TOWARDS IMPROVED PUBLIC HEALTH: THE TOBACCO AND OTHER SMOKING PRODUCTS (PREVENTION OF SUPPLY TO CHILDREN) AMENDMENT BILL 2001

Wayne Jarred

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ABSTRACT

The sale of tobacco products to children and the health effects of environmental tobacco smoke are being targeted by the Commonwealth, the States and Territories. The Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Bill 2001 represents Queensland’s response to these two important social and public health problems.
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1 INTRODUCTION

The Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Bill 2001 was introduced into the Parliament on 3 April 2001. The objective of the Bill is to improve the level of public health by reducing the exposure of the public to tobacco and other smoking products. The Bill is part of a package of measures included within the Queensland Tobacco Action Plan 2000/01 to 2003/04 which was released in October 2000.\(^1\) In addition to tackling the problem of passive smoking the Action Plan contains measures designed to lower the rate of the uptake of smoking in the young and support for those wishing to quit as well as specifically addressing the incidence of smoking among indigenous Queenslanders.\(^2\)

Queensland Health issued three Consultation Papers in July 2000 calling for submissions from the public on appropriate means that could be employed by the government to:

- Reduce the exposure of persons to passive smoking in public places (formally known as environmental tobacco smoke).
- The reduction or elimination of tobacco advertising at the point of sale and promotional campaigns.
- Prohibit the placement of self-service tobacco vending machines in liquor licensed premises which may be more easily accessible to children.\(^3\)

The Tobacco and Other Smoking Products (Prevention of Supply to Children) Bill 2001 contains provisions concerning:

- The sale of tobacco products from vending machines;
- Advertising and promotion of tobacco products;
- Passive smoking (environmental tobacco smoke); and
- Enforcement and evidentiary provisions.

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\(^3\) Queensland Health, *Option for Consideration: Phased smoking bans in enclosed workplaces and public places, and in rooms of liquor licensed premises when meals are being consumed*, Consultation Paper, July 2000.
In doing so, the Bill amends the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998*, the *Health Services Act 1991* and the *Police Powers and Responsibilities Act 2000*.

## 2 THE RATIONALE SUPPORTING ANTI-SMOKING MEASURES

### 2.1 PREVENTION OF HARM TO OTHERS

The underlying rationale for the regulation of smoking is that smoking poses a risk to human health. The extended rationale for the regulation of passive smoking is that smoking is not only a health risk for the smoker but also for those who come into contact with the mainstream and side-stream smoke originating from the smoker. If passive smoking really does harm health, then a strong case can be made for limiting the places and situations in which smoking is permitted.4

It has been scientifically shown that nicotine, a drug that occurs naturally in the tobacco plant, is the drug that makes smokers keep on smoking. Research has shown that nicotine is addictive and after a while the body produces a feeling that more is required and the dependency cycle is complete. The smoke from burning tobacco contains 4 000 chemicals including:

- Tar which is a mixture of chemicals
- Nicotine the addictive substance
- Carbon monoxide which is also contained in motor vehicle exhaust fumes
- Ammonia which is used in some floor cleaners
- Arsenic which is commonly used in rat poison.5

The use of tobacco is the major cause of drug-related deaths in Australia. In 1997, over 18 000 deaths were attributed to the direct use of tobacco which represented 80% of all drug related deaths.6 In Queensland it has been estimated that smoking directly contributed to approximately 3 000 deaths per year (15% of all deaths) between 1992 and 1996. Over this period it was also estimated that 8% of all

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deaths in children aged newborn to four years were directly attributable to exposure to passive smoking. Deaths in this age group were primarily due to smoking by parents resulting in low-birthweight babies and sudden infant death syndrome.

Smoking was estimated to have directly contributed to more than 27 000 hospital admissions per year during 1995/1996 and 1996/1997, and more than 185 000 occupied bed days were directly attributed to smoking at a cost of $108 million to Queensland.7

3 THE NATIONAL APPROACH TO PASSIVE SMOKING

3.1 NATIONAL PUBLIC HEALTH PARTNERSHIP

In October 1995 the Australian Health Minister’s Advisory Council (AHMAC) considered the development of a national public health policy framework as a joint venture between the Commonwealth, States and Territories. In October 1996 the respective Health Ministers agreed to enter into a National Public Health Partnership for Australia. To this end, a Memorandum of Understanding was signed by the respective Health Ministers in February 1997.8

In November 2000, AHMAC endorsed the National Public Health Partnership’s work on the National Response to Passive Smoking. Membership of the Partnership Group (as a sub-committee of AHMAC) is made up of the Chief Health Officers of Public Health in each State and Territory, and representatives of the National Health and Medical Research Council and the Australian Institute of Health and Welfare. It makes recommendations to AHMAC on national public health priorities and strategies to be adopted.9

The Partnership’s Legislation Reform Working Group worked in conjunction with State and Territory Tobacco Policy Officers to develop a legislative framework addressing passive smoking.

7 ‘Smoking: number one preventable mortality’, Alcohol and Drug Networking Newsletter, September 1999, p 3.


The Legislation Reform Working Group published:
- A Background Paper which provided an analysis of the impact of passive smoking on public health and resultant government responsibilities;
- A Statement of Guiding Principles to be used as the basis for developing legislation; and
- Core Provisions for the development and / or revision of existing legislative approaches.

The Legislation Reform Working Group recommended the adoption of the following Guiding Principles for passive smoking legislation:
- People have a right to participate in the life of the community without risks to their health from environmental tobacco smoke exposure;
- There is no right to smoke in an enclosed public place or workplace;
- Non-smoking requirements should be designed to apply equally to all premises within a particular industry sector in order to facilitate equal treatment;
- A successful transition to a non-smoking environment would best be accomplished by a phasing in period for some types of premises; and
- Compliance systems should be primarily based on public awareness, education and community support.\(^{10}\)

The legislative framework adopted by AHMAC contained 14 key issues that are to be incorporated into the legislation of the States and Territories. The key issues are:
- Passive smoking provisions should cover public places and workplaces
- Passive smoking provisions should address the problem across a variety of premises
- The legislation should provide for obligations on the part of both individuals and occupiers
- There should be minimum standards ie. a general provision prohibiting smoking except where it is specifically not prohibited
- The object of the legislation should be stated
- Definitions of terms used to be provided
- Smoking in enclosed public places to be prohibited
- Signage to designate smoke-free areas
- Specific offences for smoking in prohibited areas

Towards Improved Public Health

- The prevention of smoke from entering smoke-free areas
- The phasing in of new provisions
- Exclusions and exemptions
- Enforcement
- Provisions to bind the Crown\textsuperscript{11}

Whilst the Commonwealth has been involved in the development of a national response to passive smoking, the enactment of specific legislation remains the responsibility of the States and Territories.

4 THE STATE GOVERNMENT’S STRATEGIC RESPONSE

The \textit{Drug Strategic Framework} document established the government’s policy framework when it was released in 2000.\textsuperscript{12} The social and economic cost of tobacco and alcohol use has been targeted in the strategy, as have illicit drugs. The use of tobacco has been identified as the leading contributor to drug-related deaths and illness in Queensland.\textsuperscript{13} The \textit{Drug Strategic Framework} is the State government’s response to the national drug framework on harmful drug use issued by the Commonwealth government in 2000.

The \textit{Drug Strategic Framework} was followed up by the release of the \textit{Tobacco Action Plan} that highlights the government’s intention of targeting the key initiatives of minimising passive smoking in public places, youth smoking, the QUIT campaign and the indigenous tobacco control project. Passive smoking and youth smoking levels, as targets of the \textit{Tobacco Action Plan}, have found expression in the Bill now before the parliament.

In the light of accumulated medical evidence that exposure to passive tobacco smoke is a health risk, legislation regulating smoking in enclosed public places has become an appropriate public policy for all governments.


\textsuperscript{13} Queensland Health and Department of the Premier and Cabinet, November 1999, p 2.
Queensland, along with the other States and the Territories, agreed in 1999 to the release of the National Tobacco Strategy. This Strategy is an integral part of the National Drug Strategic Framework. The Tobacco Strategy seeks to address the supply, demand and promotion of smoking as well as the passive effects of the habit.14

### 4.1 Policy Coordination between the Commonwealth and Queensland

The Commonwealth and the States and Territories have cooperated in the formulation of national policies on tobacco use. Anti-smoking legislation in the States and Territories is the end product of the interaction between the levels of government in the policy formulation process:

**Coordinated Policy Formulation between the Commonwealth and Queensland**

<table>
<thead>
<tr>
<th>National</th>
<th>Queensland</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Drug Strategic Framework</td>
<td>Queensland Drug Strategic Framework</td>
</tr>
<tr>
<td></td>
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</tr>
<tr>
<td>National Tobacco Strategy</td>
<td>Queensland Tobacco Action Plan</td>
</tr>
<tr>
<td>Memorandum of Understanding to</td>
<td></td>
</tr>
<tr>
<td>Establish a National Public Health Partnership for Australia</td>
<td></td>
</tr>
<tr>
<td>National Response to Passive Smoking</td>
<td>Legislation</td>
</tr>
</tbody>
</table>

### 4.2 The Bill Currently Before the Parliament

The *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Bill 2001* has the improvement of public health as its objective. This objective is to be achieved through provisions in the Bill that provide for increased penalties on the sale of tobacco to children, further restrictions on advertising and

promotion, further restrictions on smoking in public places and the establishment of a framework for investigation and enforcement.

4.2.1 Further restrictions on the supply of tobacco to children

The consumption of tobacco products by children has been identified as a problem and was addressed in the *Tobacco Products (Prevention of Supply to Children) Act 1998* and in the current Bill.

A survey conducted in 1996 by the Centre for Health Promotion and Cancer Prevention Research found that the most common source of cigarette purchase by minors were supermarkets, petrol stations and convenience stores. The younger age group of 11/12 completing grade 7 were found to be more likely to have purchased from a vending machine than the older age of 16/17 completing grade 12. The older the child, the greater the chance that the cigarettes were purchased over the counter from a retailer.\(^{15}\)

A Gold Coast general practitioner conducted a survey on the selling intentions of retail tobacco product sellers. The survey conducted in September 1999 found that 73% of tobacco retailers surveyed in Gold Coast City would sell cigarettes to minors. A 15 year old girl who took part in the study could have purchased cigarettes from 19 of the 31 outlets approached whilst a 16 year old boy taking part in the survey could have done so from 15 of 18 retailers who were approached. Another 17 year old boy could have purchased cigarettes from 20 out of 25 retailers approached. Seventy-four retailers were approached of whom 54 were prepared to sell cigarettes to minors. The general practitioner blamed the low level of prosecutions for the preparedness of retailers to break the law.\(^{16}\)

It is proposed that penalties for the supply of tobacco or cigarettes to children be increased from a maximum penalty of $975 for a first offence to $5 250. For a subsequent offence, the maximum penalty will rise from $1 950 to $10 500.

The penalty for employees of a tobacco supplier who supply tobacco to a child when they have been instructed by the employer:

- Not to supply tobacco products to children;
- To sight acceptable evidence of age of any person thought not to be of adult age; and

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\(^{15}\) For details of the survey’s results see Peter Bartholomew, *Tobacco Products (Prevention of Supply to Children) Bill 1997*, Legislation Bulletin 13/97, Queensland Parliamentary Library.

• That they (the employee) will be held liable under the *Tobacco Products (Prevention of Supply to Children) Act 1998* for the prohibited sale of tobacco products to children in contravention of the employer’s instructions will rise from $75 to $750 for a first offence and from $150 to $1 500 for any subsequent offence.

### 4.2.2 Queensland statistics on adolescent smoking rates

In December 2000 the Queensland Cancer Fund released the results of a survey of 2000 secondary school students from State and private schools on their smoking habits. The survey indicated that 1 in 4 of secondary school students were regular smokers. It is estimated that approximately 65 000 Queensland teenagers are smokers. The study reveals that 38% of 17 year old boys and 36% of 17 year old girls are smokers. The 12-15 age group recorded a smoking rate of 17%.

The Executive Director of the Queensland Cancer Fund whilst happy with the prohibition provisions of the *Tobacco Products (Prevention of Supply to Children) Act 1998* has been critical of the absence of an advertising campaign designed to remind retailers of their obligations under the Act.

The review period for the effectiveness of the provisions of the *Tobacco Products (Prevention of Supply to Children) Act 1998* is being amended by the current Bill. Under the Bill, the review must commence no later than 31 May 2004 and be tabled in the Legislative Assembly no later than 31 May 2005.

### 4.2.3 Victorian statistics on adolescent smoking rates and a controlled study on enforcement strategies to minimise sales to adolescents

During 1998 and 1999 the Victorian Department of Human Resources conducted a study in the western suburbs of Melbourne to ascertain the level of compliance among tobacco retailers to the prohibition of sales to minors. The rationale for the study was the documented rise in adolescent smoking. In 1984, 22% of males and females 12-15 year olds were smokers. This had declined to 15% for males and

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17 ‘Smoking habit drags in more high school students’, *Courier-Mail*, 14 December 2000, p 3.

20% for females by 1990. By 1996, a increase to 18% for males had been recorded whilst the female rate had remained steady at 20%.\textsuperscript{19}

As a precursor to the study test purchases were conducted on 400 tobacco retailers in the Western Region of Melbourne. The controlled trial purchasers resulted in 41% of tobacco retailers selling cigarettes to minors.\textsuperscript{20} As a consequence the Western Region Tobacco Project was developed with the following aims:

- To establish whether compliance with the prohibition provisions of the Victorian legislation on the sale of tobacco products to minors could be improved by increased prosecutions and media coverage of the outcomes of those prosecutions; and
- The development of a best practice manual of policies and procedures to support Environmental Health Officers of local authorities who investigate tobacco sales to minors.

The Project Report stated that the Tobacco Act Enforcement Protocol containing guidelines and procedures under which investigations should be conducted has now been implemented Victoria wide. Whilst the protocol relies heavily on an initial complaint against a retailer to the local authority it does accommodate Environmental Health Officers commencing a process of their own volition. In this latter situation, a test purchase can be conducted and if a sale results, then a prosecution under the Act will commence. If the test does not result in a sale, then it is repeated within 2-4 weeks. If the retailer still refuses to sell, that retailer receives a letter of congratulation and a certificate of understanding.\textsuperscript{21}

In line with previous published literature the study found that a successful and sustained reduction in the sale of tobacco products to minors is heavily dependent on community education, consistent law enforcement and media coverage of prosecutions.\textsuperscript{22}

The compliance checks conducted within the project found a lower compliance level with the prohibition provisions for milkbars and service station convenience


\textsuperscript{20} Victoria. Department of Human Services, p 1.

\textsuperscript{21} Victoria. Department of Human Services, p 5 and Attachment 3.

\textsuperscript{22} Victoria. Department of Human Services, p 3.
stores (58%) compared with supermarkets, newsagents, takeaways and tobacconists (30%).

The Project Report also indicated that there was difficulty in sustaining media interest in the project over the entire 18-month period. Media coverage was reported as comprehensive at the time of the first prosecution but as further prosecutions occurred (seven during the life of the project) the media’s interest fell away. The media plays an important role in disseminating the results of prosecutions and its influence should not be underestimated. The project report indicated that long-term media interest in the issue would have to be addressed.

4.2.4 Further restrictions on advertising, display and promotion

The current Bill provides new provisions restricting advertising, display and promotion of smoking products. Generally, the advertising and display of smoking products will only be allowed at retail outlets. Retail displays of smoking products may only be displayed in a position where the supplier or an employee of the supplier can access the displayed products. Public access to product displays will be prohibited. However, this provision does not apply to the installation of a tobacco product vending machine within a bar area of licensed premises, a casino or a gaming machine area where the machine falls within the view of employees of the premises. Nor will the restrictions on the placement of tobacco products for sale apply to duty free shops where displays may be placed anywhere in the shop.

Clause 26 of the Bill inserts a new Section 26G into the Act which provides for a prohibition on the arrangement of smoking products displays in such a way or manner that it would constitute a tobacco advertisement. Displays that create a visual image that smoking is desirable, inviting, appropriate etc. will be prohibited.

Currently, the most widely used product display method is by the use of a stack dispenser where multiple packets of cigarettes are lined behind each other and removed from the front by the seller when sold.

Duty free shops will be able to display more than one carton of a particular product line whilst other retail sellers will only be able to display one such carton.

Cigarette packets will not be allowed to be displayed so that they form a visual picture that the manufacturer may be using for an advertisement and left that way.


on the pretence that they are a product display. The sale of such packets and their replacement in the same order in order to maintain the visual image will be prohibited.

Retail suppliers will be required to display a Quit Smoking sign at the point of sale. Failure to do so could result in a maximum fine of $750. Unlike other provisions in the Bill there is no provision here for a higher penalty for subsequent offences after any initial conviction. The mandatory sign will be standardised and prescribed under regulation.

The supply of entitlements for goods or services or to a reduced price for goods or services to the general public by manufacturers, wholesalers or retail sellers will be prohibited. For instance, an entitlement to purchase a good other than a tobacco product at a reduced price with proof of purchase of a tobacco product will be prohibited. This type of merchandising or promotion is commonly found in other sales areas. The penalty for contravention will be a maximum fine of $5 250.

The giving away of smoking products for promotion, the conducting of competitions for promotion or the conducting of competitions connected with the sale of smoking products to the public will all be prohibited (new Sections 26L-26P).

4.2.5 Further restrictions on smoking in public places

Smoking will be prohibited in such enclosed areas as:

- Common areas of multi-unit residential accommodation such as motels, hostels, boarding houses, nursing homes, and residential accommodation comprising lots in a community title scheme
- A premium gaming room at a casino where levels of waging are higher than in other gaming rooms and where food and drink are supplied free to patrons
- Dining areas of licensed premises where meals are available
- Restaurants and cafes where meals are consumed
- Gaming table areas of casinos
- Shopping centres
- Cinemas
- Workplaces.

Enclosed areas that will not be included in the smoking prohibition are:

- Enclosed rooms on licensed premises where meals are not consumed such as bars, lounge bars, nightclubs and casinos
- Beer gardens, parks, footpaths and open sports stadiums
- private homes used exclusively for residence or business where no person other than the residents are involved.

Whilst open-air sports stadiums are exempt the occupiers of such areas may impose a voluntary prohibition or restriction on smoking. For instance, the occupiers of the Wooloongabba Cricket Ground imposed smoking restrictions in certain areas of the ground in March 1999.26

The smoking prohibition in these places will commence on 31 May 2002. Voluntary bans on smoking in these areas have been possible in the past and many occupiers have implemented such bans on their own initiative. Even private homes that are used as the site of home businesses and are frequented by employees of the business proprietor or the public will fall within the ambit of the smoking prohibition.

It will be an offence for occupiers of premises to allow smoking to take place in prohibited areas. As with legislation in other States the occupiers of areas in which smoking is prohibited will be able to rely on a defence that they were not aware that the smoking offence was occurring and if aware, that the offender was requested to stop.

4.2.6 Investigation and enforcement

The Bill provides that authorised persons appointed under the Act may enter land around premises without the permission of the occupier for the purpose of contacting the occupier. This power is also to extend to entry to part of any place to which the general public ordinarily has access.

The existing powers under the Act for authorised officers to obtain warrants for entry to places are extended by a provision in the Bill that allows Magistrates to issue special warrants after application by such means as fax, phone or radio. Special warrants may be issued before an application is sworn. (New section 36A)

It is envisaged that special warrant applications are to be appropriately used in urgent circumstances or where the authorised officer is in a remote location from where the Magistrate cannot be reasonably reached in a reasonable timeframe. If the issuing Magistrate is unable to communicate the warrant to the authorised

officer by fax the special warrant can be issued by the Magistrate who authorises the authorised officer to complete the warrant form in the correct manner.

Generally, authorised officers acting under the authority of a warrant will be required to identify themselves, give the occupier of the premises a copy of the warrant, and to enter the premises with the consent of the occupier without the use of force. In situations where immediate entry without force appears on reasonable grounds not to be possible because of frustration on the part of the occupier or some other person, then the authorised officer may enter by the use of reasonable force.

After entry, authorised persons will have the power to call upon the occupier of the place to assist the investigation under the Act. A maximum fine of $3,750 can apply for the offence of failing to give reasonable help when requested. However, the defence of self incrimination will be available to persons who fail to give help when requested.

Any person found committing an offence against the Act and who fails to give the authorised person his or her name and /or residential address will, under the provisions of the Bill be liable for a maximum penalty of a $3,750 fine compared with the existing $375 fine. The penalty for the obstruction of an authorised officer without reasonable excuse will rise from a maximum penalty of $375 to $3,750.

5 POLICY OF THE ALCOHOL AND OTHER DRUGS COUNCIL OF AUSTRALIA

The Alcohol and other Drugs Council of Australia (ADCA) is the peak body for consumer groups and people working to reduce harm caused by alcohol and other drugs. ADCA produced its Drug Policy 2000: A New Agenda for Harm Reduction.27 ADCA supports the National Tobacco Strategy as adopted by the Commonwealth, States and Territories.28

5.1 COMMUNITY SUPPORT FOR TOBACCO RELATED STRATEGIES

In 1998 the Australian Institute of Health and Welfare conducted a survey on the public support for policies and strategies aimed at reducing tobacco use:


28 Alcohol and Other Drugs Council of Australia, 6.1 Tobacco, p 7-8.
Percentage of Support for Measures to Reduce Tobacco-Related Harm

Australia 1998.29

<table>
<thead>
<tr>
<th>Measure</th>
<th>Males</th>
<th>Female</th>
<th>Person</th>
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</thead>
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<tr>
<td>Stricter enforcement of laws relating</td>
<td>88.1</td>
<td>91.8</td>
<td>90.0</td>
</tr>
<tr>
<td>to sale of cigarettes to those under</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>age</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Banning tobacco advertising at sporting</td>
<td>57.1</td>
<td>65.5</td>
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<td>events</td>
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<tr>
<td>Banning smoking in the workplace</td>
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<td>Banning smoking in shopping centres</td>
<td>80.5</td>
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<tr>
<td>Banning smoking in restaurants</td>
<td>77.4</td>
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<td>77.1</td>
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<td>Banning smoking in pubs/clubs</td>
<td>47.7</td>
<td>52.1</td>
<td>49.9</td>
</tr>
</tbody>
</table>

Across Australia the survey found that the older age groups were (in percentage terms) more in favour of the banning of smoking in workplaces, shopping centres, restaurants, hotels and clubs. For instance 33% of males in the 14-19 year old group were in favour of banning smoking in hotels and clubs whilst for the 50-59 age group the percentage was 54%. Similar results for females were also recorded.

Seventy-one percent of males 14-19 years supported the banning of smoking in restaurants whilst for the 50-59 age groups the agreement response was 83%. Once again the agreement rate for females in the same age group was similar to those of males.

The banning of smoking in shopping centres was agreed with by 75% of males in the 14-19 age group whilst 81% of the 50-59 age group agreed with such banning. There was however higher agreement for the banning of smoking in shopping centres from females in the 50-59 age group which was recorded at 88%. Female agreement in the 14-19 age group was similar to that of males in the same age group.30

A South Australian survey conducted in 1997 found that 6 months after the passing of legislation placing a ban on smoking in restaurants in that State, that 73% of


30 Higgins, Cooper-Stanbury and Williams, p 13.
those surveyed agreed with the ban.\textsuperscript{31} The view has been expressed that, when legislation has been passed to prohibit smoking, then those who were ambivalent prior to the legislation alter their view to a positive one in favour of the legislation.\textsuperscript{32}

6 THE PREVALENCE OF SMOKING IN THE COMMUNITY

Results of the 1998 National Drug Strategy Household Survey indicate that Queensland has one of the highest rates of tobacco usage of all the Australian States\textsuperscript{33}.

\begin{thebibliography}{99}
\end{thebibliography}
Percentage of population 14 years and over using Tobacco by State and Territories

<table>
<thead>
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<th>Smoking Status</th>
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<th>VIC</th>
<th>QLD</th>
<th>WA</th>
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<td>22.5</td>
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<td>42.5</td>
<td>33.0</td>
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<tr>
<td>N/Smoked</td>
<td>37.8</td>
<td>33.1</td>
<td>32.0</td>
<td>31.0</td>
<td>28.0</td>
<td>30.4</td>
<td>31.0</td>
<td>31.3</td>
<td>33.8</td>
</tr>
</tbody>
</table>

7 THE EFFECTS OF PASSIVE SMOKING ON HUMAN HEALTH

In 1997 The National Tobacco Campaign, an initiative of the Federal, State and Territory Health Ministers was launched. An integral part of the Campaign was the recognition of the dangers of passive smoking.34

The Campaign Information Kit indicated the extent to which the link between smoking and disease had been examined:

Over 57 000 reports world-wide have examined the connection between cigarette smoking and disease, making it the most extensively documented cause of disease ever investigated in the history of biomedical research.35

With this level of effort being channelled into the effects of smoking, it was inevitable that once a link had been established between smoking and particular diseases that attention would turn to the effects of passive smoking. The first piece of medical research on the effects of passive smoking was published in 1981.36 This study suggested that exposure to passive smoking could actually cause lung cancer. The study examined the incidence of lung cancer among a group of non-smoking spouses of heavy smokers in Japan.

34 Australia: Minister for Health and Family Services, The National Tobacco Campaign: Every cigarette is doing you damage, Information Kit, 1997.


7.1 NATIONAL HEALTH AND MEDICAL RESEARCH COUNCIL REPORTS

The National Health and Medical Research Council published reports in 1987 and 1995 concerning the health effects of passive smoking.\(^{37}\) The 1995 report indicated that in relation to certain categories of illness, the available evidence had strengthened the hypothesis that exposure to passive smoking is a health risk. In producing the 1987 and the 1995 reports, the NHMRC examined the results of approximately 70 different studies focusing on the incidence of lung cancer in non-smokers and the incidence of respiratory complaints in children.\(^{38}\)

In reviewing the results of these studies, the 1995 report concluded that passive smoking is highly likely to be a causal factor in:

- lower respiratory tract infection in young children;
- asthma;
- lung cancer; and
- cardiovascular disease.\(^{39}\)

A 1991 study conducted at the Royal Women’s Hospital, Melbourne examined the respiratory capacities and histories of 11 year old children who were classified as being of very low birthweight when delivered. The study concluded that passive smoking is associated with adverse respiratory function in surviving very low birthweight children at 11 years of age and that continued exposure to passive smoking, or active smoking, beyond 11 years may lead to further deterioration in respiratory function in such children.\(^{40}\)

The National Heart Foundation of Australia points to the results of more than 15 epidemiological studies that have been conducted since 1985 as having consistently reported a 24% to 30% increased risk of fatal and non fatal illness befalling those non-smokers living with smokers. The foundation also reported that the Department of Health in the United Kingdom reported that passive smoking is a

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cause of heart disease.\textsuperscript{41} The relevance of the negative consequences of passive smoking for public policy is summed up by the Australian National Heart Foundation:

\textit{The effect of passive smoking on cardiovascular health is very important in terms of public health because environmental exposure to tobacco smoke and disease of the heart and blood vessels are both very common in many populations. This means that even a small increase in risk related to passive smoking would translate into a large number of additional cases of heart attack, stroke and premature death.}

\textit{Considering that smoking is a major risk factor for stroke and peripheral vascular disease, it is also likely that passive smoking increases the risk for these diseases, although there is an insufficient number of studies available to make this conclusion at present.}\textsuperscript{42}

Recent research in the United States of America points to the greater risk of females contracting lung cancer than males due to the presence of a gene that is naturally active in females. In men, the gene has been found to be naturally inactive but can be activated by smoking. The incidence of women contracting lung cancer over that of men is 12 fold when either direct or passive smoking is involved.\textsuperscript{43}

A 1999 study conducted by the Hunter Area Health Service based in Newcastle found that 47\% of children under the age of 12 months were suffering from the effects of passive smoking. The study acknowledged that the largest contributor to this, was the number of cigarettes that the mother consumed whilst carrying a child and the number of cigarettes that the parents consumed in the presence of their children after birth.\textsuperscript{44}

\section*{7.2 EFFECTS OF PASSIVE SMOKE ON EXPOSED WORKERS}

The December 1998 edition of the \textit{Journal of the American Medical Association} reported the results of a study conducted in California on the respiratory health of bartenders before and after legislation was introduced that prohibited smoking in bars and taverns in that State. The study concluded that the establishment of smoke-
free bars and taverns was associated with the rapid improvement of respiratory health in the workers of such establishments.45

Commenting on the findings of this study the Executive Director of the Queensland Cancer Fund said that it could be expected that two-thirds of Queensland bartenders who now experience respiratory problems to be relieved of those symptoms if and when a similar ban was introduced into Queensland’s licensed premises.46

The plight of hospitality workers is recognised by the Queensland Cancer Fund which argues that they need to be protected as such workers have no choice but to suffer the health risks associated with long-term exposure to environmental tobacco smoke.47

In 2000, a member of the Victorian Legislative Assembly presented a petition to Parliament signed by over 500 Crown Casino workers who were concerned about the negative health effects of continually working in an environment contaminated with environmental tobacco smoke. The Tobacco Amendment Bill that had just been introduced into parliament did not contain provision for a prohibition on smoking in gaming venues.48

7.2.1 Effects on the hospitality trade

The Chief Executive of the Restaurant and Caterers Association of Queensland has stated that restaurateurs would accept a smoking ban provided hotels and bars were included. The Association’s spokesperson was concerned that any ban would be nothing more than a trial on restaurants.49 The Executive Director of the Queensland Cancer Fund has argued that similar bans in force in the United States


have not resulted in a downturn in restaurant trade.\textsuperscript{50} Additionally, 78\% of restaurants in South Australia enforcing smoking bans and 84\% of those with smoking restrictions had not suffered a decline in turnover with some even recording an increased turnover.\textsuperscript{51}

For patrons of restaurants, their patronage of such places is part of their leisure time whilst for staff it is their place of work. Many employers across many industries have placed bans on smoking in workplaces on the grounds of a safe and healthy work environment. For instance QANTAS Airlines banned smoking by employees in or near their workplaces in April 1996, the Commonwealth banned smoking in government offices in March 1988.

A survey conducted in 1997 found that 77\% of 600 private sector companies contacted had implemented a non-smoking policy. Of this 77\%, 46\% prohibited smoking at work whilst 31\% had placed restrictions on smoking.\textsuperscript{52}

The benefits of workplaces becoming smoke-free have included increased productivity, decreased costs as well as a more pleasant working environment.\textsuperscript{53}

A survey conducted by researchers from the University of Western Australia on the likely effects of a ban on smoking in hospitality venues concluded that the imposition of smoke-free regulations would significantly decrease the smoking habits of the majority of smokers without resultant negative financial impacts to venues. The research team reported that they had found strong evidence in the survey to the effect that any decline in smoking patrons would be compensated for by an increase in non-smoking patrons.\textsuperscript{54}

A recent report out of England suggests that hotel operators can expect an increase in turnover by about 7\% if they introduce no-smoking areas within their establishments. The Director of the United Kingdom anti-smoking organisation

\textsuperscript{50} Alcohol and Drug Networking Newsletter, May 2000, p 4.

\textsuperscript{51} ‘Smoke Bans Shown to be Big Benefit’, Media Releases, Queensland Cancer Fund, 30 March 2000.

\textsuperscript{52} ‘Smoking in workplace accepted as dying habit’, Australian, 18 January 1997, p 16.

\textsuperscript{53} ‘Queensland workplaces tackle tobacco issues’, Alcohol and Drug Networking Newsletter, November 1999, p 3.

\textsuperscript{54} ‘Hospitality smoking ban has benefits’, Drugs in Society, March 2000, p 7.
Action on Smoking and Health argues that smoke free areas in hotels are good for business and represent the next profitable trend for hotels in that country.  

8 COURT LITIGATION AND PASSIVE SMOKING

When the occupiers of venues contravene provisions of an Act prohibiting smoking in particular areas they may be prosecuted for the offence. Civil liability accrues to such occupiers on the basis that they may have owed a duty of care to the complainant. The court is then required to establish whether or not the defendant actually owed a duty of care and if so, to what extent or degree and then further did the defendant breach this duty of care. If the answer to these questions is yes then the complainant may be awarded damages by the court to compensate for any financial loss or physical suffering that occurred as result of the defendant breaching the acknowledged duty of care.

In 1992 the New South Wales Department of Health was sued by a former employee for personal injury suffered from coming into contact with environmental tobacco smoke in her place of work which was a Community Health Care Centre. The personal injury suit alleged aggravation of a pre-existing condition of asthma whilst working at the Community Health Care Centre. A civil jury awarded the former employee $64 000 plus costs.

An expert medical witness for the plaintiff in the above case said in evidence:

*I must say that there is no definite evidence that environmental tobacco smoke over a long period of time will definitely chronically worsen asthma. That is because the studies have not been done. No-one can say or no to that. What we can say is that it acts as an acute irritant.*

In 1997 the Federal Human Rights and Equal Opportunity Commission heard a complaint from a nightclub patron who claimed compensation for an asthma attack suffered as a result of exposure to passive smoking in the Sydney nightclub in March 1995. The Commission awarded the complainant in this matter $2 000 compensation on the grounds that the proprietor of the nightclub had discriminated against her. The Commission determined that the nightclub was discriminatory to the patron who suffered from asthma by not providing a smoke-free environment.

55 ‘No smoking pubs make more money’, Alcohol and Drug Networking Newsletter, January 2000, p 2.


The Hilton Hotels Tribunal hearing was the centre of a further inquiry by the Human Rights and Equal Opportunity Commission. The Commission has power under the Human Rights and Responsibility Commission Act 1986 to conduct inquiries into matters of discrimination. The Commission called for public submissions as to the types of orders that the Commission could make to redress the discrimination suffered by non-smokers at smoking venues and to ensure that further occurrences did not occur.

After reviewing the submissions received (3 from anti-smoking organisations and 3 from tobacco companies) the Commission found that the only viable method would be a prohibition on smoking at the venue. However this was an order that the Commission was not prepared to make because it would have singled out the Hilton Hotel Chain. The Commission felt it was more appropriate for State governments to legislate for prohibitions in such venues:

Whilst this decision does not relate to the general community debate over the efficacy of environmental tobacco smoke I cannot make the decision in a vacuum. Many public entertainment venues (although not nightclubs) are already smoke free. Several State governments have legislated to ban smoking in restaurants, hotels, clubs etc. In NSW, where the respondents venue is situated, legislation was passed by Parliament in 1997 which provides that smoking will not be allowed in public entertainment venues which did not comply with clean air standards five years after these standards have been introduced. However, no such standards have been promulgated.

It is clear that momentum is building to ban smoking in public entertainment venues. In this context it seems to me inappropriate to single this venue out for an earlier ban because a complaint has been successfully brought under the Disability Discrimination Act. For this reason, I am not prepared to support this option.58

A female patron of a Melbourne restaurant won $7 600 in damages after suffering a serious asthma attack allegedly caused by environmental tobacco smoke whilst dining at the restaurant in 1998 and which it was claimed subsequently triggered a 2 month long bout of asthma. The complaint was heard in the Melbourne Magistrates Court in August 2000 with the decision being given in September 2000.59

The case was described as being the first of its kind in Australia with the issue being the health of customers or patrons and not a workplace safety issue for hospitality workers.


There was a 1995 out of court settlement of $4 000 between the Victorian Department of Health and a male nurses aid who had contracted conjunctivitis as a result of contact with environmental tobacco smoke whilst working in a rural hospital. The settlement was described as Australia’s first that concerned a non-respiratory illness. The nurses aid had worked in the hospital between 1985 and 1991. The settlement amount of $4 000 was for pain and suffering whilst an earlier claim for medical expenses had been paid by Victorian Workcover the previous year.60

In November 1997 it was reported that a female shopper had settled a claim out of court with the Myer Shopping Chain after she had on 3 occasions suffered an asthma attack caused from inhaling tobacco smoke whilst shopping at Myer Melbourne.61 In 1997 approximately 150 shopping centre managers in Victoria were surveyed to ascertain their policy on smoking within their shopping centres. The collated results were that 68% had a policy on smoking, of which 40% had implemented a total ban, with 28% implementing a partial ban.62

Passive smoking was recently used as a defence by a Victorian prisoner in custody who had been charged under prison regulations with a drug offence. The prisoner claimed that a reading indicating that his body contained traces of cannabis usage was in fact caused by inhaling passive smoke from other prisoners. The prison manager did not accept this defence and convicted the prisoner of the drug offence. On appeal to the Victorian Supreme Court, the conviction was quashed on the grounds that the Prison Manager did not call for expert evidence that may have supported the possibility that the prisoner’s drug reading may have been as a result of passive smoking.63


9 LEGISLATION IN OTHER AUSTRALIAN STATES

9.1 NEW SOUTH WALES

The New South Wales parliament passed the Smoke Free Environment Act 2000 in time for the staging of the Olympic Games in Sydney in September 2000. The object of the Act is the promotion of public health by reducing exposure to tobacco and other smoke in enclosed public places.

Entertainment places such as cafes, restaurants, shopping centres and gaming rooms in casinos were designated smoke-free areas under the legislation. Hotels and clubs were not covered by the provisions of the legislation. Penalty provisions for contravention are a maximum of $550 fine for individuals and $5,500 for establishments. The non-inclusion of hotels and clubs within the authority of the Act was not supported by the New South Wales anti-smoking lobby group which had expected the government to establish a complete ban on smoking in entertainment places.64

The New South Wales legislation does allow defences for individuals committing an offence against the Act and occupiers of premises in which the offence takes place. An individual has a valid defence if he or she did not know, and could be reasonably be expected to have known, that the place was a smoke-free area. An occupier of a smoke-free area has a defence against prosecution if it can be shown that the smoker was not aided in any way by the occupier or an employee and that the offence was undetected or, once having been detected, that the individual was requested to cease.

Occupiers of smoke-free areas are required to display signs indicating that smoking is prohibited in the particular area. Failure to do so is an offence against the Act. Failure on the part of occupier incurs a fine and would also be one element of an individual’s valid defence against prosecution for smoking in a non-smoking designated area.

9.2 VICTORIA

The Tobacco (Amendment) Act 2000 amended the Tobacco Act 1987 and provided for the new prohibition of smoking in enclosed restaurants, cafes, dining areas and controlled shopping centres. The Act was assented to on 6 June 2000 but the

64 ‘New Smoking ban for NSW’, Alcohol and Other Drugs Networking Newsletter, June 2000, p 2.
provision relating to the new offence of smoking in enclosed restaurants, cafes, dining areas will not commence until 1 July 2001. The prohibition on smoking in controlled shopping centres designated under Orders in Council commenced on 1 November 2000.

As with the New South Wales legislation, a defence is open to occupiers of such premises that they did not provide such items as ashtrays, matches, lighters or anything else designed to facilitate smoking and that the occupier did not know that prohibited smoking was taking place.

However, unlike the New South Wales legislation, the Victorian Act does not provide a defence for the person actually committing the offence of smoking that they were unaware that smoking was prohibited in the particular enclosed restaurant, café or dining area. An individual contravening the Act within a controlled shopping centre is entitled to a defence that the prescribed signage was not displayed at the shopping centre.

9.3 SOUTH AUSTRALIA

The *Tobacco Products Regulation Act 1997* provided for a prohibition on public buses, lifts, auditoriums where public entertainment is being conducted and public dining and café areas. The maximum penalty for smoking on public buses, in public lifts, enclosed public dining areas and cafes is $200. However, the maximum penalty for smoking in auditoriums during public performances is $5,000. As in New South Wales and Victoria, occupiers of enclosed public dining areas and cafes have the defence that they did not facilitate the smoking act and that they did not know that it had occurred or was occurring.

9.4 TASMANIA

The *Public Health Amendment (Tobacco) Act 2000* prohibits smoking in public theatres and cinemas and also provides that theatre and cinema management commit an offence if smoking is allowed to take place.

9.5 AUSTRALIAN CAPITAL TERRITORY

The Australian Capital Territory was the first Australian jurisdiction to legislate for a prohibition on smoking in enclosed public places. In 1994 the *Smoke-Free Areas (Enclosed Public Places) Act 1994* was passed. This Act placed a prohibition on smoking in public restaurants which was phased in over a 12 month period. The *Smoke Free Areas (Enclosed Public Places)(Amendment) Act 1997* extended these provisions to cover licensed premises that are licensed under the *Liquor Act 1975*
and the *Casino Control Act 1988.* A similar phase in period was allowed for licensed premises as was the case for restaurants in the 1994 Act.

### 10 CONCLUSION

The *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Bill 2001* is paralleled by legislation in the other States and Territories. The Bill contains many of the core provisions adopted by the Australian Health Ministers’ Advisory Council in 2000 and falls within the national framework of the drug response. Occupiers of enclosed public places such as restaurants, cafes, eating areas on licensed premises and gaming rooms who have not in the past been subject to such legislation will have until 31 May 2002 to comply with the smoking prohibition provisions of the legislation.
APPENDIX – NEWSPAPER ARTICLES

Title Jails escape smoking ban.
Source Courier-Mail
Date Issue 04/04/01
Page 4

PRISONERS and casino high-rollers have escaped the Queensland Government's anti-smoking laws tabled in Parliament yesterday. Smoking will be banned in enclosed places where food is served in venues such as hotels, clubs, restaurants and casinos under the new laws to be introduced on World No Tobacco Day on May 31 next year. Advertisements will be restricted and smoking promotions will be outlawed. Vending machines will be out of children's reach.

Health Minister Wendy Edmond said the legislation would not apply to private homes or cars, or private living areas in a boarding-house, hostel or nursing home. Premium gaming rooms in casinos, prisons and on-stage acts where actors smoke as part of the performance will be exempt. So will business cars carrying more than one person.

Ms Edmond told Parliament the laws were an important milestone for public health.
RESTAURANTS, pubs and clubs will be given 12 months to ban smoking in indoor eating areas before offending patrons face a $1500 fine. The State Government will also ban the promotion and retail advertisement of tobacco and other smoking products in its long-awaited crackdown on passive smoking.

Cabinet has endorsed the legislation, to be introduced today in State Parliament, after more than 12 months of industry consultation. Premier Peter Beattie said it would have been irresponsible for his Government not to limit passive smoking given the irrefutable evidence of poor health outcomes.

"I believe that all fair-thinking Queenslanders will support this legislation because 3000 Queenslanders a year die from smoking-related diseases," Mr Beattie said.

He said it was impossible for the Government to ban smoking in all public places, but he urged restaurateurs and cafe owners to set aside non-smoking areas in their outdoor eateries.

"Passive smoking can be just as harmful to health and as annoying to non-smokers under canopies and umbrellas as it is indoors," he said.

Health Minister Wendy Edmond said the 12-month lead-in time for the laws would allow venues to make structural changes to comply with the legislation, although no financial assistance would be provided by the Government. Ms Edmond said tobacco companies and public venues knew the potential legal implications of allowing passive smoking and she believed the Government had to act.

"There will always be a few people who see it as an infringement on their rights but I think we're putting the right of people not to get smoking-related diseases-especially when they don't themselves smoke-ahead of those concerns," Ms Edmond said.

She said the new laws also closed a loophole which allowed vending machines to be placed in licensed premises where people under 18 could have access to them.

Under the laws:

* Cigarette vending machines would be allowed only in bar and gaming areas of licensed premises, with fines for any breaches to be increased from $955 to $5000.

* Advertising of tobacco and other smoking-related products would be restricted at retail outlets, and promotions banned, with a potential $5250 fine for any breaches.
* Shops selling tobacco would be forced to display quit smoking signs, with a $750 fine for any breaches.

The Queensland Hotels Association and Clubs Queensland yesterday welcomed the laws and said lengthy industry consultation and the inclusion of a 12 month lead-in time had produced the best result.

But a spokeswoman for the Heart Foundation said the new laws could have been introduced faster and there should have been further restrictions in the retail area.

During the state election campaign, the Coalition refused to match Labor's planned laws but Opposition Leader Mike Horan said yesterday that the legislation would "most probably" be supported.
THE Queensland Government has approved laws to ban smoking in cafes, restaurants and dining areas in pubs and clubs. But the legislation, which also bans smoking at gaming tables, will not take effect until 2002 after it is introduced into State Parliament next year.

State Cabinet finally approved the anti-smoking legislation yesterday, which will prevent patrons from lighting up in all enclosed areas in dining venues, in a move that brings Queensland into line with most other States and Territories. The laws will also increase the maximum penalty for retailers who sell cigarettes to anyone aged under 18 from $975 to $5,000.

Also banned will be point-of-sale tobacco advertising and promotions, including free lighters and other giveaways. Retail outlets will be prevented from displaying more than one packet of cigarettes per line.

Queensland’s club industry has backed the laws, while hoteliers and doctors have criticised the proposed legislation. The chief executive of Clubs Queensland, Ms Penny Wilson, said many clubs had already introduced smoke-free dining and the proposed 12-month phase-in period would allow other venues time to adjust. But the Queensland Hotels Association has opposed the moves to legislate to ban smoking on the grounds that the industry is already self-regulated.

The Australian Medical Association of Queensland criticised the legislation for failing to cover all public places, questioning whether the Government was genuine about stamping out passive smoking. Queensland had been lagging behind other States and Territories in introducing anti-smoking laws which were agreed upon by health ministers under the National Tobacco Action Plan.
This Publication:

RB 3/01  Towards Improved Public Health: The Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Bill 2001 (QPL Apr 2001)

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