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**SUBMISSION TO THE
DEPARTMENT OF HEALTH
ON THE DRAFT
CONTROL OF TOBACCO AND ELECTRONIC DELIVERY
SYSTEMS BILL, 2018 AND
ITS ACCOMPANYING SOCIO-ECONOMIC IMPACT
ASSESSMENT**

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1. Executive summary

The Free Market Foundation objects in principle to the draft Control of Tobacco and Electronic Delivery Systems Bill, 2018.

The Bill itself is problematic for the following reasons:

- It violates consumer and personal freedom unduly;
- It assigns too wide discretionary powers to government officials;
- It encourages further unemployment and stagnated economic growth; and
- The impact assessment meant to sustain the Bill is lethally flawed.

Among a host of other problematic provisions, the Bill does not mention or recognise anywhere, including its preamble, that South Africa is a free society where adults are supposed be allowed to make decisions for themselves and their lifestyles. The Bill will give the Minister of Health an unrestrained power to ban smoking anywhere in South Africa on a whim. The Bill will force smokers to choose between their personal freedom and continuing to employ domestic workers. The Bill will kill small and micro-businesses which cannot absorb the costs associated with the point of sale display ban or will lose custom due to the ban on smoking in hospitality establishments, and the Bill will try to cut the legs from out under the vibrant and developing vaping industry.

The socio-economic impact assessment is supposed to be an impartial analysis of the reasoning behind the Bill, weigh the expected as well as likely consequences of the Bill up against other considerations, and highlight the advantages and disadvantages of the Bill. It does none of these things.

The assessment is biased, as it was conducted by employees of the Department of Health (the department which is sponsoring the Bill) and thus suffers from bias and a conflict of interest. Furthermore, the assessment lacks balance, in that it appears only one side of the tobacco regulation discourse was consulted, being those who favour regulation. At one point the assessment admits that informal economy businesses were not consulted about the consequences of the Bill's point of sale display ban, even though the informal economy is where this ban will have the most devastating consequences. Finally, the assessment is rife with intellectual dishonesty, with most assertions being made without citing evidence. There is no weighing of benefits and costs; instead, the entire assessment serves as a motivational letter for why the Bill should be adopted. A faulty impact assessment alone should prove fatal to a proposed law of this nature.

There is no place in a free society for patronising and paternalistic legislation of this kind which seeks only to socially engineer the population into behaviour political elites and so-called 'experts' deem to be appropriate. Such thinking evolves into a slippery slope of lifestyle regulation where government will eventually force everyone to have only one primary consideration in life: their health. Considerations like recreation, career advancement, and building relationships will be summarily set aside by the unelected degreed lifestyle regulators in their journey toward a utopia where everyone does what they believe is good. The Bill must be withdrawn.

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2. Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)¹ is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project² is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

3. Introduction

The Constitution of the Republic of South Africa, 1996,³ and its Bill of Rights are meant to protect the rights of citizens. They exist to protect not only that conduct which is popular with the majority, but also those which are unpopular, because a majority can do evil if it is allowed to do what it wishes with the minority. In particular, the Constitution is intended to protect citizens from the arbitrary acts of government. In other words, to stop a government from doing what it likes.

A legislator who passionately hates smoking should stop to contemplate the consequences of this Bill before supporting it. There are more important issues at stake than the legislator's hatred of smoking. The most important is the question of respecting the rights and freedoms of citizens. Members of Parliament should use smoking as an example to test themselves and discover whether they really support democracy and the rights of the individual citizen – to live their lives in peace and freedom without being constantly harassed by their government to conform to some norm or standard, or to adopt habits that the citizen rejects. This is especially true when the government attempts to compel its citizens to adopt a particular lifestyle.

People who smoke have rights and the government should respect and protect those rights. Instead, we find government itself trampling on rights.

What we have in this Bill is one section of the population ganging up on others that have a habit that the first group dislikes, on the people that manufacture the products used by the out-of-favour group, and on the people that distribute the products. This form of victimisation of people because of their habits is very dangerous. If this were to be extended to excessive eating, many of the people that are ganging up on the smokers would find themselves in trouble with the law.

The draft Control of Tobacco Products and Electronic Delivery Systems Bill, 2018 strips smokers of their human dignity when it prohibits them from smoking in their own homes or at restaurants where the owner is perfectly happy to accommodate them. It also strips them of human rights and freedoms when they are treated as pariahs.

¹ www.freemarketfoundation.com.

² www.ruleoflaw.org.za.

³ Henceforth "the Constitution."

The great 19th century legal scholar F.C. von Savigny described the law of liberty or freedom as “The rule whereby the indivisible border line is fixed within which the being and activity of each individual obtain a secure and free sphere is the law.” This legislation transgresses that borderline and reduces the freedoms promised to the people in the Constitution.

Smokers are being discriminated against because they are smokers, which is in conflict with section 9(3) of the Constitution. This section may generally be read to outlaw discrimination on the grounds of race, gender, sex etc, but those are merely more common examples of a total prohibition against unfair discrimination. The anti-tobacco legislation discriminates unconstitutionally against smokers, tobacco manufacturers, and tobacco distributors.

The general tenor of the Bill is one of extreme authoritarianism in direct conflict with the democratic values found in the Constitution, in the following senses:

- It is characterised by the delegation of arbitrary power to the Minister. In most cases ministerial powers are not subject to the objective criteria or guidelines required by section 1(c) of the Constitution.
- The Constitution requires that substantive law may be made only by a deliberative legislature and that laws may delegate the power to the *executive* only to *execute* its laws, not make them. In order to execute (implement) laws the executive may make *regulations*. The executive may not be turned by delegated powers into an alternative and illegitimate legislature. Some of the powers delegated in this Bill are excessive to this extent.
- Where powers may be delegated, that is, where there are legitimate executive functions, the Constitution requires that those to whom powers are delegated must be given clarity on the *purpose* for which they are delegated and *objective criteria* according to which these powers may and must be exercised. In most cases, no objectives are specified (or there is with insufficient clarity) and there are no objective criteria.
- It is not only the letter of the Constitution with which laws must comply, but with its spirit, in that laws have to promote constitutional values. The extreme authoritarian nature of this Bill is as patronising as law can be. It treats citizens as if they are not emancipated and does not recognise any capacity for adults to manage their own affairs. It is in conflict with democratic values to presuppose that people are capable of deciding for whom to vote, whom to marry, how many children to have, what career to pursue, what lifestyle to live, and the like, but not to control their own bodies and health, including what risks to run once fully informed by mandated information and health warnings. A democratic society of emancipated citizens is one in which the State’s role is to enable citizens to be fully informed and then to leave them free to choose. That this extreme measure will be hailed by radical activists as “progressive” or “democratic” does not make it so. It is in fact authoritarian and a derogation from personal and property rights.
- The Bill perpetuates a misconception by defining private property as a “public place”. The reason for misclassifying that which is manifestly private as being “public” is a stratagem to legitimise extreme regulation of the private lives and property of citizens. Apart from being conceptually flawed *per se*, it is anomalous in the sense that it treats a *private* workplace, perhaps a small business with two partners, both of whom smoke, as if it is somehow “public”, which is clearly is not. It should be lawful for an attorney, for instance, to have a sign at their *private* office reading “smokers only; smoking obligatory”.
- A great concern with this Bill is the extent to which it is so fundamentally out of touch with reality that it needlessly fuels the problem of disrespect for the law confronting our country. Nobody, including the government, will take this law seriously or has the slightest intention

of enforcing it except, at best, in the context of a small high-income proportion of society. Based on more than enough experience with the previous legislation, we can safely assume that there is no serious intention of enforcing the law even in the context currently contemplated by its authors. The existing legislation, itself probably legally suspect in fundamental respects, has resulted in a discombobulated array of attempts to comply by a minority of business, and continued conduct by the majority as if it doesn't exist. Nobody seriously believes that this law will have any relevance, or that anybody will attempt to enforce it, in the context of the vast majority of South Africans who gather in tribal bomas, urban shebeens and taverns, working-class canteens, spazas, stokvels and eating establishments. It is, in short, a shamelessly elitist Bill contemplating a world consisting only of elites. Surely nobody seriously envisages the prohibition of smoking in certain types of popular nightclubs, or at "sessions" and "raves" commonly attended by adolescents. Is this to be a law written in bad faith in the full knowledge that it will never be applied purposefully in the real world?

- We recall our observation to this effect to the Portfolio Committee when the existing Act was under consideration. A representative of the Department of Health said brazenly that it was not necessary for the law to be taken seriously or for government to have the slightest intention of enforcing it, or capacity to do so. The purpose of the Act, according to the official, was to "send a clear message". This is an unconscionable view. It is manifestly unacceptable for a government seriously committed to the Constitution, democratic values and the Rule of Law to display such disrespect for its own laws. The appropriate way for the government to "send a clear message" to the public is by way of education and dissemination of information, and its duty to society is to cultivate respect for law by example.
- The Constitution requires that legislation must be preceded by a fair and reasonable (section 33) public participation process (section 195(1)(e)). The socio-economic impact assessment of the Bill admits that the public participation process is incomplete, especially with regard to informal sector of the economy. Ordinary South Africans will look upon this Bill as if it was drafted by somebody from another planet. The majority of South Africans will never know nor care about, and would certainly not comply with, this law. It is not enough for government merely to go through the motions of public participation and input. It has to do in a *bona fide* way that does not constitute a sham.

The Bill is a serious affront to the South African constitutional order and its underlying values of freedom, human dignity and the Rule of Law. As such, the Bill should, as a whole, be scrapped.

4. Freedom and dignity

4.1 People control – not "tobacco control"

Freedom is the ability to act without artificial constraint. We are absolutely free, and so is everyone else. This means, by its nature, that no person may violate the freedom of another – a type of "internal limitation" on what we may and may not do in society.

Governments were created because freedom was not respected. Individuals and tribes used violence against one another to attain the ends they desired. The government was given the power only to use violence to protect freedom – a referee in the game of life. Government has now stepped far over these bounds.

Although this is described as a tobacco control bill, it is in fact a people control bill. It sets out to interfere in the way people live their lives. First, tobacco is labelled as an evil substance with the tacit consent of those who use it, many of whom feel guilty about the habit they have acquired. Then invalid claims are made about the detrimental effects of the habit on the people in close proximity to a smoker, the so-called “tacit smoking” effect. Finally, the general distaste that non-smokers have for smoking, fortified by the claims about “tacit smoking”, is used to take away some of the freedoms, not only of the smoker but also of the non-smoker.

Persecuting people with a smoking habit in all places outside their homes has nothing whatsoever to do with health: it has everything to do with people control. Persecuting people who manufacture, distribute and sell a legal substance called tobacco has nothing to do with health: it has everything to do with people control.

The government of a country with a Constitution that guarantees citizens their freedom has no right to be in the business of people control.

4.2 Slippery slope of lifestyle regulation

If the principle that government may regulate any aspect of our lifestyle because it is deemed “bad for us” is accepted, there is no stopping what may and will come next.

Life is not only about being healthy. The subjective nature of value dictates that different people have different preferences, tastes and priorities in life. Many are perfectly willing to sacrifice some aspect of health in favour of another consideration, such as comfort, leisure, career, or beliefs. Indeed, there is a saying: Those who live for longevity alone have not lived.

Government’s argument is that unhealthy lifestyles increase the burden on government’s health infrastructure. Government itself, however, voluntarily took this role in our society upon itself. The Constitution elaborates a right to access to healthcare, but it does not provide that government must provide full healthcare packages to everyone for every conceivable ill. Indeed, if this is truly government’s concern, it should state clearly that persons suffering from smoking-related diseases are expected to fund their own medical care.

4.3 Tobacco does have benefits, but that’s beside the point

Tobacco does have benefits. Much of those benefits are simply *perceived* benefits by smokers, but freedom means people can find their own meaning in life. Tobacco may lead to happiness, less social anxiety, focus, etc.

“But we are protecting their health”, protagonists of these authoritarian measures may say. The response to that claim is, “it is not yours to do”. Just as it is not for government to prohibit restaurants from serving food that may be injurious to people’s health because it is considered fattening, so also is it not for government to deny people the right to suck smoke into their lungs because it may be injurious to their health.

Looking after health is an individual and personal matter. An individual can avoid smoking, eat the right foods, exercise, do everything correctly and be less healthy than a person that does all the wrong things.

4.4 Overburdening law enforcement

Government departments keep producing, and Parliament keeps enacting, new law after new law. All these laws are supposed to be enforced and the police are expected to do the job. From all reports they are unable to contain crimes of violence, let alone worry about people smoking in offices.

Yet there is a distinct possibility that police, faced with a choice of going after a hijacker or catching smokers who are smoking in a “public place” would choose to go after the smokers rather than the hijackers. If they were to choose soft targets they could remain very busy while totally avoiding dangerous criminals. It would be the rational course to follow.

Government departments should therefore not be myopic in their approach, they should think of the wider implications of the legislation they propose, taking into account the most important priorities of the law enforcement agencies and their potential ability to deal with newly-created “soft” crimes.

In the case of tobacco, the legislation is threatening to drive the trade in tobacco products underground, as would definitely happen if tobacco products were to be totally banned. In America when legitimate firms were prevented from dealing in alcohol, the trade was taken over by gangsters, or mobs as they were called. This creates tremendous problems for the police force.

The legislation displays a naïve belief that if the legitimate traders are prevented from advertising and displaying tobacco products, cigarettes will no longer be “pushed” amongst young people. Predictably, what will happen is that a trade will develop in dark alleys, with unsavoury characters offering cigarettes for sale to children, and in the process illegitimate traders will get children hooked on substances that are substantially more harmful than cigarettes. It is all too easy for gangsters to “lace” cigarettes with narcotics in order to achieve their purpose without the children initially being aware of what the gangsters are doing. Making tobacco a legal but “illegitimate” substance has dangers that the Department of Health has obviously not considered.

5. The Constitution and the Rule of Law

5.1 The Constitution

The Constitution contains various provisions, especially in the Bill of Rights, that protect the freedom of South Africans to determine their own destinies. This can be summed up in the notion of freedom of choice, or freedom of enterprise.

The most important provision underlying all of the other provisions is found in section 1 of the Constitution – the Founding Provisions. Section 1(a) provides that South Africa is founded on “[h]uman dignity, the achievement of equality and the advancement of human rights **and freedoms**” (our emphasis). This provision permeates all the provisions of the Bill of Rights by virtue of being a founding value.

Other provisions relevant to freedom of choice include the following:

- Section 7(1) provides that the Bill of Rights “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and **freedom**” (our emphasis). Section 9(2) provides that the right to equality “includes the full and equal enjoyment of **all rights and freedoms**” (our emphasis).
- Section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. According to the Department of Justice and Correctional Services,

this means that “[n]o person should be perceived or treated merely as instruments or objects of the will of others. Every person is entitled to equal concern and to equal respect”.⁴

- Section 12(1)(a) provides that everyone has the right “not to be deprived of freedom arbitrarily or without **just** cause” and section 12(1)(c) guarantees the right of everyone “to be free from all forms of violence from **either public or private sources**” (our emphasis).
- Section 13 prohibits “slavery, servitude or forced labour”, the converse of which will also be true: forced unemployment or labour disassociation.
- Section 14 guarantees the right to privacy, meaning private affairs should not be interfered with or monitored without consent.
- Section 18 provides that “[e]veryone has the right to freedom of association”. This right means that natural or juristic persons may associate or disassociate with whomever they wish and cannot be forced by law or other coercive means to associate or disassociate.
- Section 22 provides that all citizens have “the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”. The language of the provision is clear, in that the *practice*, but not the *choice*, of profession may be *regulated*, but not *prohibited*. To read prohibition into regulation would make the entirety of the provision and the ‘right’ redundant. No provision in the Constitution may be construed as being redundant or inconsequential.
- Section 25 guarantees the right of everyone to be secure in their property unless the property is expropriated for a public purpose or in the public interest with compensation. No expropriation may be arbitrary. Expropriation of property can affect any entitlement of ownership, meaning that regulating away someone’s ability to decide what to do with their property – without the property vesting in someone else – would qualify as expropriation.

Chapter 2 of the Constitution – the Bill of Rights – does not ‘create’ rights, but merely protects pre-existing rights from infringement. Section 7(1) states that the Bill of Rights “enshrines” the rights, not creates them. Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.⁵ South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South Africans ‘lose’ that right. If this were the case, there would be little use in referring to rights as ‘human’ rights, as section 1 and the Preamble of the Constitution do. South Africans are all rights-bearing entities because we are humans with dignity and individuality, not because government has ‘given’ us those rights.

The rights in the Bill of Rights can be limited by operation of section 36, but the basic essence of the right in question must remain. Indeed, if protection for human rights is removed from the Constitution or otherwise perverted through legislative ‘limitation’, South Africa’s constitutional project will be severely undermined in that the highest law will continue to recognise the rights in question, but will not adequately protect them. This is not a situation South Africans would want to find themselves in. By implying that government can extinguish rights simply by enacting legislation dressed in the garb of ‘protecting’ the people while undermining their freedom, the impression is created that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

⁴ http://www.justice.gov.za/brochure/2014_ConstitutionRights.pdf/.

⁵ <https://dictionary.cambridge.org/dictionary/english/enshrine>.

5.2 The Rule of Law

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note for the purposes of this submission.

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

"[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
3. the legal protection of certain basic human rights.

[66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:

'the rule of law excludes arbitrariness and unreasonableness.'

I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law."⁶

The Rule of Law thus:

- Permeates the entire Constitution.
- Prohibits unlimited arbitrary or discretionary powers.
- Requires equality before the law.
- Excludes arbitrariness and unreasonableness.
- Excludes unpredictability.

The Good Law Project's *Principles of Good Law* report largely echoed this, saying:

"The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation."⁷

The report also identifies four threats to the Rule of Law,⁸ the most relevant of which, for purposes of this submission, is the following:

⁶ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.

⁷ Good Law Project. *Principles of Good Law*. (2015). 14.

⁸ Good Law Project 29.

“[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** [...]”

Friedrich August von Hayek wrote:

“The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal.”⁹

What is profound in Von Hayek’s quote is that he points out that *the* Rule of Law is not the same as a rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple ‘rules of law’ on a regular basis – expropriation without compensation would be an example of ‘a’ rule of ‘the’ law. The Rule of Law is a doctrine, which, as the Constitutional Court implied in *Van der Walt*, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government”.¹⁰

Dicey writes “the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”.¹¹ He continues, saying the Rule of Law means “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government”.¹²

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to make a decision “in the public interest”. What is and what is not “in the public interest” is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The “public interest”, however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e. they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement. Unfortunately, the Basic Conditions of Employment Act gives the Minister of Labour the authority to

⁹ Von Hayek FA. *The Constitution of Liberty*. (1960). 206.

¹⁰ Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). 202-203.

¹¹ Dicey 184.

¹² Dicey 198.

make “sectoral determinations” – which includes determining a minimum wage – which is a clear violation of the Rule of Law and the separation of powers.¹³

5.3 The imperative of impact assessments

The most important tenet of the Rule of Law is its prohibition on arbitrariness. Arbitrariness is not only a symptom of unfair and bad governance, but is also very harmful to the economy, as it leads to uncertainty and means people and businesses cannot plan their affairs ahead of time.

The opposite of arbitrariness is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.¹⁴ Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the solutions proposed.¹⁵ It has also been said that a third element, effectiveness, is a part of reasonableness.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which states the principles according to which the public administration must function, provides that transparency “must be fostered by providing the public with timely, accessible and accurate information”, requires that policy or legislative interventions must be supported by demonstrable evidence.

To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be publicly available to satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence, and is therefore irrational and unconstitutional, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional. These studies are known as socio-economic impact assessments (SEIAs).

Without published SEIAs, government is called upon to *judge for itself* whether its *own* policies are reasonable. Such a state of affairs would make the Rule of Law a redundant concept.

For the people to have a say in the decisions that affect their lives, they must know how the decision was arrived at and on what basis, and their participation must be meaningful (in other words, government must engage in good faith) and not merely a façade. Without a SEIA, the public cannot participate in the policy-making and law-making processes as mandated by the Constitution.

In *Principles of Good Law*, the Good Law Project writes:¹⁶

“Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them.”

¹³ Section 51 of the Basic Conditions of Employment Act (75 of 1997).

¹⁴ Hoexter C. *Administrative Law in South Africa*. (2012). 344.

¹⁵ Hoexter 340.

¹⁶ Good Law Project 34.

It goes on to describe what a SEIA would encompass:¹⁷

“2. Socio Economic Impact Assessment (SEIA). Multi-faceted analysis *and quantification* of:

2.1 The purposes of laws – precisely what “mischief” they are addressing;

2.2 Desired consequences;

2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;

2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;

2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;

2.6 Inter-departmental considerations – the extent to which other departments are implicated;

2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity.”

The Department of Planning, Monitoring and Evaluations’ (DPME) SEIA System (SEIAS) guidelines describe the purpose of SEIA as follows:¹⁸

“3. The role of SEIAS

SEIAS aims:

- To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
- To anticipate implementation risks and encourage measures to mitigate them.”

The DPME regards a SEIA as more than a mere cost-benefit analysis. SEIAs, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, “help decision makers to understand and balance” the impact of policy on different groups within society.¹⁹

That regulations or legislation can lead to unintended consequences is acknowledged by government. They could occur because of inefficiency, excessive compliance costs, overestimation of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.²⁰

The SEIA System applies to legislation and regulations, as well as policy proposals.²¹

¹⁷ Good Law Project 35.

¹⁸ Department of Planning, Monitoring and Evaluation. “Socio-Economic Impact Assessment System (SEIAS): Guidelines.” (2015). 4.

¹⁹ DPME 7.

²⁰ DPME 4.

²¹ DPME 8.

6. Part 1: The Tobacco Bill

The FMF objects to the Bill in whole and in part.

Our principal concern is with the principles needed to sustain legislation of this kind: that government has the right and knowledge to determine for free individuals and communities how they must conduct themselves and their lifestyles. The Constitution guarantees for all South Africans an open and free society where the people are able to make their own decisions without a paternalistic regime trying to socially engineer them into predefined behaviour. A constitutional government is meant to be a civil servant that provides the framework in which the people can freely engage, not a parent figure in the household of the nation.

Furthermore, the Constitution has numerous provisions that are being disrespected in the substance and spirit of the tobacco laws and this Bill:

- Section 1(a) of the Constitution states that South Africa is founded on human dignity, the achievement of equality, and the advancement of human rights and freedoms.
- Section 7(1) of the Constitution says the Bill of Rights is a cornerstone of democracy which affirms the democratic values of human dignity, equality and freedom.
- Section 9(3) requires that the State not unfairly discriminate against anyone.
- Section 10 of the Constitution stipulates that everyone has inherent dignity and the right to have their dignity respected and protected.

While purporting to control a substance, the legislation erodes property rights, one of the most important rights of a free society. When a shebeen owner is told that her customers may not smoke on her premises, it is an infringement of her property rights, as is an instruction that she may not display tobacco products in her shebeen, or use a cigarette vending machine to control theft of her cigarette stocks. That shebeen owner will have acquired property rights for the first time after centuries of denial of property rights by the colonial and Apartheid regimes only to have those property rights assaulted as soon as they have been acquired.

What follows are the FMF's objections to specific parts of the Bill.

6.1 No mention of freedom and dignity

Nowhere in the Bill, including the preamble, is mentioned the constitutional imperatives of freedom of choice and human dignity. The Bill, in form, addresses itself only to government's health concerns, without any regard to consumer choice and freedom.

6.2 Billions invested in no-smoking areas wasted

Section 2(1)(a) now makes smoking in so-called "public places" (defined as including private property) unlawful, even in the no-smoking sections that were required by law to be established in restaurants. These sections cost the economy billions. That was all now for naught.

This section should be amended to create a specific exception for smoking sections in restaurants and other hospitality establishments.

6.3 Unjustifiable violation of the sanctity of the home

Section 2 of the Bill is the most draconian part of the proposed legislation, and proposes to regulate where South Africans may and may not smoke. The most troubling provision here is that smoking will

be prohibited in “a private dwelling, if that private dwelling is used for any commercial childcare activity, domestic employment or for schooling or tutoring” (section 2(1)(e)).

This provision will have devastating consequences for the hundreds of thousands if not millions of South Africans who are employed as domestic workers around the country. Most habitual smokers will choose to rather clean their homes themselves or take their children to creches, rather than give up their smoking. In any event, it is highly unlikely that a domestic worker will jeopardise their employment by reporting their employers to government for violating this authoritarian provision.

The provision is furthermore unclear about whether the prohibition only applies while the domestic worker (or the tutees or children being cared for) are present in the dwelling, or whether it applies to that dwelling even when the domestic worker etc. is not present, but will be present. For example, if a domestic worker only works on Mondays, is smoking prohibited only on Mondays, or for the whole week, since the dwelling “is used” for domestic employment? This lack of clarity will cause uncertainty, and an ordinary construction of the legislative language would lead one to conclude that it is an absolute prohibition.

6.4 Unrestrained ministerial discretion

Section 2(2) is deeply problematic from a Rule of Law and legality perspective. It provides that “The Minister may prohibit smoking in any ... such place where the Minister considers it appropriate to prohibit smoking in order to reduce or prevent the public’s exposure to smoking.”

This is an absolute and untethered power on behalf of the Minister of Health, as they will be able to ban smoking anywhere, or everywhere, simply based on whether they “consider it appropriate”. In a constitutional state, such an awesome power cannot pass muster. It makes the rest of section 2 redundant, since the Minister is given the power to pick and choose where to ban smoking, by executive fiat, anyway.

In light of the fact that section 2 already sets out where smoking may and may not take place, this provision should be removed.

6.5 Display bans

Section 3(2) arbitrarily bans the advertisement or promotion of tobacco and electronic delivery system products. Subsection (b) even bans sponsorships by tobacco companies.

Conceivably, if an industry firm developed a cigarette with significantly less tar or nicotine or other dangerous elements, or developed a cigarette that doesn’t lead to second-hand smoking, it will, under this section, not be allowed to advertise it. This means consumers will be unable to easily identify less harmful products to replace the harmful products they are currently using. This provision is bizarre and self-defeating, which will yield detrimental, unintended consequences.

Advertising has a purpose other than attracting people to use tobacco *per se*; it is intended to persuade people who smoke to use another brand. And here the rights of citizens under section 16(1) of the Constitution are being eroded, the right to the “freedom of the press and other media” and “freedom to receive or impart information or ideas”. In respect of information, the focus is always on the prohibitions on advertising by manufacturers and the detrimental effects on them, the effects on citizen smokers is never discussed. Does one not have a constitutional right to information on the various tobacco products on the market? Does the government have the right to deny them information on such products by prohibiting advertising of the products?

Section 3(5)(a) prohibits retailers which sell tobacco or electronic delivery system products from displaying those products at their place of business. This point of sale display ban makes business impossible for vendors in poorer areas which cannot afford 'backrooms' or other premises where the products will be stored until they are requested by consumers.

Furthermore, this provision humiliates consumers. They now have to ask for something to go be collected for them, as if they are doing something to be ashamed of. It is not the place of government to shame citizens into changing their behaviour if that behaviour is harmless. Purchasing tobacco at a storefront is objectively harmless. That some minor harms may hypothetically result from this transaction cannot be used as a justification for such a grave violation of human dignity and freedom.

6.6 Ban on toys and confectionary

Section 3(4)(c) imposes a ban on "the sale or supply of any confectionary, toy or other item that resembles or is intended to represent" tobacco or electronic delivery system products.

Various toys based on television and comic book actors and heroes depict a tobacco product. Wolverine, one of the X-Men, is frequently depicted with a cigar in his mouth, when sold as a toy, for example. Similarly, there are various candies that intentionally resemble tobacco products.

There is no discernible health benefit in the prohibition of toys and candy that resemble tobacco products. Government, instead, is engaging in social engineering, based on the unproven assumption that these toys and candies make smoking seem acceptable to children – an unproven notion. This amounts to an arbitrary infringement of freedom of choice and freedom to choose one's trade in section 22 of the Constitution.

6.7 Ban on vending machines

Section 3(6) bans vending machines which dispense tobacco or electronic delivery system products, even if those machines are located in adults-only areas. This is an arbitrary and disproportionate violation of consumer choice and the freedom to choose one's trade under section 22 of the Constitution, and will clearly lead to job losses.

6.8 Plain packaging violates consumer rights

Section 4 provides for "standardised packaging and labelling".

Plain packaging will lead to a marked decrease in competition in the tobacco industry, since consumers won't be able to distinguish between products from different firms. Tobacco brands which may be less harmful than others will be mostly hidden now, which may have adverse effects on health. Consumers want to be able to identify their preferred brands.

Government is given the unrestrained and therefore unlawful power to prescribe packaging. It is thus likely that government will prescribe packaging to show graphic images of the potential consequences of smoking, as has happened in other jurisdictions. But consumers do not wish to see images of deteriorating lungs. Indeed, if the principle at play here is accepted, why not show pictures of mangled corpses on cars, or pictures of broken legs at skiing resorts in the Drakensburg?

Government should not be in the business of telling private entities how they may and many not brand or market their products. This is outside of government's constitutional mandate to advance the right to access to health.

6.9 Disregarding health

The Bill does not appear to be concerned with health when it prohibits competition between tobacco firms on the healthiness and harmfulness of their products.

Section 4(4) is self-defeating. It prohibits tobacco companies from compete on the basis of the safety of their products. By disallowing these companies to advertise that their products are less harmful than those of their competitors, government is encouraging the companies to throw health considerations to the wind and compete on other considerations. This bizarre provision will clearly yield a devastating unintended consequence.

Since all tobacco branding will now be treated similarly, illegal tobacco that does not comply with regulations will also become far more prevalent.

6.10 Online shopping ban

Section 8(5) bans postal, online or “other electronic medium” shopping for tobacco and electronic delivery system products.

This ban, especially as it relates to electronic delivery systems, is arbitrary, and infringes unjustifiably on freedom of choice. Furthermore, it makes no sense: if government truly wants to get smoking out of public places and wants to ensure relevant products are not liberally sold at stores, why is it banning online shopping?

6.11 Absurd definitions and concepts

The definition of “enclosed” in the Bill is as follows:

“‘enclosed’ in respect of an area, place or space includes any area, place or space –

(a) that has a ceiling or a roof or any other cover that functions, whether temporary or permanently, as a ceiling or a roof; or

(b) that has –

(i) a curved wall and that, if the wall is extended at both ends, is in the shape of a circle; or

(ii) two or more walls or enclosures that function as walls and that, if the walls or enclosures are extended, is in the shape of a square;

Provided that the walls or enclosures may be temporary or permanently and may or may not contain a window or any other opening: Provided further that the area, place or space may or may not have a ceiling or a roof or any other cover that functions, whether temporary or permanently as a ceiling or a roof;”

This definition will only inspire confusion and bewilderment on the part of those it is intended to apply to. It is another example of something small, especially poor, businesses will not be able to comply with, especially considering the fact that the author of this submission, a trained lawyer, is unable to fully appreciate the implications of this definition. This definition must be significantly reworked into a single sentence definition, which accords with an ordinary understanding of what “enclosed” means. In this regard, defining “enclosed” simply as “a place that has a ceiling or a roof or any other cover that functions as a ceiling or a roof” would be sufficient.

Section 2(1)(c) provides that no person may smoke in “any motor vehicle when a child under the age of 18 years is present and there is more than one person present in that vehicle”. This description is similarly bewildering.

The provision makes it appear that smoking will only be banned in vehicles if there is one additional person in the vehicle with the smoker and the child, i.e. three people. Thus, the smoker may smoke in the vehicle with the child if they are the only two people in the car. It might seem obvious that the clause saying “and there is more than one person present” implies two people, including the child, but the prior clause confuses this, as it already assumes the presence of at least one person, being the child. This provision would make far more sense if it simply said “any motor vehicle when a child under the age of 18 years is present”.

6.12 Bill will be completely unenforceable, especially in dense, poor areas

The Bill’s prohibition on point of sale advertising and display will be impossible to comply with by small and micro-enterprises, especially in the townships. The amount of non-compliance with these provisions will likely be universal in such areas.

There will inevitably be selective enforcement, with the police or inspectors choosing to only enforce those provisions in suburban and urban areas where it is easy to access retailers. Where law enforcement does decide to enforce, opportunities for bribery and corruption will come about.

These provisions have been universally condemned by small and micro-enterprises and their civil society representatives, such as the African Cooperative for Hawkers and Informal Business, the Restaurant Association, the eKasi Entrepreneurship Movement, the South African Leisure Tourism & Hospitality Association, the South African Spaza and Tuckshop Association, and the National African Federated Chamber of Commerce and Industry, all together representing (directly and indirectly) tens of millions of South Africans.

7. Part 2: The socio-economic impact assessment

A faulty impact assessment speaks to the rationality of the intervention. We will address the problems in the assessment item by item.

7.1 Lack of neutrality

The socio-economic impact assessment (SEIA) was conducted by the Chief Director of the Health Promotion, Nutrition and Oral Health unit within the Department of Health. It should be clear why this is a problem.

The Department of Health is the sponsor of the Bill, meaning the department has a vested interest in the Bill being adopted into law. If the sponsor of the intervention is responsible for conducting an objective, impartial, and balanced impact study of the intervention, it follows logically that the sponsor will suffer from intense confirmation and selection bias.

Confirmation bias is described as follows:

“Confirmation bias occurs from the direct influence of desire on beliefs. When people would like a certain idea/concept to be true, they end up believing it to be true. They are motivated

by wishful thinking. This error leads the individual to stop gathering information when the evidence gathered so far confirms the views (prejudices) one would like to be true.”²²

Applied to the impact assessment, the drafter would gather only the information and research that confirms their existing beliefs. The Department of Health’s existing belief, obviously, is that smoking is harmful and a scourge in society and must be strictly controlled if not prohibited outright.

Selection bias is a related notion, and is described as follows:

“Statistical error that causes a bias in the sampling portion of an experiment. The error causes one sampling group to be selected more often than other groups included in the experiment. This may produce an inaccurate conclusion if the selection bias is not identified.”²³

Similarly to confirmation bias, applied to the impact assessment, selection bias would make the drafter select only that information, research, and phenomena toward which they have a pre-existing affinity.

Both these biases – which are evident throughout the impact assessment – are a result of the Department of Health’s vested interest in the topic.

Some examples of the drafter displaying their own vest interest in the Bill are:

“The current process of legislative changes recognises that much more can, and should be done to further reduce smoking prevalence rates in South Africa.” (page 2) – The drafter is endorsing the notion of tobacco control and further identifying themselves with the objectives of government without further ado.

“... three options are proposed to address the tobacco control in the country This report focuses on the preferred Option, which is Option 2...” (page 3-4) – Why does the drafter prefer this option (which is conveniently the option chosen by the sponsor of the Bill), and why are none of the other options given any consideration?

“Maintaining the status quo (option 1) will lead to slower progression towards eliminating the harms from tobacco than Options 2 and 3.” (page 4) – The language employed here shows clearly that the drafter assumes, firstly, that tobacco is objectively harmful, and secondly, that a slow progression towards eliminating this harm is less preferable than a faster progression. Neither of these assumptions are elaborated on.

“The longer it takes for the legislation to be implemented, the longer it takes for the anticipated benefits to realise.” (page 4) – The drafter assumes the benefits anticipated by the sponsor of the Bill will, in fact, be realised. But the point of an impact study is to determine whether those benefits will be realised. Here it is simply assumed that they will. A similar train of thought is repeated by the drafter on page 30.

“The government could expect a legal challenge from the tobacco industry”. (page 4) – The language employed here, read with the context, indicates a clear unfriendliness from the drafter toward the tobacco industry. The impact study is not supposed to be on the side of government, but must be neutral.

“Recently Australia (December 2015), United Kingdom (May 2016) and Uruguay (July 2016) have had strong rulings in favour of public health.” (page 4) – The drafter assumes that a ruling against tobacco and the tobacco industry and in favour of government, is a ruling in favour of public health. This

²² <https://www.psychologytoday.com/us/blog/science-choice/201504/what-is-confirmation-bias>

²³ <http://www.businessdictionary.com/definition/selection-bias.html>

language is clearly biased. In fact, if the study was conducted by someone representing the tobacco industry, it might have said that there have been “*strong rulings against enterprise and freedom of choice.*” In the place of “public health”, one might write “paternalistic lifestyle control”.

“These above mentioned trends demonstrate the need to strengthen current government legislation on tobacco control in order to promote and maintain public health...” (page 5) – The drafter clearly identifies themselves with Bill and government policy here.

“Plain/standardized packaging of tobacco products, which includes pictorials/graphics and health warnings will be more effective in making tobacco products less attractive”. (page 6) – The drafter again assumes that a goal of the Bill will be realised, without any further ado. The impact assessment does not study the effectiveness of plain packaging in other regions, does not question whether there may be problems associated with plain packaging, and assumes it is a good thing for tobacco products to be less attractive. Impact assessments should not be making value judgments of this nature, especially not without evidence.

There is therefore a clear conflict of interest in having the department conduct the impact assessment on its own Bill. Instead, an independent third party, without a history of pro- or anti-tobacco lobbying should be responsible for conducting the assessment.

7.2 Lack of balance

Another result of the confirmation and selection biases identified above is that only one side of the tobacco argument is given voice in the impact assessment.

The Free Market Foundation, the Institute of Race Relations, the Centre for Development and Enterprise, Sakeliga, and other groups in civil society that would object in strong terms to an intervention such as the Tobacco Bill, were not consulted by the drafters of the impact assessment. Groups that can be considered to be anti-tobacco, however, were so consulted.

“Comprehensive tobacco control measures as proposed in Option 2 will support the core national priorities namely, (1) social cohesion and security, (2) economic inclusion, (3) economic growth and (4) environmental sustainability.” (page 4) – In addition to the strong, biased language, it is clear that only certain “core national priorities” were chosen (an incident of selection bias), not one of which appears in the section 1 Founding Provisions of the Constitution. South Africa’s national values included in that section – freedom, human rights, and the Rule of Law – are completely ignored in the impact study and in the Bill.

Stating on page 11, the drafter proceeds to list the ‘costs’ and those groups that will ‘lose’ as a result of the Bill, however, does so in an unbalanced manner.

Whereas the drafter did not question the validity of the supposed ‘benefits’ of the Bill in the preceding pages, the drafter attempts to explain away every single cost and doubts whether there will be real costs to the Bill at all. This reflects the drafter’s unfamiliarity with the widespread opposition to the Bill by civil society groups, think tanks, and small businesses. But it also reflects the drafter’s bias in favour of the Bill, by trying to create the façade of a costless government intervention that will only deliver benefits.

The most troubling instance of a lack of balance in the SEIA appears on page 13 of the assessment, where the drafter admits that “We did not speak to the forecourt retailers, despite a serious attempt to contact them, and we did not have contact with representatives of small retail stores or the informal retail sector” about the potential consequences of the point of sale ban. Instead, only large retailers

were consulted. This lack of balance is not only fatal to the legitimacy of the impact assessment, but also to that of the Bill.

From page 17 of the assessment, the drafter claims “various stakeholders” were consulted, including representatives from affected industries. This amounted to only eleven participants, out of thirteen contacted. The FMF, however, despite having been South Africa’s leading opponent of tobacco regulation over the previous four decades, was not consulted. This Bill legislates for over 55 million people, and a mere eleven entities were consulted, which did not include, apparently, any civil society groups that oppose the Bill. This is unacceptable, and, like the previous point, must prove fatal to the legitimacy of the assessment and to that of the Bill.

7.3 Intellectual dishonesty

“The public health community remains unsure of a clear role of ENDS/ENNDS in the area of tobacco control, but is agreeable on the need for regulation.” (page 3) – No source cited.

The assessment identifies the fact that there is allowance for smoking in 25% of indoor areas and vending machines are allowed as a “too cause” of the “proliferation in non-communicable diseases” in South Africa. No source is cited for this patently ridiculous claim. (page 5)

That assessment says that because “brand logos and colours” are part of tobacco product packaging, the public and the youth are “therefore” attracted to those products. It goes on to say that tobacco users are “misled” into thinking the products are “less harmful”, because of the colours in which the product is packaged. This condescending notion, which assumes South Africans lack agency and are attracted to colourful products like moths to light regardless of danger, has no cited sources. This assumption makes a mockery of consumer freedom and human dignity. (page 5-6)

The assessment identifies the fact that South Africa has not banned the display, advertisement and marketing of tobacco products at retail and wholesale points of sale as a “root cause” of South Africa’s smoking problems, again, without any evidence cited. In the same item, the assessment assumes that because tobacco products are advertised at the point of sale, tobacco use increases. This is asserted without any cited evidence. (page 6)

The assessment claims that “ENDS/ENNDS use may act as a potential ‘gateway’ for young people and children to initiate [smoking tobacco]” and that it “may” also “lead to regular tobacco smoking”. No evidence is cited for this speculation, and the speculation is in the “problem” column for which the “root cause” is assumed that ENDS/ENNDS “encourages” smoking, the “free sale of products” and the “indiscriminate use of devices in public”. These bizarre declarations make no logical sense. Why is the fact that electronic delivery systems “may” cause smoking considered to be a problem? And why are “smoking behaviour”, “free sale of products” and “indiscriminate use of devices in public places” seen as root causes of this “problem”? (page 6-7)

The “public” is identified as a beneficiary of the Bill. The assessment also singles out the “poorest of the poor, youth and women” without any elaboration on why this is the case. In both cases, benefit is assumed without any evidence. Furthermore, the freedom of the public to make their own lifestyle choices is not mentioned. The Bill’s likely disastrous impact on domestic workers (almost all being poor women) is not mentioned here nor anywhere else in the assessment. (page 9)

“Spending money on tobacco products implies a significant opportunity cost for individual households.... Money spent on tobacco needs to be taken from somewhere else.” (page 9) – This statement betrays a fundamental misunderstanding of economics. Spending money on anything, is an opportunity cost for everything else. For instance, paying R2 value-added tax on a product is R2 the

household could have spent elsewhere or saved. Paying R20 for a toy for a child is R20 that could have been spent otherwise. There are thus two problematic assumptions underlying this statement. Firstly, the drafter is assuming that if the Bill passes, people will stop smoking or will use this money in a more productive way. This is not necessarily the case. It is likely that this money will be spent on other recreational avenues which attain the same ends as smoking, such as eating, or consuming alcohol. Secondly, it assumes that people do not know how to spend their own money, and that government knows better. Indeed, in any future intervention, government can simply say “this money can be spent better” and pass a law prohibiting some or other behaviour. This is unacceptable in a constitutional democracy.

“Tobacco imposes a significant burden on the [public] health care system.... Reducing tobacco prevalence implies that the burden on the public health care system will be reduced.” (page 10) – The drafter omits to mention in relation to this statement that government has assumed this burden for itself. The Constitution does not oblige government to be involved in healthcare, and it certainly does not oblige government to provide care for smoking-related illnesses. If this were truly a cause for concern, government could easily shed its public healthcare burden to the private sector, and fund healthcare vouchers instead, or it could specifically exempt smoking-related illnesses from public healthcare, meaning those who choose to smoke will alone be responsible for their own health. This statement also errantly assumes that the Bill will be successful in reducing tobacco prevalence; an assumption that the impact assessment does not prove or attempt to justify anywhere.

From page 11 onward where the groups that will incur the cost or lose in terms of the Bill are listed, consumers are at no point mentioned. The fact that consumers will lose freedom of choice does not seem to be of importance to the drafter of the impact assessment, further reinforcing the impression that the value of freedom, as contained in section 1 of the Constitution, is not a priority for government in its pursuit of policy of this nature.

The assessment thus claims “it seems unlikely that the tobacco industry would have to incur any implementation costs associated with” point of sale display bans, smoke-free policies, banning of vending machines, and ENDS/ENNDS regulation. This is an absurd assertion by its nature. Government’s intervention in the industry will cause price and demand distortions, which inevitably entails a cost on behalf of the industry. A ban on vending machines is a massive cost for those parts of the industry that depend on vending machines. The assessment further absurdly claims that the tobacco industry will save money because companies will no longer need to pay retailers to advertise their products at the point of sale. This is problematic thinking. The industry pays for advertisements in the hope that the increased marketing will lead to increased sales and thus increased revenue. By no longer having the option to advertise at the point of sale, this marketing opportunity falls away, which will likely yield less revenue. Then, as if the assessment’s previous claims were not made, it admits that the aim of the Bill is to reduce sales; ergo, there will be a heavy cost associated with proposed regulations.

On page 12 the assessment claims that “the hospitality sector as a whole is unlikely to be negatively affected”, a baseless claim.

The assessment further claims that “The fact that establishments have incurred costs in the past to create smoking sections is irrelevant from an economic perspective”, again betraying a fundamental misunderstanding of economics by the drafter. Before smoking areas were required by law, establishments did not have smoking sections. When smoking sections were then compelled by law, the establishments incurred costs to comply with that law. Now smoking will be banned completely in those establishments, meaning the costs the establishments previously incurred to construct

smoking sections was a waste of money – money the establishments could have used for other purposes rather than complying with what has now been shown to be vexatious law.

The assessment further claims that on the testimony of a single public health advocate – presumably without any other testimony to counter it – “going smoke-free may yield a financial benefit in the cleaning costs of the smoking section would be reduced and because it may result in a higher overall occupancy rate, especially if the smoking section is currently underutilised”. This, again, makes no sense. Firstly, cleaning costs would not change. The removing and emptying of ashtrays on otherwise food and drink-dirtied tables does not cost establishments any more or less than not removing or emptying ashtrays. The section, whether used for smoking customers or not, still needs to be cleaned. Secondly, there is no reason to believe that smoking sections are currently any more underutilised than non-smoking sections. It is likely, instead, that when establishments are forced to be completely smoke-free, there will be a *lower* overall occupancy rate, because smokers will rather stay home where they are allowed to exercise their personal freedom undisturbed.²⁴

On page 13 the assessment claims a ban on tobacco vending machines won’t have any impact on tobacco vending machine manufacturers and importers, which is an inherently contradictory claim. It is akin to saying that a ban on drinking Coca-Cola in South Africa will have no impact on Coca-Cola’s market in this country. It is absurd to think that by banning someone’s only business, there will be “no impact” on their business. The assessment then goes on, on page 14, to say “the ban on vending machines will imply the death knell for vending companies that vend only cigarettes and will hurt the more diversified vending companies” and that there will be job losses. Clearly, the earlier claim of “no impact” was false. The assessment goes on to say that it “seems” that vending companies have been expecting legislation like the Bill for some time, and that their capital stock has “probably” aged beyond any further productive use. These statements are not backed up by any cited evidence.

On page 14 the assessment claims that ENDS/ENNDS devices will only be regulated because they are currently being sold and made in a “legislative vacuum”. This is legislating for legislating’s own sake, and the assessment does not question it, despite the drafter including the very argument that should defeat any notion of regulation: that vaping devices are part of the solution, rather than part of the problem. The drafter then admits that these portions of the Bill “will significantly reduce the growth in the ENDS/ENNDS market” and that the slowdown in sales “will have detrimental consequences for the manufacturers, importers, wholesalers and retailers of these produces”. There is no evidence or reason to believe, on a reading of the Bill or the impact study, that these devices should be regulated. Indeed, the evidence points to a preference for non-regulation.

On page 26 of the SEIA, the drafter had to explain how the Bill minimises implementation and compliance costs. In each succeeding item, the drafter claims that “clear and simple regulations” will be produced out of the Bill. This has not been the FMF’s experience. The Bill itself is vaguely and ambiguously drafted, and there is no reason to suppose – especially if one is an apparently objective and impartial assessor – that the regulations would be any different. This unjustified trust in government is another indication of the SEIA lacking balance as well as intellectual honesty.

On page 27 the assessment claims that there will be increased economic growth in South Africa, because of increased productivity from people who are going to give up smoking and thus, apparently, spend more money on education. This is a good manifestation of the saying “grasping at straws”. There is no reason to believe – nor is any evidence cited – that people intend to spend more money

²⁴ Provided, of course, they terminate the employment of their domestic worker to comply with section 2(1)(e) of the Bill. The Department of Health is tempting fate by assuming people will choose to retain domestic services over their smoking habits.

on education or any other service government deems “good”. It might be that they spend more money on alcohol or junk food. It is intellectually dishonest to list this as a mitigation of the risks posed by the Bill.

8. Conclusion

Some people may be puzzled by reference to the draft Control of Tobacco Products and Electronic Delivery Systems Bill as a serious attack on the freedoms of South Africans.

Unaware people who hate smoking will happily support the legislation, including its most draconian provisions. And they will maintain this stance until the government decides, once it has established a precedent using the easy target of tobacco, that their own habit or addiction, whatever it may be, should be banned in the interests of their health. Only then will they understand that if you wish to retain your own liberty, you have to defend the liberty of your worst enemy.

Non-smokers should reconsider their support of the persecution of tobacco users, vapers, and their suppliers. In giving their support they may very well be jeopardising their own future freedom or that of their children. And Members of Parliament, who should be protectors of freedom and the Constitution, should think carefully before passing this legislation into law.

The Bill, we have shown, is rife with problems. It assigns too great discretionary powers to executive functionaries, which is inconsistent with the Rule of Law, it infringes unjustifiably on consumer freedom, it will lead to increased unemployment and reduced economic growth, and the assumptions underlying it are false. These assumptions, presumably based on the socio-economic impact assessment done by the same government department which is sponsoring the Bill, are more often than not expressed without evidence. The assessment itself is replete with intellectual dishonesty, bias, and a clear conflict of interest.

The Bill’s foundations and premises are flawed, which must prove fatal. The Free Market Foundation strongly encourages the Bill to be withdrawn.

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