolescents and members of the tobacco-free generation, so it would be something that provides information to children and families in the lead-up to them joining that generation, as well as to people in the generation.*

*There will also need to be a separate and effectively long-term strategy to provide accessible information to visitors to the state. That would cost a considerable amount of money. Having said that, it would need to be weighed up against the cost, or the savings of reduced cigarette uptake.<sup>30</sup>*

45. Dr Veitch noted the absence of evidence to support policy in this area:

*That is a problem across a range of public health activities. There is a way of dealing with that. Mathematical modelling is increasingly coming to the fore as a way of assessing how public health programs might work. What is done is you construct a mathematical model. You look at the various inputs into the program.*

*One input may be the intent of the Tobacco-Free Generation Bill, that is to prevent the sale of cigarettes to people born after 31 December 1999. What the model could look at is, 'Okay, how well does that achieve that end?' The model could also look at other factors such as how much tobacco is diverted to people by families? How much tobacco is purchased overseas? A complex mathematical model is built up. These variables I have mentioned are considered. You can look at the most likely outcome, best guess if you like, for how each of those variables will play out; what the least good outcome for each of those variables is; what the best outcomes from each of those variables is. Then see how that plays out on smoking rates at different sectors of the population over time.*

*It is quite a sophisticated exercise, as it requires mathematicians as well as epidemiologists. It is a now quite widely used way of assessing policy in areas of evidence vacuum. It can sometimes be a bit disconcerting because you can see people come up with conclusions in the absence of evidence but it gives you some idea of how the parts of the system play out together.*

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<sup>30</sup> Dr Mark Veitch, *Transcript of Evidence*, 14 September 2015, pp. 24.

*A project like this would really benefit from the use of that sort of an approach to give us a better idea of how it might work and how various other factors might mitigate the benefits.<sup>31</sup>*

## **EXISTING TOBACCO CONTROL MEASURES**

46. Dr Veitch noted the importance of a coordinated approach between implementing and monitoring the consequences of the Bill, and existing tobacco control approaches:

*We have a number of tobacco control measures currently in place, across the population as a whole, and tackling various vulnerable groups within the population. They are very important to maintain. In particular, as Ms Barnsley mentioned, was the importance of maintaining funding of effective media campaigns. We know once you reach a certain level of coverage, roughly 32 weeks of television advertising a year, you begin to see a diminution in smoking rates.*

*Even though there is a little bit of difference in the measures of smoking in different members of the Tasmanian public over the last five or so years, there is a sense they are continuing to trend down. It is quite possible that is attributable to finally achieving good levels of coverage with the television advertising, in particular.<sup>32</sup>*

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<sup>31</sup> Dr Mark Veitch, *Transcript of Evidence*, 14 September 2015, pp. 25.

<sup>32</sup> Dr Mark Veitch, *Transcript of Evidence*, 14 September 2015, pp. 24-5.

## Appendix A: SUBMISSIONS

Ref No.	Name	Submission Received
1	ADATB and UTAS Centre for Rural Health	18/05/2015
2	Lana Morris	26/05/2015
3	St Helens Newsagency	26/05/2015
4	Free Choice Kingston	26/05/2015
5	Lois Ireland	26/05/2015
6	Brad Westcott	27/05/2015
7	Human Rights and Tobacco Control Network	30/05/2015
8	Bob Gosling	31/05/2015
9	Cliff Meier	02/06/2015
10	Chigwell News	02/06/2015
11	Ruth Malone (University of California)	03/06/2015
12	Chris Hill	03/06/2015
13	Australasian Association of Convenience Stores	03/06/2015
14	Greg Raspin	03/06/2015
15	Cignall Goldie Street	04/06/2015
16	Darren Emmerton (IGA Express Penguin)	04/06/2015
17	Shearwater Supa IGA	04/06/2015
18	Acton Milk Bar	04/06/2015
19	George Town Takeaways	04/06/2015
20	Helen Gosling	05/06/2015
21	Sohee Kim (TSG Kingos)	05/06/2015
22	Kevin Wade	05/06/2015
23	Luke Scott (Eastside Village Newsagency)	05/06/2015
24	Andrew Lockwood (Fourways Tattslotto)	05/06/2015
25	Tim Rundle (Director, Waverley Stores Pty Ltd)	05/06/2015
26	Anita Morgan (DHHS)	05/06/2015
27	Harry Lando (Division of Epidemiology and Community Health, University of Minnesota)	06/06/2015
28	Paul Raistrick (IGA Everyday, Ulverstone)	06/06/2015
29	Garry Martin (Winnings News)	06/06/2015
30	Prof. Jon Berrick	07/06/2015
31	Morris Store, Swansea	08/06/2015
32	Julia Walters	08/06/2015
33	Jos de Bruin (CEO, Master Grocer Australia)	09/06/2015
34	Professor Judith McKay	09/06/2015
35	Chris Bostick (Deputy Director for Policy, ASH)	09/06/2015
36	Sally Woolley (Cat and Fiddle Tobacconist)	09/06/2015
37	Martin and Genevieve Eaton (Cygnet Newsagency)	09/06/2015
38	Karen Shields (Tasmanian Hospitality Association)	09/06/2015
39	Rachel Elliot (Imperial Tobacco Australia)	09/06/2015
40	Josh Fett (British American Tobacco Australia)	09/06/2015
41	Cristie Bowler (Cignall)	09/06/2015
42	Shane Gill (BLH Group)	09/06/2015
43	Tony Lloyd (TSG George Town)	09/06/2015
44	Brendan Limbrick (Ellison Hawker Newsagency)	09/06/2015
45	Alf Maccioni (Alliance of Australian Retailers)	09/06/2015

46	Stuart Palmer (TSG Sorell)	09/06/2015
47	Saad Mohamad (Cignall Hobart)	09/06/2015
48	Bev Douglas (Warrane Newsagency)	09/06/2015
49	Mitch Ratajkoski (National Stroke Foundation)	09/06/2015
50	Maureen Davey (School of Medicine, UTAS)	09/06/2015
51	Stewart Street (Cignall Devonport)	09/06/2015
52	Heath Michael (Australian Retailers Association)	09/06/2015
53	Phillip Morris	09/06/2015
54	Domenic Greco (National Independent Retailers Association)	09/06/2015
55	Seana Gall (Menzies Institute)	09/06/2015
56	Nick Towle (Rural Clinical School, UTAS)	09/06/2015
57	Ben Kearney (Australian Newsagents' Federation Ltd)	09/06/2015
58	Morgan Begg	09/06/2015
59	Ned Worledge (Tasmanian Independent Retailers)	09/06/2015
60	Adrian Reynolds (Clinical Director, Alcohol and Drug Service, THO South.	10/06/2015
61	NewsXpress Launceston	10/06/2015
62	Tasmanian Government	29/06/2015
63	Hon Ivan Dean MLC	11/09/2015
64	Public Health Advocacy Institute	02/12/2015