

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.

Relevant sources:

1. van der Eijk Y, Porter G (2013) Human rights and ethical considerations for a tobacco-free generation. *Tobacco Control*. Open Access, URL: <http://tobaccocontrol.bmj.com/content/early/2014/12/31/tobaccocontrol-2013-051125>
2. United Nations (1948) *The Universal Declaration of Human Rights*. URL: <http://www.un.org/en/documents/udhr/index.shtml>.
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