

TOBACCO PRODUCTS CONTROL AMENDMENT BILL 2017

Second Reading

Resumed from 6 September 2017.

HON NICK GOIRAN (South Metropolitan) [2.17 pm]: As the lead speaker for the opposition, I rise to speak on the Tobacco Products Control Amendment Bill 2017. With some trepidation, Madam President, I took the opportunity to look at the explanatory memorandum for this bill because the last time the Minister for Health had legislation before the house, I looked at the explanatory memorandum and it resulted in the legislation needing amendment and the tabling of a supplementary version of the bill. So, with trepidation, I assume that this bill's explanatory memorandum requires no amendments and that there is no shifty business by the government. Looking at this explanatory memorandum, we are informed of the three main intentions of the bill, which are as follows —

- provides various measures to protect children and young people from exposure to tobacco products;
- improves and strengthens existing provisions in relation to the retail sale of tobacco products; and
- simplifies and streamlines administrative arrangements for tobacco licences.

I hasten to add that the opposition is supportive of these core intentions expressed by the government. However, as has become typical with this Labor government, the devil is in the details. Curiously, the government's second reading speech states —

Most of these proposals will continue to strengthen longstanding legislation.

The first matter the opposition would ask the government to clarify is which of its proposals will weaken the legislation. The government's second reading speech also makes much of the fact that the bill will fulfil an election commitment, but hastens to add that the government —

... is now introducing and progressing a similar bill to amend the Tobacco Products Control Act 2006.

That is a reference to the former government's draft bill, which was tabled for public information and discussion in November 2016. This brings me to the second matter on which the opposition seeks clarification from the government; that is, which provisions are dissimilar? Given that it is clear that this bill is not identical to the draft bill that was tabled for public information and discussion, the third matter on which the opposition seeks clarification from the government is: who was consulted on the changes? Whatever the changes and whatever the consultation levels, it has become readily apparent that some specialist retailers are aggrieved by the proposed changes to the defence provisions in section 23. Indeed, I have received a steady stream of emails expressing concerns. I think it would be beneficial if I highlighted a sample of those emails. I have a very large bundle, so I do not propose to delay the house and the passage of this bill, which has the support of the opposition, but I think it is worthwhile to note a selection of them. I received a bundle on 7 March this year. The first email is the simplest of all because it contains only one sentence, which is the subject line of the email. It states —

Keep Section 23 of the Tobacco Control Act 2006 as it is.

That constituent has been helpfully concise in his or her lobbying of members of Parliament and made their view abundantly clear. Eight minutes earlier on that same day I received another email. Albeit it starts with "G'day Mark" because the email was primarily addressed to the member for Rockingham, the Premier of Western Australia and the biggest fan of *The Adventures of Pinocchio*. The email states —

Apparently there is a bill up for review next week that will effectively shut down boutique cigar retailers such as Devlins. Accessibility to quality cigars is becoming ever more difficult and as a result the internet is being inundated with counterfeit and inferior products..

Bricks and Mortar retailers such as Devlins ensure the influx of counterfeit and inferior products is kept to a minimum. The market at which their sales are directed is small and somewhat exclusive noting the retail price that premium cigars attract. Individual Cuban cigars retailing in excess of \$45ea—And these aren't even the high end ones.

To be required to purchase a cigar sight unseen is certainly a big ask and will effectively shut down the Bricks and Mortar shopfront and force the retailer either out of business or to conduct internet sales only. This will put 23 sales staff out of work in this one business alone.

I would ask that the when Bill is debated and reviewed the knock on effect to cigar retailers, their staff, and customers in WA be taken into consideration.

Later that evening I received an email that starts with "Minister Cook". Again, it seems to be an email that was blind-copied to me and, potentially, other members of Parliament. I do not know any of the authors of these emails,

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which really does not matter. It is for the government to indicate how it proposes to respond to these concerns. This email of 7 March 2018 reads as follows —

Minister Cook,

I wish to register my opposition to the Tobacco Products Control Amendment Bill 2017, currently under consideration in the WA Parliament. In particular I urge you and the Parliament to maintain the current, Section 23 of the Tobacco Control Act 2006. I am a member of Devlin's Cigar Bar, a small business that this bill would put out of business.

Whilst I strongly support strong controls on smoking and in particular minors, who I believe that this bill is targeting, I respectfully suggest that the bill has missed the target when business such as Devlin's are at threat. Devlin's is a boutique club where members such as me visit intermittently, one or two times a month. The club is not about smoking but rather about camaraderie, and networking. It is my experience that the majority of members are mature, mild mannered people (men and women). It is an environment that promotes relaxation and companionship, away from the high pressured work environment. Members provide their own drinks and drink and smoke responsibly.

Devlin's shop is discrete with a non-intrusive shop front. In my opinion it does not attract passing, incidental traffic, but rather a small target specific clientele.

Apart from loss of a sophisticated meeting and socializing venue, should the bill succeed, it will lead to the loss of employment for 12 young people trying to establish themselves in a difficult and competitive work environment.

Minister, I appeal to you to use you're not inconsequential influence to bring an element of commonsense, and practical appreciation of the consequences, to defeat this bill and maintain the current Section 23 exemption of the 2006 Act, protect a boutique small business and safe guard the jobs of 12 young people.

That constituent articulately mirrored the response provided in the first email I read, which was the simple one line —

Keep Section 23 of the Tobacco Control Act 2006 as it is.

Interestingly, another person that evening sent an email that appears to have been sent to all members of Parliament. I say that because the email is primarily addressed to the member for Kingsley and the Minister for Health but underneath that line this constituent has recorded —

BCC: All members of parliament.

I assume that all members are familiar with this email of 7 March this year, which states —

I was made aware earlier today that the Tobacco Products Control Amendment Bill 2017, currently before state parliament, will modify the existing section 23 exception from the Tobacco Control Act 2006.

I strongly oppose this modification to the tobacco control act. The specialist retailer clause applies to very few retailers in Western Australia, including Devlin's, with stores in Perth City and Subiaco. This store sells premium cigars.

These products are not sold to children, and not even marketed to children—the federal excise on tobacco make the average price of these products in the region of \$40 per cigar—these are not products that pose a significant danger to the general population. Those who consume them, do so occasionally, for their own enjoyment. These products are more akin to fine food, wine or scotch than cigarettes.

Would you expect a wine retailer to not be able to show a \$1000 bottle of wine to a customer until after they have made their purchase? That is effectively what the modifications to section 23 will be asking.

There is no substantial benefit to the general public in making this change—current legislation ensures that those that choose to enjoy cigars need to do so in places that the general public cannot access—they cannot smoke in a park, at a bar or cafe, etc.

It will affect the enjoyment of those few who choose to partake in this pastime, as well as cripple a local business and put the employees of that business at risk.

I have a personal history with this business—it employed me for 4 years and it is owned by a family member. Beyond this personal link, I am and continue to be a customer. It brings me great joy to be able to access these tobacco products, being able to view them and consider my purchase in the same way I am able to do when I visit my local wine specialist.

If this change to section 23 were to be made law, not only would that benefit be removed, but eventually the business would no longer be sustainable, and I would have to purchase my cigars elsewhere—probably overseas. This would mean that the state and federal governments would no longer get either my GST or tobacco excise revenue.

No one wins from the passing of this legislation, I implore you to do everything in your power to prevent this bill from passing in its current state.

As I said, that email was sent to all members of Parliament on 7 March this year. It was primarily directed at the member for Kingsley and the Minister for Health. I wonder whether the constituent received a reply from the member for Kingsley or the Minister for Health. That need not be a detail that holds up the passage of our consideration of this legislation. I received a bundle of emails on 7 March this year but, as I said, I received quite a number of other emails that I do not propose to read into the record, but merely to give members a flavour of the concerns that have been raised regarding the defence provisions in section 23.

I will conclude my summary of those constituent concerns by reading out the most recent email that I received, which was on 13 March this year. It is addressed to John. If anyone wants to know who John is, it is the extremely hardworking member for South Perth, none other than John McGrath. It reads as follows —

John,

As you are no doubt aware there is currently a bill before WA Parliament (Tobacco Products Control Bill) which has the potential to severely impact the availability of cigars at a retail level in Perth.

Under the new amendments no tobacco products will be able to be displayed in any retail store, which means cigars will need to be away from view and may only be seen after they have been purchased.

Could you please consider the following points:

- This amendment to the Tobacco Control Act, which will remove Section 23 (the Specialist Retailer defense), will have the effect of closing a Perth small business which has operated for 21 years. I assume this is an unintended effect of the amendment and not an intentional move on the part of the Health Minister.
- Unlike cigarettes, which are purchased by brand and consumed habitually, cigars are purchased on an occasional basis. Even the most educated cigar consumer needs to see the cigars before they can make a decision.
- Devlin's are, from what I understand, the only Specialist Retailer in Perth so this amendment will negatively impact only Devlin's and the 12 staff that work there.
- As my representative ask you to represent the voice of myself and many others who don't want to see an iconic Perth business close down by saying **Keep Section 23 as it is!**

Thanks for your help.

I express no view on these particular emails other than to indicate that the opposition seeks clarification from the government on how it proposes to address the concerns raised by specialist retailers.

The final concern that I will raise is a personal one. It relates to the use of statutory review clauses. To understand this concern, it is necessary for me to briefly recount the history of the legislation that this bill seeks to amend. The Tobacco Products Control Act 2006 was assented to on 12 April 2006. The operative provisions of the act commenced by proclamation on various dates from as early as 31 July 2006 to as late as 31 May 2007. Relevantly, section 127(1) states —

The Minister is to carry out a review of the operation and effectiveness of this Act as soon as is practicable after —

- (a) 4 years have elapsed since Part 5 comes into operation; and
- (b) every fourth anniversary of that date.

Section 127(3) states —

The Minister is to prepare a report based on each review carried out under subsection (1) or (2) and is to cause the report to be laid before each House of Parliament as soon as is practicable after the report is prepared, and in any event in relation to a review under subsection (1), not later than 12 months after the requirement for the review arose.

By my calculations, that means the first report ought to have been tabled no later than 31 July 2011. The final report on the "Review of the WA *Tobacco Products Control Act 2006*" is dated August 2011. I also note that there

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does not appear to have been a second quadrennial review or report. I further note that the third quadrennial review is due by force of law to commence from 31 July this year. With only one review in almost 12 years, it calls into question the effectiveness of these statutory review clauses that we as a chamber routinely press governments to include in legislation. I wonder whether perhaps the establishment of a notification to the house on any instances of noncompliance is worthy of investigation by the Standing Committee on Uniform Legislation and Statutes Review under its standing term of reference to monitor the form and content of the statute book. In any event, I would urge the responsible minister to insist that the next statutory review—which, as I said, is due to commence, as I understand it, from 31 July this year—include an academically rigorous, evidenced-based review of the impact of the current legislation and any proposed reforms.

In conclusion, I reiterate that the opposition supports the question that the bill be read for a second time. However, in light of this government's track record on legislation over the past 12 months, the opposition seeks a response to the points of clarification that I have raised. We also ask the government to facilitate the efficient passage of the bill during Committee of the Whole House by providing direct and satisfactory answers to questions, unlike the recent debacle with the Health Practitioner Regulation National Law (WA) Amendment Bill 2017.

HON AARON STONEHOUSE (South Metropolitan) [2.38 pm]: It has been almost four years since my federal colleague, Senator David Leyonhjelm, thanked the smokers of Australia for their immense generosity, so I think it is time I echoed some of those sentiments today. Just last year, Canberra increased the tax on cigarettes by a stunning 13 per cent. That took the price of the average packet of smokes to a little more than \$35, up \$2.70 from the previous year.

In fact, smokers are so generous that, last year, they paid \$8 billion in excise tax. The excise rate has just been increased; therefore, that figure is projected to increase across the forward estimates. That far outweighs the health costs that smokers impose on the rest of us, which are estimated at \$320 million a year. We can add to that a few million dollars for the cost of bushfires caused by people flicking cigarette butts out of car windows. Smokers are, indeed, a very generous bunch of people. They are not only paying for their own health costs, but also subsidising the health costs of everyone else. Yet we continue to treat them like second-class citizens. In fact, we treat them like common criminals. We outlaw them from smoking indoors in licensed venues; we take away the right of business owners to set their own smoking policy; we constantly refer to their habit as filthy; and we try to tax them into oblivion. However, these efforts to impose tighter controls on tobacco often have the opposite effect. There is now a thriving black market in tobacco. For some people, it is more profitable to import tobacco illegally than it is to traffic in methylamphetamine. Indeed, the risks are much lower. A person who imports a container of tobacco illegally and is caught only has to pay the excise. Therefore, it is a rather low risk, high profit enterprise. Last year, Fairfax Media Ltd reported that Border Force believes that as much as 15 per cent of all tobacco sold in Australia is imported illegally to avoid the payment of tax. That equates to about \$4 billion in lost revenue. That tells me that our current prohibitionist approach to tobacco is not particularly effective. At the same time, health ministers across the country, both federal and state, are continuing to ignore more effective means of harm reduction. I am talking about e-cigarettes and vaping. No health minister in Australia seems to be taking responsibility for investigating the efficacy of e-cigarettes and vaping. That has been deferred to committees. It seems that state health ministers would rather defer to the Therapeutic Goods Administration and federal law than take leadership in this space.

Despite the lack of strict controls on the importation of tobacco, which is fuelling the thriving black market, strict controls on the sale of tobacco are still being pushed through by successive state governments, Liberal and Labor alike. In that context, I draw members' attention to clause 4 of the bill, which seeks to insert a new section 18A in the Tobacco Products Control Act to prohibit the sale of cigarettes by a person aged under 18. The second reading speech and the explanatory memorandum that were presented by the Parliamentary Secretary to the Minister for Health state that this bill fulfils an election commitment. They state also that the bill seeks to implement a uniform agreement. The 108th report of the Standing Committee on Uniform Legislation and Statutes Review refers to an agreement that was made by the Ministerial Council on Drug Strategy following an Australian health ministers' conference in 2008. That drug strategy agreement did not recommend a restriction on the sale of tobacco by people under the age of 18. The executive summary of the report states that only clause 5 of the bill relates to that agreement. Therefore, the remainder of the clauses have nothing to do with the ministerial council but have been tacked onto the bill by the government. Therefore, the assumption of many members of this chamber and of the public that all the clauses of this bill deal with the uniform legislation aspect of that agreement is certainly not correct. As I have said, clause 5 is the only clause that deals with that agreement. All the other clauses are up for debate, regardless of our views on the harmonisation of tobacco laws across state lines.

The introduction to the explanatory memorandum states that the bill seeks to protect children from the harms of tobacco and provides various measures to protect children and young people from exposure to tobacco products. That assumes that people under the age of 18 who are selling tobacco products are less compliant when checking

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identification. I refer to a report from the Western Australian Department of Health titled “Report on the Tobacco Compliance Survey 2015”. I am happy to table a copy of that report. Paragraph 4.2 of that report states —

In 2013, younger retailers estimated to be less than 20 years of age were significantly more likely to be noncompliant.

That is, when checking people’s identification. It goes on to state —

In 2015, however, there were no significant differences between retailer age groups but noncompliance reduced significantly across all retailer age groups.

That is reflected in the teen smoking rates. In recent years, there has been a steady decline in the smoking rates of people aged between 12 and 17. In 2002, the smoking rate for that age group was about 15 per cent. In 2014, the teen smoking rate dropped to just above five per cent. Under the measures that are currently in place, teen smoking rates have reduced. The health department’s own surveys and studies show that the success rate of minors purchasing tobacco has declined steadily from 2002, when the rate was about 45 per cent, to 2015, when the rate was about 15 per cent. There has been a steady decline in both the rate of noncompliance and the rate of smoking among teenagers, yet the government is still seeking to impose these measures. The government states in both the second reading speech and the explanatory memorandum that if this bill is implemented, Western Australia will be the first state in Australia to adopt these new tobacco control measures to restrict the age at which a person can sell tobacco products.

It is important to consider the impact of this change on the ground. I ask members to picture a small convenience or grocery store, service station or newsagency. Many of those businesses would employ casual teenage staff. The government is telling those employers that they will no longer be allowed employ those young people if they are working behind the counter to sell tobacco products. That will result in teenagers losing their jobs. This is at a time when the teen unemployment rate is rather high. In my home town of Rockingham, the teen unemployment rate is well above six per cent. The government is telling employers that they must fire those employees. This is from a Labor government that says it is committed to creating jobs. This is also despite the fact that surveys from the Department of Health show that there has not been an increased rate of noncompliance; in fact, since 2013, the rate has been on a steady decline. The compliance checks by the Department of Health seem to be working to keep the noncompliance rate down. I have yet to hear a compelling argument for why the government needs to impose more stringent controls on the sale of tobacco products.

I turn now to clause 6 of the bill, which seeks to amend section 23 of the Tobacco Products Control Act. In my view, this is one of the more contentious clauses of this bill. Hon Nick Goiran alluded to this in his remarks. This measure deals with the display of tobacco products, especially in the so-called specialist retailer scene. A specialist retailer is not a type of licence. It is a defence that a tobacco retailer can use if they are accused of being in breach of section 22 of the act, which states that a tobacco retailer cannot display tobacco products. “Specialist retailer” is defined as a person who, in the year 2004–05, derived 80 per cent, or more, of their turnover from tobacco products, and who has, therefore, been a specialist for more than 12 years. New retailers will not be allowed to enter that space. It will apply only to established retailers who truly specialise in tobacco products. Putting aside concerns about the level of 80 per cent of turnover, that is difficult to say. Many tobacco retailers may sell men’s gifts at the same time, so 80 per cent is a rather arbitrary level for someone who may specialise in tobacco but still sell other products. The amendment to section 23 aims to remove those defences incrementally over two years, which would see specialist tobacco retailers like Devlin’s in Subiaco or in London Court have to radically change their business model. They specialise in cigars. Members may be aware that cigars are stored in a humidor, which is a separate room with a moderated humidity level so that cigars can be displayed for a long period. The best way to buy a cigar is to go into the store and see the product. The attendant will help the buyer select one based on their taste and palate. There are different flavours and types to select. I stress that these are not products that children would buy. These are expensive, premium products. A cheap cigar might cost \$70 and upwards. This is not the kind of thing that teenagers are going for.

The stated intent of this bill to protect children, as spelt out in the explanatory memorandum, certainly does not apply to cigar specialists. We have to ask ourselves what is the intent of removing those defences. Is the intent to drive an iconic Subiaco business out of town? I would certainly hope not, although I must admit that when this issue was raised some weeks ago, the Minister for Health, Roger Cook, said on radio 6PR —

Only a very small minority of tobacco retailers in WA are specialist tobacco retailers so this part of the amendment will not have widespread commercial impact.

He continued —

... as Health Minister I will not shy away from an opportunity to save lives and prevent chronic illness
...

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In his comments, he has not really addressed the concerns of retailers and tobacco specialists, but he is spelling out a view that he is willing to pursue any opportunity to prevent tobacco-related harm. That is very concerning, because when I spoke to tobacco specialists, including Mr Simon Devlin, the owner of Devlin's in Subiaco and in London Court, they had not been consulted about the provisions of this bill, the amendments to section 23 and the defences that they use. They were completely unaware that any changes were coming through. As far as they knew, the previous health minister had tabled a bill, and that was the end of it. The government changed and we now have a Labor government. As far as they were aware, those changes were no longer going ahead. They were completely blindsided by these changes. In fact, it was not until I had a second look at the bill some weeks ago that I discovered those supposedly unintended consequences. When I started asking other members of the chamber and people in the industry, I found that no-one was aware of those changes and that no consultation had been done in recent months.

The Minister for Health and the Department of Health have said that this bill has stemmed from a 2011 review of the act and that retailers should have been well aware that the changes were coming. To that I say that a business owner in Subiaco has no idea what happens in Parliament and they have no idea what reviews might be taking place under the act. They do not have a large industry representation. The government is dealing with maybe three or four tobacco specialists in this state. Without members of Parliament, the health minister or the Department of Health reaching out to these people, they are completely unaware of the wheels of government turning and of plans to impose new controls on their business. Although consultation has now taken place, after widespread television and radio coverage of this issue and after customers of tobacco specialists emailed their members of Parliament, there was no consultation when the bill was introduced. No-one had any idea what was in it. I suspect that very few members of this place had even read it. Most people consider it to be an uncontroversial change that will simply harmonise and adopt the recommendations of the ministerial council in 2008. That certainly is not the case; and, if it had not been for my reading of the bill and my consultation with people in the industry, I suspect that this bill would have passed without much scrutiny at all, which is a very scary thought indeed.

Hon Nick Goiran: Not possible on my watch.

Hon AARON STONEHOUSE: I am very glad to hear that.

I think that shows a severe lack of consultation by the Minister for Health. We see a man who is prepared to pursue health outcomes regardless of the cost imposed on business and regardless of the impact on employment. In fact, from the briefings that I have received from the health minister's staff and the Department of Health staff, I understand that very little—maybe I am being generous—or almost no consideration was given to the impacts on business or on teen employment. This seems to be something that health bureaucrats and health ministers do not think about. The thought barely crosses their mind. They will pursue their health outcomes and damn the consequences. That is not the way government business should be run. It is not the way that legislation should be passed. It shows a huge lack of regard for business owners and employees in this state.

I will certainly have some questions when we get to the committee stage, but for now I might leave members of this place with another thought experiment, if I may. I would like members to think about the level of moral authority we have to impose our views on members of the public. Most ethicists would probably apply something like John Stuart Mill's harm principle: if someone is doing harm to themselves, it is not a valid use of government force to intrude on their life; it is valid only when they are doing harm to others. If someone smokes at home and minds their own business, that is not really any of our business, but if they blow smoke in someone's face in a public space, it obviously is. So we should pass laws that protect other parties from being harmed, but we should respect an individual's right to choose what level of harm and risk they find acceptable in their life. That is generally how we would apply a harm principle. Of course, when we have socialised medicine, that becomes more difficult. The community bears the health costs of smokers, of course. Let us keep in mind that the health cost of smoking is \$320 million a year, but the tobacco excise raises \$1 billion. Then we impose additional restrictions on retailers and licensed venues, and we continue to impose these costs on people beyond whatever was required to recoup the costs of their health cover. Members should keep in mind what level of coercion they are willing to use to impose their views of a healthy lifestyle on a nonviolent person who is harming only themselves when they smoke.

HON TJORN SIBMA (North Metropolitan) [2.58 pm]: I shall not detain my colleague Hon Michael Mischin for long, but I do want to make some remarks on the Tobacco Products Control Amendment Bill 2017. It is thematic and specific and I will get to my real area of interest during the committee stage, and that particular interest is in the changes to section 23. I see analogies between this bill and the Liquor Control Amendment Bill that has been read into the other place. This bill is attempting to do a lot at once, and I do not necessarily think that it is the better for it. If the proposition holds, as it was put forward in the second reading speech of the bill, that the proposals outlined in the bill are effectively to protect children, that is fine. But that does not hold together with the proposed changes to section 23 that deal with specialist retailers.

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By virtue of the information provided in the second reading speech, the war on tobacco seems to be being won. This is a generational battle. I think all the great social change agenda items, be it seatbelts, drink-driving or reductions in tobacco smoking, have to be addressed after decades-long action.

In the end, they start proving their worth through behavioural changes. I am encouraged by the fact that in Western Australia only nine per cent of people now aged 16 or over are daily smokers compared with 16 per cent in 2004. That is fantastic. That is great. I once smoked. It was the worst decision of my life. It took me 10 years to quit. I am sympathetic to the intent of this bill and, largely, the opposition is supportive of its major thrust. I have issues with clauses of the bill, however, and I do not want my personal prejudice to colour my thinking about what is fair, equitable and reasonable.

I will focus on the issue of underage smoking and work undertaken by the tobacco control branch of the Department of Health in 2016, which effectively tested how easy it was for people under the age of 18 to purchase tobacco products, predominantly cigarettes. The tobacco control branch put together a group of eight males and females who looked young enough for questions to be raised about their age and measured the rate of successful purchases. This kind of study has been done over time. The encouraging news is that since 2002, the rate of successful purchases by people who look underage has declined significantly. I am assuming that the methodology has stayed the same. In 2002, the number of successful purchases was 45 per cent, which is slightly less than half. The obvious point is that 4.5 to five times out of 10 an underage person would successfully purchase a packet of cigarettes or another tobacco product in the Western Australian jurisdiction to which they should not have had access. In 2015, that rate diminished significantly to 16 per cent. That is not perfect and I am alive to techniques used by big tobacco to market and make their products look appealing, and I think we should always be alert to that.

There has been a significant reduction in underage illegal purchases of tobacco products. I do not necessarily think that is cause for complacency. I think that is cause for some celebration and a focus on how we can tighten up legislation elsewhere. Where are those purchases likely to take place? I think this is the issue. In 2015, by the type of retail outlet, cafes represented 31 per cent of tobacco retailers; delis and lunch bars represented 21 per cent; newsagents, 18 per cent; service stations 14 per cent; supermarkets, 13 per cent; department stores, 17 per cent; and only 11 per cent were specialist tobacconist retailers.

I will quote from “Significant trends: 4.1 Circumstances in which sales to minors were highest”. Again, for Hansard, this is a document called “Report on the Tobacco Compliance Survey 2015” produced by the tobacco control branch of the Department of Health in 2016. It refers to circumstances in which sales to minors were the highest among cafes, delis, lunch bars and kiosks. There is no mention of specialist tobacconist retailers. The success rate was higher among male purchasers rather than females, in situations in which no other customers were present within the store, and during later hours of the day, particularly 3.00 pm onwards. That is after school and no surprise. The success rate was higher in specific pockets of locations within Perth, including a trend towards Perth’s inner northern and western suburbs. That is of particular interest as a member for North Metropolitan Region. Nowhere is trouble identified at the level of a specialist tobacconist.

During the course of departmental briefings—I was party to some of these briefings—I understand that the question was put: have there been any registered instances of underage people purchasing or otherwise obtaining tobacco products to which they are not lawfully entitled being transacted on the premises of a specialist tobacconist? The answer as I recall was: no, not one. My point is that by all means we should pursue better public health outcomes, but we should do so on the basis of some evidence. Do not do so in a way that is cavalier or erodes the capacity of lawful businesses to conduct their trade lawfully and profitably.

I have visited Devlin’s cigar lounge in Subiaco twice in my life as a guest of members. I wish Devlin’s the best. It is not my scene, but I went along and enjoyed my time there. I put to members that if we could distil the average client of the cigar bar, that person is likely to be a 55-year-old company director who is independently wealthy and has probably worked hard to accumulate their wealth and success, and most likely did not get there by accident, but by exercising their good judgement. We have an obligation to every member of the Western Australian community, but our paternalist impulse should probably be directed away from individuals such as those who can take care of themselves and can exercise their own judgement and can understand risk. We should focus it on the people who we should be taking care of or thinking about because they are more vulnerable. A child by definition is more vulnerable. I have absolutely no problem with the rest of this legislation, although I think it might lead us into some difficult circumstances when it comes to the potential benefits of vaping and e-cigarettes as compared with the tobacco product in the future. However, I really think that we should leave a small isolated group of specialist tobacco retailers alone. The best way to do that is not to make any amendment to section 23 of the act.

I will conclude by citing one of the many emails that I received about this matter, which I will read out for the benefit of Hansard. This is a short quote, but it begins thus —

I am a fully informed, consenting adult. If I want to inspect a cigar before I buy it, I should be allowed to.

I cannot disagree with that. I do not think any reasonable member of this chamber can disagree with that sentiment, but it is that kind of reasoned exercise of personal liberty and choice that will be constrained by the workings of this bill, because a specialist retailer will not be able to produce, effectively, the product that is being sold. The commercial viability of an enterprise that is predicated purely on being a specialist in a product will not be able to demonstrate its product prior to the point of sale. That is lunacy. Any business that is forced to transact that way will not be making transactions within two or three years; they will be going out of business.

I will make one final point. Much of our public commentary in Perth and Western Australia over the last 10 to 15 years, when there has been nothing else to talk about, has focused on vibrancy and how wonderful it is to have a vibrant, exciting, social and cultural life. I think we can all agree with those platitudes and sentiments without much risk. I also look at the travails of the government as it deals with its tourism policies. A small component of high net worth individuals might like to invest in this state or visit us and they might like to have a cigar in a cigar lounge at night. We would be the only capital city in the Australian continent to deny them that choice because public health officials in the Department of Health just do not like it.

My friend Hon Aaron Stonehouse made some excellent points about the exercise of personal liberty being eroded by other people's personal sentiments about what is right and proper conduct, which goes beyond legislation—the imposition of particular world views. I am sure that for some people, a perfect world would involve no more Dan Murphy's, no more cigarettes and no more coke and chip machines in hotel and hospital lobbies. What a wonderful, clean, neat, antiseptic and boring little world that would be, but I am sure that there are people who want us to live in that kind of world. I do not want to live in that kind of world. We should not just accept it as a fait accompli.

In conclusion, Hon Aaron Stonehouse reflected on various ethical frameworks to evaluate the merits of this bill. Another one is worth considering: basic utilitarianism—greatest good for the greatest number. I just want to focus on whether this legislation is providing the greatest good for the greatest number in terms of the effects of junior or underage people taking up smoking. It is not when it deals with section 23 of the Tobacco Products Control Act. Section 23 will have absolutely no impact on them but it will have a massive impact on retailers, business proprietors, people who work in those businesses and people who enjoy smoking. It is a very narrow sectional component of this bill, which otherwise undermines what is not bad legislation. During the committee stage, I will bring members' attention to section 23, which impacts on retailers and business and a small but lawful hobby.

HON ALISON XAMON (North Metropolitan) [3.12 pm]: On behalf of the Greens, I rise as the lead speaker on the Tobacco Products Control Amendment Bill 2017. I note that this bill gives effect to amendments that were recommended from a review that was undertaken by the Department of Health back in 2011, which included extensive consultation with the public and stakeholders. Also, in 2016, the previous government tabled the Tobacco Products Control Amendment Bill 2016 in Parliament. I understand that the government is now introducing the Tobacco Products Control Amendment Bill 2017 in order to address some of the issues that were identified during the 2011 review. Substantively, there is very little difference between the two bills.

Broadly speaking, the amendment bill will strengthen longstanding legislation with the intention of reducing tobacco-related harm within our community. For this reason, I will be speaking in support of this bill on behalf of the Greens. There are a number of key features in the bill. I do not want us to lose sight of some of the really important measures that this bill is endeavouring to undertake. It will introduce minimum age requirements for the sale of tobacco products. I will have a little more to say about that in a moment. It will prohibit the sale of cigarette packs that can be split into portions, and also fruit and confectionery-flavoured cigarettes. It will further strengthen requirements for the display and promotion of tobacco products. It will also prohibit shopper loyalty schemes, streamline arrangements for the renewal of licences and prohibit the issue of a retailers' licence for sporting and cultural events. It will also expand and streamline the process for appointing restricted investigators and provide a time period applicable to applications for forfeiture orders.

Tobacco-related harm is a very real thing within Australia. In fact, tobacco use is still the leading cause of preventable disease and premature death in Australia. It is estimated that two-thirds of smokers are likely to die because they smoked. Smoking is responsible for nine per cent of the total burden of disease and 20 per cent of deaths in Aboriginal Australians. In WA, over 1 500 people die from smoking-related diseases each year. There is no doubt that significant advancements have been made in the reduction of smoking rates. As mentioned by Hon Tjorn Sibma, it is true that there has been a generational change in the rate of smoking. In 1982, 40 per cent of Australian adults were smokers compared with 13 per cent in 2016, which is a significant reduction. In the past, WA has had the reputation of leading the way in implementing policy in legislation and has had some of the lowest rates of smoking in the world. In 2015, nine per cent of people in WA aged 18 and over were daily smokers. From 1984 to 2014, weekly smoking rates of Western Australian children—notably 12 to 17-year-olds—fell from

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21 per cent to five per cent. Although the overall rates have declined, these significant gains are not evident in certain groups. I am particularly concerned to note that that includes people with chronic and sustained mental health conditions, Aboriginal people, prisoners, people from some overseas countries and also members of the lesbian, gay, bisexual, transgender, intersex community, who tend to have higher rates of smoking. For example, between 1994 and 2013, the prevalence of smoking amongst Aboriginal people in Western Australia declined from 51 per cent to only 43 per cent, which is still vastly greater than the general population.

There is a significant intersection between smoking and poor mental health and issues of disadvantage and marginalisation. People who experience social or financial disadvantage are often the most affected by physical and financial harm brought about by smoking. The National Drug Strategy Household Survey produced data that showed that in Australia in 2013, daily smokers were twice as likely to have high or very high levels of psychological distress compared with people who had never smoked and they were twice as likely to have been diagnosed or treated for a mental health condition. Smoking prevalence tends to increase the severity of psychiatric disorders. Compared with the general population, people with mental illness have higher smoking rates and they tend to have levels of nicotine dependence and a disproportionate health and financial burden from smoking. In fact, one Australian study found that people with psychotic illness smoked an average of 21 cigarettes a day compared with an average of 14 cigarettes a day smoked by the general population.

As I mentioned, the lesbian, gay, bisexual, trans, and/or intersex community's prevalence of smoking is also far greater than that of the general population; in fact, it is more than double the national smoking rate. As a result, each year, more deaths result from tobacco use in the LGBTI community than from HIV, illicit drug use, alcohol use, motor vehicle injuries, suicides and murders combined. When we introduce exactly this sort of legislation, I think it is very important that we are always very mindful of the potential impacts on some of the most disadvantaged members of our community. It does not mean that these controls should not be introduced but at the same time special attention should be given towards best supporting those for whom smoking is particularly entrenched. This issue has arisen many times, particularly for people who live with severe and ongoing mental health issues for whom it can be extraordinarily difficult to break tobacco addiction. It is important that we are mindful of providing the necessary supports for people with mental illness to enable them to break their addictions effectively. Otherwise, we find that they feel as though they have no choice other than to expend their money on cigarettes often at the expense even of accommodation. We should also ensure that any proceeds from tobacco taxes are channelled back into tobacco control and health promotion activities. Again, I would like to see specific targeting of at-risk groups.

I really want to emphasise the need for adequate funding for health promotion and access to treatment. We know that progress in the development of cessation treatments for people with mental health conditions has been very slow and there needs to be greater focus on this. There is growing evidence to suggest that stopping smoking is not detrimental to psychiatric symptoms and improves mental health and wellbeing. But we know that these programs need to be targeted and that people need to be monitored closely because we also know that smoking can and does interfere with medications. We need to ensure that adequate funding for comprehensive public health campaigns is targeted at these groups. In the past, some of these particular programs, unfortunately, have often faced cuts in the mental health sector. It strikes me that it is really critical that we pay far more attention to this. I am also aware that when forensic mental health patients go into the Frankland Centre, they are no longer able to smoke. That has meant that the centre provides significant support for the people who are in there trying to deal with issues around nicotine withdrawal. We really need to look at some sort of ongoing quite concerted effort to ensure that people with chronic mental health issues can be best supported to deal with their nicotine addictions.

The Greens will always support provisions targeted at making it harder for young people to smoke in the first place. It is a pretty sad state of affairs when tobacco companies think it is appropriate to manufacture fruit and confectionery-flavoured cigarettes that are clearly aimed at enticing young people into addiction. We therefore welcome this legislation, which will prevent those sorts of products being sold in WA. Similarly, we are pleased to see the end of cigarette packs that can be split into portions to make buying cigarettes more affordable for young people. I think they are pretty cynical exercises by the tobacco industry and, by any measure, the tobacco industry is demonstrating that it is highly unscrupulous. It is clearly trying to get around regulatory controls by offering exactly these sorts of products. As well as preventing these products from being sold, as this legislation does, and that is good, the Greens would like to see the government introduce bans also on donations from alcohol, tobacco, gambling and pharmaceutical industries at all levels of government.

Discussion has also occurred about the provision to introduce a minimum age requirement for the sale of tobacco products. This is one that I have taken a very close look at, particularly the potential impact on small businesses. On weighing up the pros and cons, the Greens are very clear that this is nevertheless a welcome provision. If there is evidence to indicate that it is harder for a young person to refuse to sell tobacco products to a peer, that is pretty compelling. Apart from anything else, we recognise that tobacco is intended to be an adult product. Just as children

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cannot sell alcohol or other alcohol products as they are identified, if a particular product is deemed to be suitable for only adults, adults should be selling that product.

The Greens support these provisions and think it is quite important that if we are talking about consent and adults who inhale what still is a legal product and is not subject to prohibition, at the very least the entire realm of the sale of that product needs to lie with adults. In fact, the Greens would like to say that the Tobacco Products Control Amendment Bill does not go quite far enough. The Greens, in fact, would have liked to see an expansion of provisions to ban smoking from more public places, including the international room at the casino. We note that the majority of respondents to public consultation during the review of the act were in favour of extending smoke-free areas to other public outdoor areas, but that is not provided for in this bill. Community exposure to second-hand smoke should be eliminated through regulatory measures that cover all public and work environments, including outdoor places. The dangers of second-hand smoke are well known. I have no intention of trying to deny the science. The statistics from the Department of Health's own website tell us that nonsmokers exposed to second-hand smoke at home or at work increase their risk of developing heart disease by 25 to 30 per cent and lung cancer by 20 to 30 per cent. They are people who do not have their individual liberty respected—the right to breathe clean air. In fact, only this year, my electorate office received a complaint about being exposed to smoke when attempting to visit Parliament in the visitors' gallery right here in this chamber and has requested that I follow that up. I have written to the Parliament, as requested, and expressed their concern that they feel as though they were not able to exercise their right as citizens in this state to watch what is happening in this chamber without being subjected to second-hand smoke.

New South Wales and Queensland have both enacted legislation to ban smoking within four metres of a pedestrian access point to a public building. New South Wales also bans smoking on railway platforms, light-rail stops, light-rail stations, bus stops, taxi ranks and ferry wharves. Given WA's past status as leading the way in tobacco control, it is disappointing to see that even after enacting this legislation, we will still not meet the equivalent standard in New South Wales or Queensland.

I would also like to make some comments about the amendments to section 23 on cigar stores. I received the same level of correspondence as other members in this place. I was quite concerned when I was presented with the potential scenarios outlined to me. As such, I took it upon myself to contact the drafters of this legislation to speak to them and receive further briefings around the various allegations being presented, which were quite concerning because, as has been mentioned, we may not like tobacco use, but it is still a legal product in this country. Certainly, cigar specialist stores are legal and have every right to ply their trade because tobacco is not an illegal product. I was concerned because the sorts of suggestions being put to me were that these stores would be virtually outlawed. Obviously, that would be a clear overreaction, particularly as people would be still able to purchase cigarettes.

Hon Aaron Stonehouse outlined quite comprehensively the way that cigar stores, particularly Devlin's, operate and he described quite clearly the way that humidors work. I want to be very clear that I make the following comments based on the further briefings I received. If, indeed, I am in error, I am keen to ensure that my incorrect understanding is rectified as soon as possible. I have been led to believe that there will be relatively minor changes to the way that cigar specialty stores, such as Devlin's, will operate. As I understand it, customers will still be free to inspect the product before purchase. The difference will be that rather than being able to look through the window of a humidor, the window will require some sort of frosting—it will need to be opaque—and the customer will need to physically walk into the room to be shown the merchandise, to inspect it and to discuss it with the experts in that particular area to determine whether they wish to purchase the product. I understand that there will be some limitations on the way that these products can be advertised on the street-level shopfront, but these stores will be able to clearly state that they sell cigars and cigar-related products, and people will be left with no doubt as to what is available for purchase beyond those doors.

I absolutely accept that people who partake in the habit of smoking cigars are consenting, informed adults who are unlikely to be affected by concerns around price in the same way that people may enjoy a glass of fine wine—wine in excess is not good for you also, but it is terribly nice if it is not—and they will be able to enjoy their cigars. They will be able to continue to enjoy cigars within what people refer to as a cigar bar. If that is not the case, I certainly hope that that will come out in the course of the committee stage. But if that is the case, and the only limitations will be slight changes to the way a shopfront presents and the way people will be able to view the humidor inside the shop itself, then that strikes me as a pretty minimal change that will not necessarily affect the way that that particular shop will operate at all. I also note that the government has an amendment to section 23 that, as I read it, is clearly designed to mitigate some of the concerns of those retailers. Obviously, we will discuss that further when we get to the committee stage.

Overall, I am pleased to see this legislation before us. We have come so far in reducing tobacco harms in Western Australia, but I do not believe that there is any room for complacency. Clearly, there is a great need for increased support to and investment in those communities that still have a relatively high incidence of smoking—

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I have spoken about that—including people with mental illness, prisoners, Aboriginal people, and members of the LGBTI community. The Greens are supportive of the provisions of this bill, but we would have liked to have seen the expansion of smoking bans to more public places. I am not sure whether the government will ever win on this issue. I recognise that some members in this place feel that this bill goes too far, but, likewise, I can assure the government there are members in this place who believe that the bill does not go far enough.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [3.35 pm]: I rise to address two areas of the Tobacco Products Control Amendment Bill 2017. First, the review of the Standing Committee on Uniform Legislation and Statutes Review—the committee to which this bill was referred when it was first brought before this place—in my capacity as chairman of that committee. I will also raise a number of matters and observations of a more general nature in my capacity as a member of this place.

Turning firstly to the committee report, the bill was referred to Standing Committee on Uniform Legislation and Statutes Review on 6 September last year in accordance with standing orders and the advice, as I recall, of the parliamentary secretary introducing the bill that it was one that was being crafted pursuant to an intergovernmental agreement. The reporting date was 31 October 2017, which was the next sitting date after the 45-day time period mandated under the standing orders. The report is a rather slim but elegant volume and its primary focus is whether the bill in any way compromises or infringes upon parliamentary or state sovereignty as a consequence of it being a feature of an intergovernmental agreement. Otherwise, because the committee considered the whole bill, it also picked up on whether there was a potential, let us say, excessive or inappropriate delegation of responsibility to a subordinate officer. I will come to that in a moment.

I should add that we received a couple of submissions. The inquiry was not advertised broadly, because the question of parliamentary and state sovereignty did not seem to be something that the general public would take much of an interest in or be able to contribute to. However, there was a notification to the general public by way of social media. As a consequence of that, I suspect, we received two unsolicited submissions. A submission from Cancer Council Western Australia, the Heart Foundation of WA and the Australian Council on Smoking and Health supported the passage of the bill. The other submission was from the Woolworths Group representing Woolworths supermarkets, Woolworths Metro, Big W, BWS—the liquor store—and Dan Murphy's stores in Western Australia. That submission was marked confidential and not to be published. We make mention of that submission in our report in paragraph 2.4. The submission from the Cancer Council is referred to in paragraph 2.3. We informed the Woolworths Group that because of its request for confidentiality we would not be making available its submission publicly, but would alert members to it, and if it wishes to communicate with members of Parliament who would be involved in the debate, it can do so.

The background of the bill is that it arises out of meetings of Australian health ministers as far back as 2008 when the then Minister for Health was Hon Jim McGinty, MLA. Since then there have been a number of meetings at which strategies being considered by health ministers to improve the health of their jurisdictions and across Australia overall include a focus on the question of tobacco and the use of tobacco products. As a result of the meeting in 2008, there was a resolution to investigate banning the importation of flavoured cigarettes across Australia, referring to the unacceptability of children smoking and that tobacco companies are marketing their products to children. It went further in various other meetings and eventually Western Australia chose to reform the question of the use of tobacco products by this bill. This bill was originally crafted as one for public consideration and tabled, as I recall, by the then Minister for Health, Hon John Day, sometime in 2016. The bill before the house, as I understand it, largely picks up on the work that had been done at that stage. There have been some refinements and the like; nevertheless, it continues a process that has been pursued by successive governments over the years to reform public attitudes to the consumption of tobacco products, to address the availability of those products and to protect particular groups in the community, such as children, from being engaged in their use.

There were two elements of the bill that the committee particularly looked at. One of them of course is the commencement clause, clause 2, and, Mr Acting President (Hon Martin Aldridge), you and other members will be familiar with the tendency nowadays, more or less the default position in many bills, that apart from certain formal sections of a bill coming into operation upon royal assent—generally the long title, the short title and the commencement provision—other operative sections of a bill come into operation on a date or dates to be fixed by proclamation. We have made mention of this in other reports from our committee about how it can affect parliamentary sovereignty inasmuch as it leaves to the executive the decision whether to put into operation laws that the Parliament has considered and chosen to enact. There are often very good reasons for that. In this particular case I am pleased to say that the government has indicated when these particular provisions will come into operation: two years in the case of clause 4 of the bill and six months for the rest of the act. Clause 2, in this particular case, preserves parliamentary sovereignty by making it certain when the operative parts of this bill will come into operation. As for any effect on parliamentary or state sovereignty more generally, that is addressed in

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paragraph 6.22 of the report. It is a matter for the state whether it wishes to opt out of the intergovernmental agreement. There is no requirement that we could find, or of which we were informed, for Western Australia to be bound by the terms of the agreement. Therefore, the state cannot doubt that by either repealing this act or amending in a manner that is inconsistent with the agreement, that it leaves free this Parliament to do as it sees fit and, likewise, the state of Western Australia, to take its own course rather than to comply with the intergovernmental agreement. In the broadest possible sense, it preserves the state's sovereignty and freedom of action to take such action as it sees fit in order to meet its obligation to legislate for the peace, order and good government of Western Australia, but it also preserves this parliamentary sovereignty in the broadest sense. We were satisfied there that there were no difficulties and that parliamentary and state sovereignty were not compromised.

There was one other provision that caused us some concern, and that was clause 12, which will insert a new section 77 into the act, concerning the appointment of restricted investigators. Materially, subsection (3) of proposed section 77 states —

An enforcement agency must not appoint a person under subsection (2) unless the agency —

- (a) considers that the person has the appropriate qualifications and experience to perform the functions referred to in section 78(1); —

That is, various duties of such an investigator —

and —

- (b) has regard to any guidelines issued under subsection (4).

Subsection (4) of proposed section 77 provides —

The CEO may issue guidelines that describe the qualifications and experience that are appropriate for a person to be appointed to be a restricted investigator under subsection (2).

The CEO referred to is the chief executive officer of the department of state prescribed by section 3 of the Health Legislation Administration Act 1984. The guidelines that are mentioned are not regulations for the purposes of the Interpretation Act 1984; therefore, they are not subject to parliamentary scrutiny through the disallowance process that is provided for regulations and other subordinate legislation generally. The question arose as to whether that was leaving too much discretion at large with the chief executive officer. The committee wrote to the Minister for Health, Roger Cook, on 19 September 2017 seeking some information regarding that provision and an explanation of the rationale for proposed section 77(4). Members will see the response at paragraph 6.29 in which the then acting Minister for Health, Simone McGurk, MLA, responded on 29 September. The response states —

Proposed section 77(4) provides that the CEO may issue guidelines that describe the qualifications and experience that are appropriate for a person to be appointed as a restricted investigator. The proposed provision is modelled on section 122(2) of the Food Act 2008.

The policy rationale behind the issuing of guidelines, rather than having these prescribed in regulations, is that appropriate qualifications and experience change over time. Relevant training courses are intermittently added, varied or no longer offered by training providers. The provision of guidelines is intended to ensure that such administrative changes do not affect the appointment of persons, who would otherwise hold appropriate qualifications and experience. By providing guidelines the CEO will be able to make any changes in qualifications and experience that occur from time to time in a responsive and timely way.

In developing the guidelines, the CEO will consult with relevant agencies, including local governments, to determine what are the qualifications and experience most appropriate for this role. The commitment to consultation around such guidelines is ongoing. Issued guidelines will be publicly available and will be issued under the authority of the CEO.

The committee accepted the explanation provided by the acting Minister for Health and took the view that, on balance, the provision was of an administrative nature; it was reasonable for the CEO to issue guidelines of this character; and because a restricted investigator's functions were limited to investigating matters related to regulations about smoking in public places, there was no real harm here or risk of eroding the sovereignty and lawmaking powers of Parliament.

Otherwise, the committee concluded that the bill was materially consistent with the ministerial communiqués that had been issued pursuant to the intergovernmental agreement and simply recommended that the Legislative Council take note of the committee's findings and comments during consideration of the bill. I point out once again that unlike the practice of previous Standing Committees on Uniform Legislation and Statutes

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Review, rather than making a recommendation that the bill be passed or otherwise, we see our function more as alerting the house to potential infringements on parliamentary sovereignty or the lawmaking power of the Parliament of the state and so, having drawn those matters to the house's attention, leaving it to the house to decide whether it accepts those potential infringements. So much for the committee's report.

I will now turn to some more general matters and observations. The Tobacco Products Control Amendment Bill 2017 is another step in the path towards the very worthy objective of improving the health of Western Australians by limiting the availability of and the risk of access to tobacco products. The principal act was passed in 2006 as another stage in the journey to limit the use of tobacco products. That is all very well and, as has been indicated, the opposition supports the objectives of the bill and the bill in principle. We have a number of questions about its operation and I would like to expand on those a little. It is notable that this bill is being passed in the context, which has been repeatedly pointed out, of a reduction in the use of tobacco products in this community. One needs only to cast one's memory back to the 1980s when—to give credit where it is due—one of the good things that came out of the Burke era was the Quit campaign. It involved an intensive education program to discourage smoking and encourage people to eschew smoking and tobacco products. Certain limitations were placed around the sale of products, either then or later, but it was an education campaign by and large. It was very successful. When we consider back in the days when men wore hats and smoked without guilt, smoking was endemic in the community. I remember when I first joined the Crown Law Department in 1985, which was housed on several floors of the Westpac centre on the corner of St Georges Terrace and William Street, we had ashtrays on our desks. People smoked in the office and it was considered unremarkable. It is now inconceivable to the current generation that anyone would smoke in the workplace. It is a generational change.

Hon Peter Collier interjected.

Hon MICHAEL MISCHIN: Hon Peter Collier tells me that teachers smoked in the classroom and the evidence of smoking in this chamber is one of the things that I always point out to visitors to this chamber. Members may not be aware of it if they are newcomers, but if they go behind the screen, they can see where cigarettes and cigars were stubbed out; back in the day, there used to be an ashtray there. In the corridor outside this chamber —

Hon Peter Collier: Are you sure it was back in the good old days?

Hon MICHAEL MISCHIN: It was before my time, so it had to be the old days!

Hon Simon O'Brien interjected.

Hon MICHAEL MISCHIN: Precisely. Behind the Chair, one could smoke back then. If members go into the corridor outside this chamber on the east side of the building, they can see some samples of the original carpet from in this place, which was taken out in the 1930s. They can see where the cigarette butts burnt the carpet. One can only imagine the atmosphere of this place in the middle of summer with smoking going on behind the Chair, such is the change that has taken place. Although I cannot speak from personal experience of what went on in this place in the 1980s, it is now considered socially unacceptable to smoke in restaurants, around or in Parliament, or in business offices. Social norms changed in the space of less than 40 years, because what we are accustomed to now is nothing new. Anyone who went overseas in the early 2000s would have seen the difference in cultures between here and Europe, and those who go to Asian countries now will know the difference in attitudes. Even in Europe, people smoke on trains and in all sorts of places in a way that would be inconceivable to us in Australia. One of the great ironies is that although the number of youth who smoke has been declining, the use of other forms of abusive products is increasing in some areas.

Although we try to restrict the use of tobacco products by hiding the labels, limiting advertising and the like, if we are looking for analogies, the use of alcohol is probably as, if not more, harmful. It would be considered outrageous to put fine wines in anonymous labels and behind cupboards so they could not be chosen on the basis of their labels or to increase the cost to something so that it was unaffordable to the general public. Nevertheless, from a combination of price through taxation and social pressure from education, we have seen a reduction in the use of tobacco products, perhaps with the one exception of cigars, which Hon Aaron Stonehouse is concerned about. It is a very niche market, and one would have thought that it would not be considered in the same way as mass-produced cigarettes. I have an enormous amount of sympathy for the point the honourable member made. I do not have any particular sympathy for people who use tobacco products. I confess that I have smoked and still occasionally smoke. It is not something that I am necessarily proud of or something that I would advocate or advertise, but that social harm is one that I limit to myself and it is a conscious choice. I confess that it is a weakness, but it is my decision and I do not force the habit on others. I am sure that many people are in the same category, but one can see the social merit of legislating, where sensible, in order to limit access to tobacco products. It is sad that those who are most prone to engaging in smoking are those who are under stress, may have addictive personalities more generally, may have some mental problem, or may be bored and the like. Historically, quite apart from the level of sophistication that cigarettes were meant to impart back in the olden days, within living

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memory, there was nevertheless also an increase in the use of tobacco during periods of immense stress such as wartime and the like. However, I entirely support the idea of limiting access to tobacco products to protect members of the public and encourage people to avoid smoking if at all possible.

Having said that, I think this bill hedges a number of assumptions and, as a Parliament, I think we have a responsibility to not take the pronouncements or justifications at face value. I refer to a number of points made in the second reading speech in which the emphasis is on “protecting children”. The bill will make it illegal for children under 18 years old to sell tobacco products in retail outlets. I would hope that the parliamentary secretary can provide some data to support that that provision will achieve anything significant. We have heard mention of the potential for the bill to make it difficult for small businesses, particularly those outside the metropolitan area and small businesses that rely on a family to run them. It may limit the ability of those businesses to purvey a legal substance to their customers on demand simply because the person behind the counter happens to be under the age of 18 years. There may very well be data to support the idea that someone under 18 years old—the magic figure being 18—who is selling something may be more vulnerable to it, but if they are over 18 years old, it will not cause them any harm and they will not be tempted to take up smoking. I also take the argument, which I suspect is one of the affirmatives that has been raised, that it may be difficult for children to refuse to sell tobacco products to their peers. That may be right. However, I would like to hear evidence to support those propositions.

The claim that we need to protect children from exposure to tobacco products is also used to justify the banning of split-pack cigarettes. I have not hunted around for that sort of thing, and maybe I am not sufficiently in tune with the way in which retail works, but I have never encountered split-pack cigarettes. I would like to hear more about what they involve and why they are such a danger, as opposed to a pack of 20 or 25 cigarettes. That is particularly the case given that cigarettes are very expensive. I think the price hovers at around \$34 or \$35 for a pack of 20 or 25 cigarettes. I am not sure how much of a saving there would be that would make it worthwhile for people to sell split-pack cigarettes, unless they are selling them on the black market and making a profit. Perhaps the parliamentary secretary will be able to explain that to me.

The second reading speech states that because it is against the law to sell tobacco products to children, it is reasonable that children not be put in the position of selling tobacco products or having to ask people in their own age group for proof of age. In fact, it is said that we know from the compliance activities of the Department of Health that young sales staff are more likely than older sales staff to sell tobacco products to people under the age of 18. If this is an endemic problem, I am surprised it has not been addressed before this time. Again, I would like to know what evidence supports that proposition and why that is a justification for this supposed protective measure. Also, if this is an endemic problem, why will tobacco retailers be given two years in which to make the necessary changes? A lot of kids could potentially be harmed in the space of two years. Why was that time frame chosen?

The second reading speech refers to customer loyalty reward programs. I would like evidence about how many customer loyalty programs offer cigarettes as a reward. My understanding is that major retailers and airlines and the like specifically exclude tobacco products from their loyalty programs. If there are customer loyalty programs that offer cigarettes and warrant this step, I would like to know what they are.

I turn now to flavoured cigarettes. I understand that the particular concern is cigarettes that are manufactured overseas. I am not aware of any fruit or confectionery-flavoured cigarettes that are manufactured in Australia, so perhaps the parliamentary secretary will be able to tell us about that. I recall that Indonesian clove-flavoured cigarettes were all the vogue in the mid-1980s. I can tell members that if they had a couple of those, they would be ready to give up smoking for life. Those cigarettes were quite popular at one stage among the sophisticates around town. Other than that, I have not seen flavoured cigarettes for sale anywhere, yet they are apparently a great risk to children. There may be some attraction in cherry cheesecake, vanilla filling, or apple, strawberry, coffee, lemon or cheese-flavoured cigarettes. They sound pretty disgusting to me—if anything, I think they would put people off cigarettes. I would like to hear evidence that those types of cigarettes are a particular peril to anyone, let alone juveniles.

I entirely support the idea that we ought to limit the availability of tobacco products and discourage their use. However, it seems to me that we have advanced enormously along that path over the last 30-odd years. It seems to me also that if we could apply the same formula for other products that people abuse, such as the drug “ice” and liquor, and using a mobile phone in their car, we would be doing the community a great service. There is a point at which regulation is counterproductive and proceeds with a backlash. I suspect that one of the reasons cigarette smoking has not been banned per se, in the same way as other forms of drug use have been banned, is that there would be a backlash. When the Quit campaign was introduced in the mid-1980s, some people told me that they would smoke just to defy the authorities. I accept that that was a rather juvenile attitude. However, some people want to defy the authorities just to rebel against over-regulation. Although I support the implementation of proper public health measures, we as a Parliament owe it to our community to ensure that those measures achieve what we want them to achieve and that we do not get into minutiae that will not achieve anything other than waste the

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time of this Parliament in debating laws that may sound good in a second reading speech and look good on paper or on an advertising campaign poster but are not effective in addressing the mischief that we are meant to address for the peace, order and good government of this state.

That brings me to my final point, which is the proposed amendments to section 23 of the Tobacco Products Control Act. I accept that this reflects the existing provisions in the act. My interest in this issue is not the same as the one outlined by Hon Aaron Stonehouse, although I have sympathy for what he said. My interest is the manner in which it reverses the onus of proof. The Parliamentary Secretary to the Minister for Health would have been present in the last Parliament when we debated at great length whether it is proper to reverse the onus of proof and criminalise particular activities. There is a place for that. I refer to a booklet published by the Department of the Legislative Council of the Parliament of Western Australia titled "Fundamental Legislative Principles (FLPs)". Page 3 of that publication outlines one of the questions that members of the Legislative Council are invited to ask themselves when considering any proposal to legislate. It reads —

Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

It then proceeds on two bases. The first is that a reversal of the onus of proof is not a good thing to do per se. The second is that there are circumstances in which a reversal of the onus of proof is justified. It goes on to point out —

At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence beyond reasonable doubt; the accused is not required to prove anything. Provisions in some legislation reverse this onus of proof and require the person charged with an offence either to prove or disprove some matter to establish their innocence (legal burden) or to point to some evidence that suggests a reasonable possibility that the matter exists or does not exist (evidential burden).

Generally, reversal of the onus of proof of an element of an offence (especially in criminal matters) is objectionable on the basis it trespasses on personal rights and liberties. However, justification is sometimes found in situations where the matter to be proved by the defendant is peculiarly within the defendant's knowledge and would be extremely difficult, or very expensive, for the prosecution to prove.

I refer members to section 23 as proposed to be amended by the amendment on issue 1 of supplementary notice paper 28. It is intended to insert in clause 6 of the bill the following proposed subsection after section 23(1) —

- (2) If a person is charged with an offence under section 22(1) it is a defence to prove that at the time the offence is alleged to have been committed —
 - (a) the person was a specialist retailer; and
 - (b) the display was of a cigar or an implement designed to cut a cigar; and
 - (c) the display could not be seen from a public place outside the premises specified in the licence; and
 - (d) a health warning sign in accordance with the regulations was displayed immediately adjacent to the display.

I will not go into the detail of the offence that is found at section 23, but it seems to me that the things listed are objectively ascertainable, perhaps with the one exception outlined in proposed paragraph (a), which refers to whether a person is a specialist retailer within the meaning of the act, but I understand that various things are prescribed around that to define it. Whether there is a warning sign is something that the investigator could pick up on and, in proof of that, he could take a photograph of it; and, if there is not one, he could have the basis for a charge. Whether the display is of a cigar or an implement designed to cut a cigar should be apparent to the investigator at the time that he is investigating. Whether the display can be seen from a public place outside the premises specified in the licence could be ascertained by the investigator; and, if it is thought to be otherwise, a photograph could be taken to show that that is not the case. To the extent that these things require a reversal of any onus, I would have thought that the proper way of doing it would be by making them exceptions and evidential burdens rather than legal proof burdens. I would be interested in the parliamentary secretary explaining to us why that is not the case. I accept entirely that it reflects the structure of section 23 in its current form, which reverses the onus of proof. But bearing in mind the legislative principles and bearing in mind the approach taken by the government in the last term of Parliament when it was in opposition when it found this issue to be very important when scrutinising legislation, I would be interested in the parliamentary secretary's explanation of why we have to go so far as a legal burden of proof being reversed rather than simply an evidential burden having to be satisfied by a defendant or, indeed, something needing to be negated by the prosecution beyond reasonable doubt.

Point of Order

Hon JACQUI BOYDELL: I ask the house to note that there is no government minister present in the house at this point.

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The ACTING PRESIDENT (Hon Martin Aldridge): On that point of order, your observation is noted; however, there is no point of order. In this case, the parliamentary secretary representing the Minister for Health has carriage of this bill.

Debate Resumed

Hon MICHAEL MISCHIN: The government has been saved; there is someone.

Having made those observations, I look forward to the consideration of this bill in more detail in Committee of the Whole and the explanations that the parliamentary secretary may be able to assist us with during consideration of the bill, which, as has been indicated by our lead speaker, Hon Nick Goiran, the opposition supports.

HON SIMON O'BRIEN (South Metropolitan) [4.14 pm]: Several of the previous speakers have encouraged me to contribute, so blame them! I have a few things that I would like to put on the record about the issues that have been raised in the debate on the Tobacco Products Control Amendment Bill 2017. I recall when, I think, Minister Graham Kierath decided unilaterally that it was his responsibility to ban by way of regulation, without telling cabinet, smoking in all workplaces in Western Australia. That caused a few raised eyebrows when it became known. When a former father of this house, who was also a minister at the time, realised what had happened, he said, "Heck, if I'd realised that was going through an Exco, I would have pulled it, but none of us realised." I recall also some years later when another sanctimonious minister and an ex-smoker—there is nothing worse than a reformed smoker, is there, Mr Acting President?—by the name of Jim McGinty decided to inflict his personal prejudices on the good folk of this colony because he was disgusted by smoking and had to do everything he could to stamp it out. There was a bill to restrict smoking more than it had been restricted in the several previous iterations. By proxy, he outside this place and Hon Giz Watson inside this place decided to have a sanctimony competition to see who would win. I remember Hon Norman Moore making some observations, because by this stage the Holy Grail was to ban smoking altogether inside any workplace. I do not know what sort of stuff members for the Mining and Pastoral Region are made of these days, but Hon Norman Moore stood up for the people. He said, "What about the poor old prospector in the front bar of the Iron Clad Hotel in Marble Bar? Are you saying that he can't have a smoke with his beer?" The answer was yes, and there were no apologies either, because the line from the government was that smoking is evil and has to be stamped out. Trying to outdo that line was Hon Giz Watson, who was aghast that there should be some sort of phasing-in period for this latest impost.

Hon Michael Mischin interjected.

Hon SIMON O'BRIEN: That is a different matter. I will come back to cannabis.

She said, "Why don't you just ban it right now?" It went back and forward a bit and, in the end, McGinty said, "All right; we'll make it effective immediately." So the poor old prospector with a fag hanging off his lip in the front bar of the Iron Clad Hotel in Marble Bar came off second best thanks to the zealotry and self-righteousness of another couple of people who had involved themselves in this debate. I remember I involved myself in the debate a bit. I do not know which occasion it was; there have been quite a few over the years. A chap I know who was a director general of a certain large department in this locality said, "Simon, I heard you on the radio giving us both barrels. I respect the fact that you've got your view and I've got mine and we're not going to meet in the middle. But I am Jewish and I find it a bit offensive that you refer to those in my corner as health Nazis or smoke Nazis." I said, "You are acting like a bunch of fascists, but I take your point. I don't want to cause you any offence, so I'll refer to you as health zealots in future. Would that be all right?" He said, "Yes, thank you very much." I said, "Good. You have a good day and we'll see you on the airwaves tomorrow."

The health zealots have taken this agenda and run with it, and continue to run with it. Gee, Hon Alison Xamon wants to be a health zealot, so she did a few laps with it today. To what end? Is this a real First World problem? Is this what Parliament has to spend its time on? Is this what our bureaucracy has to spend its time on? Let us turn to the bill and look at what is in it. Not a heck of a lot is particularly earth-shattering because there is not a lot left to track down and do, yet the health zealots, aided and abetted by some sanctimonious ministers, still keep pursuing their never-ending drive to inconvenience smokers. Not that I am inviting unruly interjection, but I have to ask Hon Alison Xamon whether she has ever seen the fruit and confectionery-flavoured cigarettes to which the member referred and which are mentioned in the second reading speech.

Hon Alison Xamon: Have I seen them?

Hon SIMON O'BRIEN: Yes.

Hon Alison Xamon: No; I do not smoke them either.

Hon SIMON O'BRIEN: She has never seen them.

Hon Alison Xamon: No.

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Hon SIMON O'BRIEN: I have not seen them either.

Hon Alison Xamon: I have been told about them.

Hon SIMON O'BRIEN: Has anyone here ever seen these fruit and confectionery-flavoured cigarettes that we are proposing to ban?

Hon Alison Xamon: I have smelt them when I have walked past people.

Hon SIMON O'BRIEN: Seriously? I had never heard of them until this bill came in. I have smelt plenty of marijuana cigarettes; I imagine even the Greens would know a little about that, but I have never heard of fruit and confectionery-flavoured cigarettes, but if we want a fruit-flavoured cigarette, we are not going to have one in this town after this bill goes through. Similarly, are split-pack cigarettes a feature nowadays?

Hon Alison Xamon: What is that?

Hon SIMON O'BRIEN: Hon Alison Xamon has not seen fruit and confectionery-flavoured cigarettes. Has she seen split-pack cigarettes?

Hon Alison Xamon: Yes, I have seen split-pack cigarettes.

Hon SIMON O'BRIEN: Where has she seen them?

Hon Alison Xamon: I have seen the small ones that people walk around with. They are very tiny. They are designed to cater to people who have small amounts of money.

Hon SIMON O'BRIEN: We must not have that! I do not know whether they are very small cigarettes or very small packets of cigarettes.

Hon Alison Xamon: They are very small packets. They are often designed for children. That is whom they appeal to because children do not have a lot of disposable income—at least mine do not.

Hon SIMON O'BRIEN: Cigarettes are very, very expensive these days.

Hon Alison Xamon: I would say cigarettes are quite expensive.

Hon SIMON O'BRIEN: Right. These days cigarettes are very expensive by unit, much to the distress of many of the people whom Hon Alison Xamon is concerned about: people who do not have any money, people who have psychiatric problems, people who are homeless.

Hon Alison Xamon: Yes, which is why we should help them to get off it.

Hon SIMON O'BRIEN: Let us heap the grief and aggravation on to them by pricing cigarettes out of their price range because we are doing it for their own good, and are we not smug and self-righteous about it? Heaven forbid that anyone should have a beer and a cigarette in the front bar of the Iron Clad Hotel. Let us ignore problems with methamphetamine and the violence visited upon our community. Let us persecute the last few smokers. We have a bit of information. I have to tell members that I would not rely on a second reading speech from this government very often, and I certainly would not rely on the advice of the health zealot lobby that helps inform this sort of bill, but presumably the government cannot disagree with its own second reading speech when it refers to the relative decline in smoking numbers. It states —

In Western Australia in 2016, just under nine per cent of people aged 16 years and over were daily smokers ...

For a nonsmoking society that hates it all, and all the Greenies saying, “Oh, gee, we cannot have smoking; we have to keep niggling away at people who want fruit-flavoured cigarettes or little packets or something”, that seems like rather a lot of people. When I look at the number of people out on the street, I do not notice one in 11 of them smoking, but they are the figures. That is interesting. Anyway, the second reading speech points out —

In Western Australia in 2016, just under nine per cent of people aged 16 years and over were daily smokers, down from 16 per cent in 2004.

I am not sure how to measure that level of progress. Is that a dramatic improvement or is it something else? The rate of attrition in the number of absolute smoking participants in our community is slowing. Whatever governments do, they will still find people who want to smoke and people who have not been seduced or convinced by all the Quit campaigns, all the pricing of cigarettes out of people's reach or banning people from smoking in places, making it socially unacceptable, making it too hard. Even the health zealots who wrote this—I make no apology for using that term, by the way, and if anyone wants to see me about it inside or outside this place, do so—state that it is around nine per cent. I do not know. It probably is around 10 per cent of people. That is rock bottom. They are people who are prepared to pay the cost, who do not care about social vilification for daring to be a smoker, and who put up with the inconvenience of not being allowed to smoke just about anywhere. For

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heaven's sake, I have seen that councils on the coast have banned smoking on the beach. I would not have thought passive smoking would be much of a problem on a windswept ocean beach, but apparently it is.

Hon Alison Xamon: It is.

Hon SIMON O'BRIEN: Oh, deary, deary me! It is all too hard, is it not? What does the government do now? It will not try to help smokers who want to get off cigarettes—those last nine or 10 per cent. It is not prepared to help them; it is not interested. Our health authorities do not give a damn. All they are concerned about is chasing down the last surviving cigar retailer and persecuting him out of existence, and mucking around with fruit-flavoured cigarettes, which is hardly the biggest issue confronting our society. However, when we come to measures that might assist the remaining hardcore smokers to desist from their habit, the answer is no. Electronic cigarettes have been backed by the British Medical Association and various other authorities around the world, and e-cigs and vaping work. They are not going to work here in Western Australia, though, are they? That is because we have some small-minded people who tend to be Ministers for Health who cannot do anything except toe the official line given to them by the health zealots about how we have to crack down ever more and more on smokers, always clouded in, "But it's for all the right reasons." That is rubbish. They are hypocrites and wastrels—the lot of them. Why do government members not get dinkum? If they want to do something about providing some assistance to those people who are hardcore smokers, they should look at their own policies. Instead of trying to give them a pain in the neck with everything they do and instead of trying to snub their nose at them, what about doing something that is going to help? I will resume my remarks shortly after question time no doubt, Madam President.

The PRESIDENT: Hon Simon O'Brien, I look forward to listening to your comments on this bill and we will now adjourn the debate for question time.

Debate interrupted, pursuant to standing orders.

[Continued on page 1505.]