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The human rights implications of smoking bans in closed environments: What Australia may learn from the international experience

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ABSTRACT

There is a high prevalence of tobacco smoking amongst the populations of closed environments; particularly prisons and psychiatric settings. There are increasing attempts to ban smoking in these environments, which has implications (positive and negative) for the protection of human rights of the people detained and staff. Aspects of the culture of such environments make it challenging to reduce smoking prevalence. The article focuses on what Australia may learn from the legal decisions from jurisdictions that have more experience with the regulation of smoking in closed environments (the UK, New Zealand, USA and Canada). The analysis of the case law from these jurisdictions reveals that the courts are willing to protect non-smokers exposed to second-hand smoking in certain circumstances, but human rights claims brought by smokers denied the ability to smoke are less likely to succeed. Recommendations are made to ensure that smoking bans are implemented in a rights-respecting manner.

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1. Introduction

The dangers presented by cigarette smoking to both the smoker and those exposed to second-hand smoke are well documented (the risks are outlined in Part 2). There are increasing levels of regulation of smoking in society that has led to there being numerous places where smoking is not allowed. These include bars, restaurants, beaches in some jurisdictions and public transport. There are also mechanisms in place to discourage smoking, such as, high levels of taxation on cigarettes, mass media education campaigns, age restrictions on the purchase of cigarettes, health warnings on packaging and, more recently, plain packaging.

It is unsurprising, therefore, that the regulation of smoking has extended to closed environments – that is, places where people are required to live for a potentially lengthy period of time. However, it is the fact that people live in these environments for 24 h per day seven days per week that makes regulation, particularly outright bans, of smoking somewhat problematic. No government has extended a smoking ban to private residences.² Yet prohibiting smoking in a prison cell or hospital room, when people have no control over when they come or go, is akin to a ban in private residences. The impact in

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¹ Applying Human Rights in Closed Environments: A Strategic Framework for Compliance Australian Research Council Linkage project.

² Although there are some private spaces where smoking is regulated in certain circumstances, such as cars with children in them. See, for example, the *Smoking in Cars with Children (Prohibition) Act 2011* (ACT).

Table 1
Smoking bans in closed environments.

Country	Forensic psychiatric institutions	Prisons
Australia	Some bans in place, but smoking is not consistently banned. For example, in the state of NSW most have a smoke-free policy (Allan, 2013: 204), but in Western Australia a ban was reportedly imposed and then reversed (Sullivan, 2014: 28).	Banned in the Northern Territory from 1 July 2013; Banned in Queensland from 5 May 2014; Banned in two Tasmanian prisons from 1 February 2015; Banned in Victorian prisons from 1 July 2015 and in NSW prisons from 10 August 2015.
United States of America	Psychiatric inpatient units exempt from hospital ban imposed in 1992, however by 2011, 79% of facilities had implemented voluntary complete smoking bans (Brown-Johnson et al., 2014: 204–05).	Banned in Federal prisons in 2004 and by 2007, 87% of prisons and jails had smoke-free policies (Kennedy et al., 2015).
Canada	Began imposing bans from 2005 (Grant et al., 2014: 1733)	Banned completely in Federal prisons in 2006; Banned completely in most provincial prisons, with Quebec being the remaining province with a partial ban.
United Kingdom	Banned from July 2008 (Ratschen et al., 2009a,b: 131)	Smoking has been prohibited in the prison on the Isle of Man since March 2008 and in Guernsey prison since 1 January 2013. The High Court has held that prisons were not exempt from the <i>Health Act 2006</i> that banned smoking in public places. The decision (<i>The Queen (on the application of Black) and Secretary of State for Justice [2015]</i>) has not come into effect as the Secretary of Justice has been given an opportunity to appeal.
New Zealand	Up to the 21 District Health Boards to implement. The Waitemata District Health Board introduced a ban in 2009 (this was subject to a legal challenge discussed in Part 4).	Complete ban (indoors and outdoors) commenced 1 July 2011.

closed environments would be even more severe than a smoking ban applied to private residences because even if smoking were banned in private residences in the community, there would still presumably be places where people could smoke and they would have a choice over when to go to those places. People in closed environments subject to a total smoking ban have no such alternative or choice – they cannot leave their place of residence.

Of course there are different considerations in closed environments compared to community-based regulation. Second-hand smoke in closed environments presents a risk to others in that environment – both other detainees and staff. The authorities operating these environments have a duty to protect the health of these individuals. For this, and other reasons, the United Kingdom, New Zealand, the United States of America and Canada have imposed smoking bans in some closed environments (detailed in Table 1 in Part 3).

This article focuses on the implementation of bans in two specific closed environments: prisons and closed mental health facilities. There are particular features of the culture of these environments that make bans difficult to enforce. Following a consideration of these challenges, the article goes on to consider the implications of bans from a human rights perspective.

There are a number of international human rights that smoking bans impact upon. Smoking bans impact on the right of smokers to privacy and to be free from discrimination,³ among other rights (which will be considered in detail in Part 4). These are all rights that people in closed environments retain, despite being deprived of their liberty.⁴ However, non-smokers who work and are detained in such environments also have rights that may be breached by exposure to second-hand smoke.

It is not unusual for there to be competing human rights considerations and they arise in a range of contexts. For example, one person's right to freedom of speech may impact on another person's right to be free from discrimination. The best way to get a clear picture about the operation of human rights in these settings is to examine the legal decisions considering claims relying on these rights. There are currently no Australia decisions. However, Australia – as a jurisdiction that has more recently begun imposing smoking bans in closed environments – may learn much from cases decided in jurisdictions with similar human rights obligations and greater experience with bans.

³ The right to privacy is contained in art 17 of the *International Covenant on Civil and Political Rights* and the entitlement to be free from discrimination is found in art 26 of the same Covenant: *International Covenant on Civil and Political Rights* ('ICCPR'), art 9; opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The application of the ICCPR domestically in Australia will be detailed in Part 4.

⁴ In relation to prisons, this is confirmed in international law by Principle 5 of the United Nations Basic Principles for the Treatment of Prisoners (1990), which stipulates: 'Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants'.

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