

**Submission to the Select Committee on
Personal Choice and Community Safety**

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Preliminary considerations on the control of behaviour by government

The question of the optimal level of control of individual behaviour by society is one of long standing. Societies benefit from cooperative behaviour by individuals when this does not injure others in the society. Systems of collective control of behaviour have evolved in all societies, whether as impromptu alliances of individuals or formalised agencies to oppose harmful and malicious behaviour. Beyond this, the recruitment of the formalised agencies for the control of behaviour for the benefit of the government rather than the people is and has been clearly apparent. This submission is founded on the notion that a great strength of humanity is its diversity and the suppression of that diversity beyond necessity is to be avoided.

A general principle in democratic societies is that laws must be approved by the people, not simply imposed upon them. Laws are typically justified by their effectiveness in reducing the loss of property, health and life. Obviously these harms cannot be eliminated given the human condition, but minimising behaviour that directly and seriously harms another person for the benefit of the actor is almost universally accepted. Suppressing behaviour that may harm the actor is more contentious. The justification that socialised health care makes any harm to the actor an externality that harms society in general is fraught with difficulty. In practice, such harms are only punished as a possibility and rarely or never in the occurrence. That is, only individuals who are innocent in the spirit of *habeus corpus* are punished. I will argue that only if the individual's behaviour is highly likely to cause a substantial social harm can its suppression be justified.

Take as an example an individual who wishes to climb a mountain. While this may carry a substantial risk of a serious fall, the probability of such a fall is largely dependent upon the skill of the mountaineer. In these situations, some form of licencing might be entertained, in which only those who have demonstrated a specified level of skill are allowed to pursue the sport. In contrast, scaling a prominence in a crowded city may bring not only the externality of rescue and subsidised medical treatment, but also the direct injury of a bystander. Thus blanket suppression of the latter behaviour is more likely to be approved by society. In addition, the actual method of suppression must demonstrate that it strongly reduces both the performance of the behaviour and the stated negative consequences.

Finally, it is necessary to note that age-dependent restrictions on behaviour interact with individual choice but will not be considered in this submission.

Therefore the behaviours outlined in the terms of reference will be judged by what reduction in actual harm may arise from their suppression as well as what benefits may be lost due to that suppression.

Experience establishing standing in the inquiry

I am a psychologist with thirty years of experience in research in the drug and alcohol, health psychology and forensic fields. I have worked at research centres and the NSW Ombudsman's Office and I am currently employed at the Road and Transport Safety Research Centre at the University of New South Wales. My work has included statistical analyses of data relevant to this inquiry and publication of the results. I am prepared to appear as a witness if necessary.

1. Risk-reduction products related to tobacco smoking

Nicotine, a natural chemical produced by many plants to deter herbivory, also acts strongly on some acetylcholinergic receptors in humans. Its reduction of sympathetic activation (stress) without sedation is perceived as beneficial by many users. It seems that this perception underlies the addictiveness of smoking.

Smoking, the intentional inhalation of smouldering material, is a considerable burden on health, associated with reduced function of the lungs, cardiovascular disease and cancer. While nicotine is not innocuous, it is generally agreed that its potential to cause the diseases associated with smoking is minimal or non-existent.

By far the most effective intervention to cease tobacco smoking is some form of nicotine replacement therapy. The inhalation of nicotine in some form is preferred by many smokers as it produces an effect that is rapid, predictable and controllable by the user. A number of nicotine inhaler products are currently available and widely used. The e-cigarette is functionally equivalent to these.

This part of the inquiry concerns an individual choice that is already legal. The question is whether e-cigarettes should be allowed the same status as nicotine inhalers that are marketed as pharmaceutical products. This question should be answered by the current laws regarding fitness for use of commercial products. If nicotine inhalers are to be allowed, there should be no restriction upon their supply or use apart from the specification that they perform the function advertised. All of the negative consequences put forward as objections to e-cigarettes can be obtained with currently available nicotine inhalers. The nicotine capsules themselves are no more or less dangerous to children than many household chemicals. As in similar situations, parental vigilance and caution are the appropriate responses rather than capricious regulation.

The use of e-cigarettes may well be a public health benefit insofar as it reduces the prevalence of smoking. It is easy to suspect that taxation is involved in this. The government collects large amounts of tax on tobacco products and justifies this as harm reduction and offsetting the public health burden due to smoking. It would be quite difficult to argue for similar levels of taxation on a product with little or no harm to the user and a potential public health benefit.

2. Outdoor recreation

As stated above, many activities cause no direct harm to anyone but the individual pursuing those activities. Considering first the adverse outcomes to the individual in an activity like bicycling, crashes occur at the rate of about one in one hundred thousand kilometres of riding (Lusk, et al., 2011) or episodes of exposure (Chieng, Lai & Woodward, 2017). Common activities such as playing rugby or skiing are over 500 and 50 times more likely to lead to injury on a per-exposure basis. Even DIY home repairs are more dangerous (Chieng, Lai & Woodward, 2017). Thus bicycling does not represent a substantial danger to the average cyclist. Moreover, the danger to others is very low in the case of bicycling. Yet the supposed public health burden of bicyclists has resulted in more legislative restrictions than, say, rugby. We might ask why mandatory helmets for bicyclists have been introduced when this activity is a relatively minor contributor to public health costs and may indeed be a reduction in those costs when the health benefits of bicycling are acknowledged (de Hartog et al., 2010).

Although a recent survey found that almost one third of riders felt that helmets were a disincentive to riding (Bicycle Network, 2017), the response has often been that the mandatory helmet law is a necessary public health measure. In fact, a comprehensive study of the effect of the introduction of the law in NSW found that the reduction in fatalities post-law could be explained by reduction in bicycling, improvements in road safety and the availability and use of off-road cycleways (Lemon, 2018). So far, complaints about mandatory helmets in NSW have resulted in the fines being increased.

3. Any other measures introduced to restrict personal choice

There are other restrictions on personal choice that may seem capricious. For instance, it is a requirement to wear a life jacket in NSW if a single person is using a craft less than 4.8 metres in length, even if the body of water is sufficiently shallow that the person can stand up in the water without any risk of drowning. This is to some extent due to the inflexibility of a legislative regulation on behaviour. We use the terms sensitivity and specificity to quantify how good a method is at identifying when a particular event or condition has occurred and how good it is at rejecting events or conditions that do not meet the criteria. The life jacket law may be quite sensitive, but lack specificity in terms of the risk of drowning. Legislative restrictions typically cite adverse public health outcomes for justification, but are often defined in ways that ignore those outcomes.

It is well known that experience is perhaps the best method for learning. Developmental psychology tells us that children usually progress from activities in which negative outcomes are not severe, applying the knowledge gained to more dangerous activities. Such knowledge transfers between activities, for there is evidence that bicycle riders recognise hazards in driving more quickly than non-cyclists (Beanland & Hansen, 2017).

Potential negative effects on the individual

Concentrating on the relatively uncommon salient events such as injuries may obscure the cumulative benefits of individuals making their own choices and thus refining their ability to deal with the ubiquitous risks of life.

This viewpoint is presented in the Self-Determination Theory of Ryan and Deci (2010). The authors and their colleagues have identified three “needs” that underlie the motivations to achieve autonomy, competence and relatedness.

To an individual, the sense of autonomy is hedonically positive and a valued part of the image they wish to project to others. A person's ability to avoid the negative outcomes associated with certain behaviours that are chosen is viewed positively, whether as luck, acquired skill or native ability. Successful negotiation of risks (competence) clearly brings a variety of rewards such as admiration and mutual aid (relatedness).

As restrictions on individual behavior have accumulated, there has been a proliferation of risk fads. Activities ranging from the uncomfortable but usually innocuous to those with a substantial probability of injury or death are promoted as “challenges” (e.g. Ramowski et al., 2010). Whether these two phenomena are connected is uncertain, but it has resulted in a move away from the individual assessing and managing the risks that accompany daily living toward pursuing risks that serve only as indicators of fearlessness or foolhardiness rather than building competence.

A second possible effect of frustrating autonomy is a loss of personal responsibility. Kupferberg (2017) writes of the psychological effect upon East Germans of decades of having decisions made for them. Upon reunification, those who were not members of the political elite found themselves struggling to cope with making choices that were routine for those in West Germany. As they were accustomed to following rules, they found it difficult to make their own. In a sense, they had dissociated from this aspect of their lives as it was less stressful and probably safer than dissent. A prime candidate for this effect in Australian society is the behaviour of pedestrians whose concentration is fixed on their mobile phones (Lennon, Oviedo-Trespalacios & Matthews, 2017). By assuming that they need only follow the rules by tracking other pedestrians, they adopt a sort of collective decision making. Given the ubiquity of mobile phones, it is not a rare event that there is no lead sheep in a group of pedestrians.

It is often said that the best regulation is self-regulation. When a person has established and refined their own rules for behaviour, he or she does not need to rely on surveillance or agents of enforcement. To the extent that self-regulation is eroded by standardised rules imposed upon the population to control minor risks with uncertain effectiveness, a valuable resource is diminished.

Potential negative effects upon society and the government

The benefits to society of diversity of thought and action are often stated and observed in Australia. In contrast, societies that attempt to homogenise the thoughts and actions of their people tend to drift into xenophobia and seek to prosper by conquest or subjugation of other societies. It is easy to point to examples of this, where ethnic superiority is accepted and promoted as an unquestionable rationale for collective action. Assertions of religious and political superiority are just as common and divisive.

The argument for strict limitations on the power of government to prescribe the behaviour of its citizens rests not only on theory, but also on observation. If the polities of the world are arranged from those honouring democracy to those in which the alliance of an ethnic, political or religious elite and the police and armed forces exert the greatest control over their citizens, it is clear that the highest priority of the police and armed forces in the extreme is not to suppress crime, but dissent. Government aims to protect itself, not the people.

This is not an aberration, for those who control an institution are likely to use its powers for the good of that institution, if not directly for their own benefit. This applies to any sort of institution and emerges in the private domain as often as the public. We routinely hear calls for restrictions on the powers of private corporations, yet public institutions are as vulnerable to the misuse of power. The wish to oppose crime as the taking of resources, health and life from others for the benefit of the criminal is near universal and forms the foundation of our systems of justice. Yet at the extremes of social control discussed above, crimes are defined in terms of their danger to the welfare of the government, not the welfare of the people.

I argue that the actions of government to control the behaviour of individuals should be limited to instances in which highly probable and substantial direct harm to others is the effect. Beyond this, the express consent of the people should be sought. It is clear that there is no check on the tendency of government to regulate the behaviour of the people more minutely apart from the electoral damage caused by a very unpopular choice. As mentioned earlier, activities much more dangerous than bicycle riding seem to be left alone because the benefit for the government would be small and the negative reaction of the electorate large. If the people wish to approve the punishment of behaviour that may indirectly harm others they may do so. Power, as many have pointed out, is a dangerous thing in the hands of humankind, and the more concentrated, the greater the potential for misuse. The two examples I have used in the initial sections illustrate how a government may extend its power to control behaviour for its own benefit whether that benefit is to maintain revenue, increase its workforce, or enhance its electoral prospects by manipulating its attractiveness to interest groups. These actions should be opposed not only in particular instances, but as a general principle.

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