LAW REVIEW PROJECT

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SUBMISSION ON DRAFT TOBACCO REGULATION R264

PRELIMINARY

The Law Review Project is unambiguously for the effective protection of the rights of all people including anti-smokers, to which end it supports effective and jurisprudentially legitimate laws and policies. To the extent that the draft regulations are consistent with this principle and the Constitution, they are welcomed and supported.

There are, however, significant aspects in conflict with these principles, the universal principles of good law, and the legitimate rights of smokers, anti-smokers, employers and property owners.

Some provisions appear to be unconstitutional.

This Submission is confined to concerns about, rather than points of agreement with, the Draft Regulations.

In this Submission the term "anti-smoker" is used instead of "non-smoker" to make the crucial and commonly ignored distinction between *non-smokers* who happily mix with smokers and do not mind them smoking, and *anti-smokers* who, like the present writer, are offended by second-hand tobacco smoke ("passive smoking").

CONSTITUTIONAL CONCERNS

1. Separation of Powers

This is a far-reaching law that affects the lives of all people, profoundly in many cases. A core component of the rule of law is the separation of powers. The rule of law is one of our foundational provisions. As such, it is in the very first section of our Constitution (§1).

The separation of powers means that substantive law, especially far-reaching laws such as this, ought to be legislated by the legislature. According to the separation of powers the three basic *functions* of government – legislation, execution, adjudication – should be performed by one, and only one, of the three *branches* of government, the legislature, executive and judiciary respectively.

There are sound philosophical and practical reasons for this. As far as law-making is concerned, legislatures (at all three levels of government) are elaborately constructed physically and subject to elaborate institutions, laws and procedures (some prescribed by the Constitution, others traditional) which ensure that they are fit for purpose.

Virtually none of these apply to the executive branch of government, which means that it is inappropriate for it to make substantive law.

The executive is equipped to make regulations *for the implementation of law*, that is, to specify implementation details and formalities, such as fees, forms and operating hours.

Under special conditions minor law-making functions may legitimately be delegated to the executive, such as specifying the technical details of vehicle roadworthiness, or the syllabus of educational institutions.

Legislation by legislatures goes through, and should go through, a great number of checks and balances that are necessary for law to be good law. Such checks and balances are, and should be, absent from the executive. They include discussion documents, green papers, white papers, draft bills, tabled bills, public consultations, participation and hearings, seminars and conferences, workshops and briefings, civil society and vested interest evaluation and comment, impact and cost-benefit assessments, evaluation by diverse and opposing experts, media coverage and public debate, three readings in each of two houses of parliament, lengthy portfolio committee proceedings and evaluation, and, finally, screening by the Sate President and his advisors.

Regulations, on the other hand, are law by decree, made with little or no public participation or considered evaluation of the kind required by the rule of law in §1, by §195 of the Constitution, and the principles of good law in general.

That is not to say that this measure has not been properly considered, but that such far-reaching law is not *in principle* and *in law* a legitimate executive function.

The Department is accordingly urged to proceed by way of parliamentary legislation.

2. Ultra Vires

Since the statute under which this regulation is envisaged provides for indoor smoking, it may be *ultra vires* for a regulation to prohibit indoor smoking. A principle of South African law is that delegated powers have to be interpreted strictly. In other words, they are presumed in law to delegate less rather than more power, no more, in fact, than is provided for unambiguously. Since the *Tobacco Products Control Act* envisages indoor smoking "subject to any prescribed condition", the Minster is empowered to prescribe conditions rather for than against indoor smoking.

This is an additional reason for this proposal to be a matter of legislation rather than regulation.

3. Paradigm Shift

Aspects of the proposal constitute a profound paradigm shift. It no longer reflects the legitimate desire to protect anti-smokers, but an extreme curtailment of smokers' rights when alone and harming no other person. Smokers may not, for instance, enjoy food, refreshments or music when smoking, not even in their own isolated outdoor smoking areas. Such areas, it seems may not even be covered, for that would render them "indoor", which means that when isolated as if they are social outcasts, smokers, in rainy and cold places, may not be protected from the elements.

BASIC PRINCIPLES OF GOOD LAW

1. Nuisance Law

What anti-smokers need is proper enforcement of nuisance law. The time-honoured principle of law that no one may constitute an undue nuisance to anyone else, or in any other way violate their rights (assault, theft, rape, fraud, trespassing etc) would, if properly enforced, be all anti-smokers need for their protection. Nuisance law does not concern itself with what kind of imposition is inflicted, only that it may not be material, whether it be undue noise, vulgarity, smoke from fires, cooking smells, tobacco smoke, sexual harassment, litter, or whatever.

Until now anti-smoker law has clearly had as its objective the legitimate, even if occasionally excessive, protection of anti-smokers. This measure is such a fundamental departure from what has gone before that implementing it by way of discretionary decree should not be regarded as a reasonable option. It envisages something profoundly new in our law, namely the control of smokers regardless of whether anti-smokers are affected.

A regulation, as opposed to legislation, of such extreme import may be unconstitutional for the additional reason that it could be in violation of §33 according to which all administrative action must be "*lawful, reasonable and procedurally fair*".

2. Property Law

A basic tenet of property law is proprietor discretion. In the absence of legislation, proprietors determine conditions of entry. A restaurant owner might, for instance, ban smoking completely, have a smokers' area, or allow smoking everywhere. A proprietor could, and arguably should, be allowed to make smoking obligatory in a restaurant only for smokers. The *Reader's Digest* company has been an example for many decades of full indoor smoking prohibition in all its premises worldwide. Its policy was a perfectly legitimate exercise of property rights long before there was anti-smoker legislation.

Under right-of-entry property law, smokers and anti-smokers alike vote with their rands and their feet for and against the policies of private businesses. Members of the public, activist lobbies, and vested interests should not be regarded as having the right to dictate policy on other people's private property.

There are countless examples that illustrate how adequate this principle is, such as a night club playing music so loudly that it would be unlawful in, say, a place of religious contemplation. Many factories generate noise that would be unlawful in a residential neighbourhood. The principle of freedom amongst consenting adults is what converts violent assault to lawful conduct in, for instance, rugby and boxing, or physical intimacy.

According to this principle anti-smoking law may already have gone too far in that it curtails the rights of property owners. Maybe the fact that this has been accepted for so long has created the unfortunate impression that it is an acceptable principle of law which legitimises any invasion of what people may do on or with their own property.

3. Contract Law

A related concern is the extent to which freedom of association and freedom of contract are curtailed by both existing law and the proposed regulation. Under freedom of association and freedom of contract, consenting adults are allowed to determine their own conditions of interaction.

These references to existing law are necessary to draw attention to the extent to which anti-smoking law may already constitute an unwarranted diminution of rights and freedoms, and why any new law that goes even further should do no more than fulfil the essential duty of government to protect anti-smokers from smokers.

CONFLICTS AND TRADE-OFFS: FALSE DICHOTOMY

It is commonly and mistakenly stated in the literature of smoking *by both sides* that there is necessarily a trade-off between the rights of smokers and anti-smokers. This assumption explains the belief that there should be "a balance" between supposedly conflicting rights. The trade-off hypothesis is clearly a false dichotomy and should play no role in government policy-making.

The logical flaw in the notion is easily understood by application to other contexts. We do not seek a balance between the right of muggers to money and the right not to be mugged, or the right of rapists to sex and the right not to be raped. We don't say the optimal "balance" is occasional mugging and rape.

Instead we have an *absolute* right not to be mugged or raped. Simultaneously, everyone has an absolute right to money or sex from and with freely consenting adults.

There is in this no trade-off; no balance to be struck.

So it should be with tobacco smoke. Anti-smokers should have an absolute right not to be subjected to other people's smoke, and smokers should have an absolute right to smoke alone or

with consenting adults. And property owners should have an absolute right to decide conditions of entry.

Needless to say, the latter point may confuse people, in that they may point out that property owners may not allow rape on their property, but this is a consequence of not understanding the principle. A property owner may, for instance, specify that entry is conditional upon payment of an entry fee. This not theft or robbery, and entails no "trade-off" of rights. Likewise, and by way of a deliberately extreme example to illustrate the point, an owner may specify as a condition of entry willingness to have sex, which would convert heinous crime into perfectly lawful conduct.

That such conditions may not be regarded by all as ethical is another matter. Vices are not crimes, or should not be. People are and should be free to be immoral, such as eating to excess, having reckless recreations, having unprotected sex, being obese, or being dishonest without committing fraud. None of these entail a "balance" of rights. They all entail freedom of association and contract, basic property rights, and freedom of lifestyle choices, not as trade-offs but as absolute rights.

This, with respect, is the philosophy that should inform tobacco policy.

EFFECTS THAT MAY BE UNINTENDED

One of the effects of inadequate evaluation (raised above) manifested in this proposal is that it has previsions which are either inappropriate, or are sound but inappropriately formulated. In this context it is unfortunately necessary to impugn the statutory drafting competence of whoever drafted the published draft. He or she apparently lacks knowledge or experience in the highly specialised branch of law known as statutory drafting.

High on our list of concerns is the counter-productive impact this measure would have on anti-smokers. **Far from enhanced protection, anti-smokers would endure *increased* exposure to second-hand smoke. This is especially true for children and domestic workers in private homes, and residents of apartments.**

This section addresses these concerns. Here are some, but by no means all, examples of what we trust are unintended aspects of the proposals as drafted:

1. Our first unintended consequence, mentioned above, is the negative impact on anti-smokers. By forcing smokers out of safe and properly ventilated indoor areas set aside for them, they are forced into two dubious alternatives: (a) private homes with children and domestic workers, and (b) public streets and parks where with anti-smokers trying to escape second-hand smoke.

   Incentives have consequences. Prohibiting indoor smoking incentivises behaviour modification. That is its purpose. Some of it is predictable, and some not; some is positive, and some negative.

   Predictable effects have already manifested themselves in the few countries where total indoor prohibition has already been decreed *and enforced* (in many countries laws are cosmetic rather than real). Ireland's experience, for instance, is that restaurants and places of entertainment have suffered twice over, firstly by *de facto* expropriation without compensation of investments people were forced by earlier anti-smoking laws to make in partitioned and ventilated smoking areas and, secondly, by the loss of business due to smokers staying away.

   One obvious response of smokers is to socialise at home instead of going out with friends and family. Apart from resultant damage to business, especially small business, and job losses, this has the perverse effect of much more smoking where there are usually children and babies, and often domestic workers present.

   There is an ancillary risk to government of being liable for massive damages in terms of the expropriation clause in the Constitution (regarding deprived of their property in the form of compulsory investments in smoking areas, partitions and ventilation equipment).

2. §2(1) of the proposal envisages total prohibition in "public places". It reads:

"*No person may smoke any tobacco product in any public place*".

This is hauntingly similar to §2(1)(a) of the Act which reads:

"*No person may smoke any tobacco product in a public place ...*"

The Act goes on to provide for regulations governing smoking in public places, which is one of the reasons why outright prohibition by decree may be *ultra vires*. Either way, it seems the drafter may be unconscionably unfamiliar with the principle Act, which may explain this and other anomalies and inconsistencies.

A cannon of interpretation of South African law is that new law must be presumed by the courts to differ significantly from preceding law – law-makers are presumed not to legislate frivolously or whimsically, but to legislate in order to change things. New laws must be taken seriously and not dismissed as superfluous.

What change is envisaged in this repetition of law? Is the single differing word ("any") significant? Is there some problem that needs fixing? These are the questions the courts are forced to ask. Superfluous drafting plunges the law, the courts and society into needless confusion and costly uncertainty.

3. §2(3) of the Act envisages limited prohibition in specified outdoor public places. This provision in the Act is itself problematic because "public places" are specifically defined as indoor, but that aside, the Act allows for prohibition by regulation only under special conditions, namely an "*outdoor public place, or such portion of an outdoor public place as may be prescribed, where persons are likely to congregate within close proximity of one another or where smoking may pose a fire or other hazard*".

§2(2) of the proposed regulation, on the other hand, envisages blanket prohibition regardless of circumstances at the time of smoking. A golf course, for instance, is a "sports facility". Is it really intended that a lone golfer, gardener or walker with no one else in sight may not smoke?

The reference to "*portion of an outdoor public place*" in the Act is clearly intended to apply to circumstances where only part of an outdoor public place fits the specified conditions. In such cases the Minster may presumably preclude smoking only in those parts, not everywhere and at all times.

There are additional implications of §2(3) which it is hard to imagine are seriously intended, and if they are they would probably constitute a violation of §33 of the Constitution, such as the absence of a requirement of a need for other people to be present. Someone smoking alone in an office or factory, or a labourer painting the goal posts on a soccer field when no-one else is in or near the stadium, will be criminalised. Likewise, a gardener on a golf course or a cleaner on a beach when there's no-one else around. The proposed prohibition even applies to a lone artisan dismantling a speaker system at a venue long after the event.

Not just that, but owners *and* employers are criminals if they do not interpret what is prohibited properly, and enforce it consistently.

4. §2(2)(h) is especially bizarre in various respects. Firstly, to mention just one of countless scenarios, a smoking married couple will have to stand 50 metres apart if they are "near" a swimming area. They will have to do so even if there is no one else on the beach.

Secondly, "near" is undefined. That may render the provision void for vagueness. At best, if 50 metres is near for smokers, near to a swimming area presumably means *at least* 50

metres. If so, the smoking wife of a smoking husband who is 50 metres from a swimming area, will have to be more than 50 metres from her husband and 100 metres from the swimming area.

Thirdly, it seems not to matter to the drafter that being far from people near swimming areas may force smokers to be disproportionately near to anti-smokers who are not huddled around a swimming area.

Fourthly, how, one wonders, are people to know how far 50 metres is? Apart from the obvious fact that it is a needlessly excessive distance, only rugby and soccer players could estimate the distance within reason because they know it is about half the length of their sports field, but most people have no idea how to estimate such a substantial distance. How would police know and how would they enforce the law? Would they carry a tape measure and pegs which they place in the ground where they find someone smoking, then another where they find someone they regard as "near" a swimming area, and then measure the distance whilst the suspect waits patiently? Does it not make more sense, and is it not more enforceable and effective at protecting anti-smokers to apply a law that says people may not smoke under conditions that constitute a nuisance for anti-smokers?

Fifthly, one of the many problems with laws that attempt to regulate *minutiae*, as opposed to specifying universally coherent principles, such as nuisance law and neighbourhood law, end up subverting nonsense of good intentions. When laws jettison old-fashioned principles of good manners, social decency and common etiquette (whereby all that is asked of smokers is to refrain from being a nuisance), they promote anti-social conduct of the kind we see increasingly around us. Smokers are encouraged to replace manners with legalistic compliance whereby they insist on their supposed right to smoke where it is technically lawful regardless of the impact on anti-smokers.

Paradoxically, such laws often make things worse for intended beneficiaries, especially in middle- and low-income communities.

5. §2(4) bans smoking within 10 metres of doors, windows, entrances and vents. Not to be pedantic, but this is another example of the need for skilled drafting in that it appears as if smoking would be allowed at exits, but not entrances. This would be the effect of the *unius inclusio est alterius exclusio* principle.

   As it stands, the prohibition applies regardless of whether the place is occupied or open.

   More seriously, it appears to be a measure drafted by elites for elites, because it presupposes luxuriously spacious places. Ten metres from doors, vents, windows and entrances in many places, especially where middle- and low-income people congregate, is within 10 metres of the next prohibited place. In some communities, such as "CBDs", "townships", "locations" and "settlements", people may have to walk several kilometres to find somewhere to smoke lawfully.

   Such provisions suggest that no one expects the law to be enforced purposefully. If the government makes laws it does not itself respect enough for consistent enforcement, all law is brought into disrespect. For law to be respected it must be respectable. To be respectable, it must be law that ordinary people take seriously in the ordinary course of events with a reasonable expectation of compliance and enforcement.

6. §3-5 impose curious and unreasonable obligations on owners and employers. They are turned into surrogate police. This principle has unfortunately crept into our law in earlier provisions which leaves us with a problem not envisaged at the time, namely, that once such a principle is accepted, there is no logical limit to its application.

   There are other problems with these provisions that make them unreasonable and/or unworkable. Many facilities, for instance, have built-in ashtrays, such as old (and some new) planes, boats, trains, buses and buildings. It is presumably not intended that all of these must be removed at enormous cost and inconvenience.

According to §3(3) there must be "no smoking" signs at entrances *and* "*appropriate locations and in sufficient numbers to ensure that employees and the public are aware …*". What does this mean? Every room, machine, seat, passage, toilet, parking space, lobby or shop in a shopping centre? If indoor smoking really is banned everywhere, there is no more need for smoking prohibition signs than ones prohibiting drugs, assault or tax evasion. This proposal is one of many examples of over-kill in the draft. Either indoor smoking is allowed in specified places, in which case signs are necessary, or nowhere, in which case signs are superfluous.

§4(1) permits designated outdoor smoking areas, but they may not be "*adjacent to walkways and other areas where persons generally congregate or walk*". This is one of the provisions that presupposes people with sufficient wealth and luxury for such an area to be available. As it happens, many or most advanced places (offices, factories, shopping centres, hotels, airports, harbours, etc) have no area away from where people generally walk. Such areas are non-existent in most middle- and low-income areas which is where most South Africans live.

Again, not to be overly pedantic, but recurrent references in the draft to "persons" suggests a drafter unfamiliar with the crucial distinction between persons and people. People are humans, which is presumably what is intended, whereas persons include juristic or artificial *personae*, such as companies, government departments, clubs and churches. The misuse of "persons" has some anomalous and presumably unintended implications.

In the unlikely event that an owner or employer is fortunate enough to have sufficient superfluous land to have an isolated place removed from wherever people might be, they may designate a smoking area. However, were they to be considerate enough to do so, they would impose some curious obligations on themselves neglect of which would be criminal. They will have to "ensure", for instance, that no-one serves food or refreshments, or provides "entertainment", whatever that means. Extraordinarily, generous owners/employers would have to monitor the place, bearing in mind that it must be isolated, to determine how long smokers are there, If any smoker stays longer than "necessary to smoke a cigarette", they must be "discouraged".

Such provisions seem to be manifestly unreasonable and patronising. They herald a fundamental shift from the principle of protecting anti-smokers to dictating the lifestyle choices and the daily conduct of free people who harm no one other than, perhaps, themselves. If this principle is allowed to creep into South African law (by way of a seemingly minor decree rather than high-level legislation) there will be no basis for stopping the advancing "nanny state" from invading every aspect of life. In totalitarian countries obesity is prohibited obesity and daily exercise obligatory. The difference between clamping down on harmless smokers and full abolition of lifestyle choice is a matter of degree not principle.

It is instructive of the anti-smoker bias in the measure that owners and employers may make no provision for smokers. They *must* protect anti-smokers and *may* ignore smokers. This may have extraordinary consequences, such as smokers having to travel great distances and waste considerable time, perhaps at the expense of productivity, to find somewhere they may smoke lawfully.

We repeat that **anti-smoker rights ought to be protected absolutely and unambiguously**, and that our concern is that this proposal steps over the legitimate line of protection into the murky waters of authoritarianism, and does so at the expense of, rather than for the enhanced protection of, anti-smokers.

CONCLUSION AND RECOMMENDATIONS

1. We respectfully urge the Honourable Minister not to proceed with the proposed regulations, but to refer them back to his officials for fundamental reconsideration.

2. If it is decided to proceed with new measures along the lines envisaged, they should, in our respectful view, as a matter of Constitutional law and good governance be legislation, not regulation.
3. Whatever changes are made to extant law, we respectfully urge that they should not depart from the paradigm hitherto applied of protecting anti-smokers without curtailing the legitimate rights of smokers, and they should not impose inapropriate policing duties on employers and owners.