

Civil Liberties: Up In Smoke

Simon Davies

Privacy International

Foreword by Joe Jackson



**PRIVACY
INTERNATIONAL**

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About Privacy International

For over twenty years Privacy International (PI) has vigorously defended the right to privacy. The organization has campaigned across the world to protect people against intrusion by governments and corporations that seek to erode this fragile right. It has worked directly in more than fifty countries and alongside dozens of colleague organizations to raise awareness of a vast spectrum of privacy issues.

The author, Simon Davies, is Privacy International's founder and director. He is also a Visiting Senior Fellow in the London School of Economics.

Foreword by Joe Jackson

I'm a lucky smoker. I don't mean because I'm still alive. After all, there are millions of 70 and 80-year-olds still alive, smoking much more than I do.

I don't mean, either, because I'm getting away with murder. God knows how many people have been subjected to my 'passive smoke', but there are well over a billion smokers in the world and not one of them has been prosecuted for killing someone with 'secondhand' smoke.

No, what I mean is that I'm comfortably off, self-employed and relatively free. I haven't been refused a job or sacked for smoking in my own free time. I haven't been denied insurance or refused a tenancy because I smoke. I haven't been forbidden to adopt a child, denied medical care, or seen my business ruined by smoking bans. And I haven't personally been spat at or punched for smoking, although I know people who have.

The sort of thing I have experienced is more along the lines of being invited to a loft party in San Francisco, where booze, marijuana and cocaine flowed freely. When I asked, however, if I could smoke a cigarette, the reaction was as though I'd asked for a pint of warm human blood. Finally our hostess, with a pained expression, said she supposed it would be OK if I did it alone by an open window in a little room at the end of the corridor. Still, many California residents are now forbidden from smoking in their own homes, so - again - I was lucky.

Or consider the time I met up with an old friend in Brisbane, Australia, only to find that we couldn't smoke and drink anywhere in the city, even outside. A few bars have 'smoking areas', about 20 feet away from the other patrons, but you are not allowed to take your drink there with you. But I had a hotel room with a balcony. I would have been fined \$250 for smoking in the room, and the evening was chilly, but my friend and I were able to sit

outside with a bottle of vodka and smoke. Even this was not allowed, but we got away with it. You see how lucky I am? Life for me, as a smoker, is merely very annoying, as opposed to sheer hell.

Such sarcastic anger is often wasted on nonsmokers. “What’s the big deal?” they say. Well, the big deal isn’t so much smoking as being treated like dirt and forbidden to enjoy a legal pleasure on private property. And yes, pubs and clubs are private property.

Imagine that for many years you’ve taken your dog to the pub and enjoyed a glass of whisky. Suddenly the dog is illegal, because someone might be allergic to it. Then the whisky is illegal, because the government says spirits are more likely to lead to alcoholism, so you can only have beer – in a plastic glass (which can’t be used as a weapon).

But you can’t have more than two pints because of government targets based on government-defined units of alcohol, and if anyone serves you a third pint it will be captured on CCTV and the pub fined or closed down – if, that is, it hasn’t closed already because half the customers have left in disgust.

So let’s say you leave in disgust and stop by your local fish and chip shop where you are, by decree of the Department of Health, refused salt and vinegar. And, by the way, all these rules apply everywhere: no exceptions, no choice.

So what’s the big deal? You can still have the fish and the chips. You can still have two pints. What are you, a filthy boozier? A fat pig?

I’m being sarcastic again, trying to show how smokers feel. But this kind of fantasy increasingly becomes fact. Drinkers and ‘wrong eaters’ are next in line. It’s already happening. The antismokers are just the vanguard of a movement to extend the power of government into every

corner of our lives, with the justification of something no-one can be against: 'health'.

Health authorities and lobby groups, lavishly funded by governments and pharmaceutical companies, have accumulated disproportionate power. All sense of proportion has been lost, too, in their exaggeration of health risks and their pursuit of dubious 'targets' regardless of any damage they do along the way.

They spread fear and intolerance on the basis of the most atrocious junk science, yet are rarely challenged by mainstream journalists and politicians. The worst example of this is the myth that 'secondhand smoke kills', which does not stand up to the slightest scrutiny, but which certainly gives people an officially-approved license to bully and hate.

Antismokers have attacked freedom, choice, civil rights, property rights, business, social life and culture, and played a pioneering role in a major expansion of government power into private life.

These are some of the things that this much-needed report by Privacy International, a leading advocate of personal privacy, seeks to address. Please read it, because they are things that affect everyone. As smokers have been saying for years, we really are standing on a very slippery slope.

Joe Jackson
Musician and writer
June 2011

Executive summary

A trend has emerged internationally which is leading to outright discrimination and persecution of smokers. Legislation enacted for the protection of public health is being exploited to create a range of intrusions that were never intended even by the most ardent supporters of tobacco regulation.

Encroachment into the home and family life of smokers has in some instances become blatant and intrusive, with local authorities, health bodies and housing associations adopting policy measures that restrict the right of people to act freely in their own home and vehicle.

The extent of surveillance of smokers by authorities has sharply increased with the use of tracking and surveillance equipment to monitor the activities and movements of smokers.

Employers are routinely and unfairly discriminating against staff who smoke, and are engaging tactics that are based on harassment and intimidation.

Evidence-based policy that nurtures fairness and equality has been sacrificed in many aspects of tobacco policy. Tolerance is being replaced by a zeal for recrimination.

Smokers increasingly face discrimination and persecution, even when their actions are calculated to create the minimum impact on the lives of other people.

Introduction

This paper has been prepared by a team led by Simon Davies of Privacy International at the request of Forest, the UK smokers' rights group. Forest has also contributed to the cost of the research, for which we are grateful.

The research does not address the health aspects of tobacco smoking, nor does it 'take sides' on what has become a controversial aspect of public policy management. Instead the paper focuses on the privacy and civil liberties implications arising from the regulation of tobacco use globally.

The publication of the report is timely. Although tobacco regulation in the modern era is relatively recent, enough time has elapsed to determine some key trends and implications. One of those trends is the surveillance and control of tobacco smokers, with all the consequent risks to privacy and rights. The almost unrestricted use of drug testing kits for nicotine, routine tracking of smokers by way of public camera networks, infiltration of social network profiles, banning images of smoking in films and establishing whistleblower and reporting hotlines are signs that a foundation has been established to institutionalise smokers as low grade criminals.

Whatever specific position is taken on tobacco regulation (or indeed any other issue), an evidence-based approach is crucial when assessing the effect of public policy. Privacy and rights advocates frequently apply neutral analysis when dealing with laws relating to national security, counter-terrorism, police powers and reforms to the criminal justice system.¹ This doesn't mean that those analysing the measures are opposed to the aims of such reforms. On the contrary, it is often the case that an evidence-based audit of such powers can improve both the effectiveness and public trust in those objectives. The same applies in the realm of tobacco regulation.

The health risks associated with smoking are accepted by the authors of this report and by the supporting organisation.² We also acknowledge that governments and other authorities have a role to play educating people, children especially, about those risks. However several centuries of substance regulation show that careless regulation can create severe consequences in terms of the impact on individuals. In establishing regulation, governments must strive to avoid an unintended own goal that invites negative and damaging consequences. We have sought in this paper to identify such consequences and we invite government to reflect on them.

In some senses this paper is an early-warning report. While the fear and persecution that characterised previous substance prohibition is not yet generally evident in the realm of tobacco control, there are danger signs that without care the next decade could witness injustices on a substantial scale. As we establish in this report, there is already adequate evidence that in some environments smokers are regarded as social pariahs who deserve no rights. If smokers start to perceive themselves this way then the path will be cleared for a repeat of the worst errors made in previous attempts to prohibit the use of substances. As with previous prohibitions, regulation moves quickly from a public health mechanism to an assault on the individual.

Simon Davies
Privacy International
June 2011

Regulation, privacy and rights

For centuries – and certainly since the time of John Stuart Mill – there has been widely explored association between personal liberty and state restrictions.³ This relationship has been articulated in debates on regulation of behaviours and lifestyle choices, particularly with tobacco and other substances.

This paper acknowledges the importance of the freedom debate but is not concerned with its dynamics. These have already been thoroughly debated. Instead, the authors will make a contribution to the ongoing dialogue by introducing fresh material.

We are however concerned with the freedom issue to the extent that it provides a frame of reference for this paper. On free speech, for example, a freedom asserted by one person can be countered by another's demand not to feel hurt, offended or threatened by such expression. A complex legal framework has emerged to cope with such differences. Similarly, while it can be asserted that there is a right to smoke, others can argue that they have a right not to be hurt, offended or threatened by the activity. A similarly complex process needs to be observed to respond to such conflicts. Sadly, with tobacco regulation, this is not always the case.

The intention of this paper is to identify where the genuine interest of diminishing the health risks associated with smoking are being exploited, abused or enforced by invasive and intrusive measures. Whether those measures are justified is a matter for the public and legislators to determine. As a privacy advocate, I believe the line has been crossed.

We do accept that any free society must respect the rights of the individual. The smoking debate is often characterised as a clash between the rights of smokers versus the rights of non-smokers. This is usually a false

dichotomy and is no more valid than a debate over police powers being characterised as a clash between criminality and crime prevention. A free society offers the possibility of creating solutions that satisfy civil liberties while achieving most public policy objectives.⁴

It is in the nature of control that rules must be buttressed through enforcement and that enforcement must be supported by intelligence gathering. This is even more the case with controversial regulations. It is often the case that laws created to limit smoking evolve promptly to impose further constraint such as limitations on imagery or free speech.

To offer a practical example, in some environments where smoking is banned, staff members are instructed to report any suspicion of wrongdoing. Fines and penalties are instituted and transgression is elevated to a disciplinary offence. Technological detection measures are implemented. Whistle-blower and informer hotlines are established and evidence is systematically gathered on suspects. This domino effect can and does lead to unwarranted and unacceptable levels of surveillance and intrusion.⁵

The creation of controls leads inevitably to the institution of surveillance. That is the key reason why privacy is now the most endangered and precarious of all civil liberties.⁶ At the heart of this great increase in control is a desire for safety – safety from crime, safety from ill health, safety from ‘bad’ people.

The combined effect of such control is a push to denormalize some aspects of human behaviour with the intention of promoting ‘good’ and socially responsible conduct. Deviants are identified and penalised in myriad ways never before imagined. With escalating regulation, deviation is increasingly probable, and with increasing surveillance deviation is easier to detect. In some respects, a shrinking ‘zone of normality’ has been constructed.

Individuals may step outside this domain, but they will be more vulnerable, exposed and observed than ever before. Such is the case with smoking restrictions, as this paper will outline.

From the perspective of population management, at least some of these impositions superficially make sense. From the perspective of individual rights, they can spell disaster. Denormalisation requires vast buttressing by legal enforcement. This is already taking place. The number of people who each year are restrained or disciplined by legal, administrative and judicial mechanisms is many times greater than twenty years ago. Legislation regulating conduct in public has substantially increased in the same period.⁷ The requirement for 'permission' to initiate group activities has soared. It can now be argued that individual freedom is no longer conditioned by what is expressly prohibited in law, but instead is circumscribed by what the law expressly permits.

It is within these complex conditions that the global sweep of tobacco smoking restrictions are evolving. It is one thing to dismiss the implications and argue that smokers can twist in the wind. It is quite another to take a more sensitive view that smokers too have rights and that those rights must be respected by the state, by employers and by fellow citizens. Impositions must be considered within a framework of competing views and interests, and this essential equation is often overlooked.

Yes, governments have a responsibility to protect their citizens, but the imposition of hurt or hardship or the curtailment of rights is seldom within their gift unless there is overwhelming evidence that no other course of action was possible. In the arena of tobacco regulation it is too often the case that governments seek to prove a point rather than finding the best possible solution that preserves rights, health and dignity. One wonders what good can come, for example, of forcing smokers in Nairobi to stand in the middle of a busy road,⁸ or

requiring smokers at Edmuntun Airport to stand outside in temperatures of -20C or banning smoking throughout the entirety of a large public park.⁹ Whose interest does this serve?

Do the ends justify the means? Is the curtailment of the rights of smokers justified by the goals of public health reform? As with all such dilemmas the answers are not simple, but nor can they be dismissed on the basis of simplistic reasoning. The bottom line is that the evidence outlined in this paper clearly shows that in some instances authorities have crossed the line on what is fair and reasonable in a free society.

Legislators are not particularly enthused at the prospect of having their proposals risk assessed, but in the case of tobacco regulation a risk assessment is always necessary but is seldom undertaken.

Smoking regulation: a brief history

Although restrictions on tobacco smoking have been implemented since the 16th century, such regulations were sporadic and often temporary. It was only in the 20th century that governments started to impose a more harmonised style of regulation based at least in part on clear public policy objectives rather than the prejudices of particular pontiffs or monarchs that motivated previous restrictions.

The first national smoking ban in modern times was imposed by the Nazi party in Germany between 1939 and 1943.¹⁰ The bans prohibited smoking in all public transport, public buildings and Nazi party offices. Restrictions on advertising and smoking in public were also progressively implemented until the demise of the regime.

While the bans were inspired on health grounds, they degenerated into a justification based on racism. The

Nazi party had used the cutting-edge health research at the time to instigate restrictions, but later found that racist messaging could be engineered into propaganda supporting the laws.

Almost thirty years passed before the current trend of smoking restrictions began. Starting in the British Crown dependency of Jersey in 1973, restrictions were slowly adopted worldwide.¹¹ The US state of Minnesota followed in 1975, followed by a rapidly growing number of states and countries that implemented bans of smoking in public places. Now almost a hundred countries have adopted regulations restricting the smoking of tobacco.

In some cases bans have been repealed¹² while others have been scaled back. In the vast majority of cases however – regardless of their effectiveness or acceptance – laws have been retained and usually extended.

Ambit of regulation

The majority of laws are justified on the grounds of public health, though some are legislatively based on employee safety, child safety or workplace safety. The vast majority impose a ban on smoking in public (government run) buildings and public transport, and most create restrictions on smoking in public areas such as bars and restaurants.

However the scope of these laws is substantial, and encompasses a wide spectrum of circumstances.

An analysis of laws in these countries shows a trend to progressively tightening restrictions. For example in Armenia, Australia and Israel laws that initially banned smoking in public buildings were then extended in subsequent years to include such spaces as hotel rooms, bars, sporting venues and restaurants. Many, including the US and Japan, began pushing the limits of these laws to the extent that smoking in homes or on the street has been banned.¹³

A second important trend is the development of punitive legislation to buttress previously unenforceable bans. In Israel for example the 1983 laws that were widely ignored were reinforced by legislation in 2007 that made venue owners personally liable for enforcing the restrictions.

However the most restrictive conditions are seldom reflected in national laws. Municipalities and local government have imposed some of the most far reaching and intrusive regulations, including outright restrictions on smoking across entire cities.

Seven key areas of concern

An increase in non-statutory penalties and controls

Increasingly, bodies such as housing authorities, residents associations and local councils have imposed a widening spectrum of prohibitions on smoking activities. Private sector organisations such as train companies are also now imposing fines for smoking, even where there appears to be no legal basis for such action.¹⁴

An extensive widening of the scope for imposing restrictions

Where at one time the main focus for control of smoking was the act of lighting up in a public place, impositions are now created for related activities such as portraying the images of smoking or displaying cigarettes in a semi-public place such as a shop.¹⁵ Employment contracts also prohibit smoking in a range of circumstances based on reputation aspects rather than health.

A shift toward ‘people’s policing’ of smoking

In many countries there has been a sharp increase in reporting techniques such as hotlines and anonymous tip-off facilities. Whistleblower legislation also now protects staff who report violations of smoking restrictions, while authorities encourage the disclosure of information on smoking violations.¹⁶

A shift from an evidence-based approach to a morality-based approach

An analysis of parliamentary and local council debates over the past ten years shows a decrease in interest in the production of evidence to support increased restrictions. Controls through legislation tend to be imposed on the basis of a sweeping moral argument that the ends justify the means.

An increase in surveillance of smokers

Once a substance has become a public health issue the floodgates are opened at a number of levels for surveillance of smokers. This activity can be undertaken by employers, health authorities, the insurance industry, family or neighbours. The legislative initiative taken by the state is regarded (sometimes in law) as a mandate to conduct such surveillance.

A sharp increase in cases of discrimination

As complaints to Privacy International exemplify, there is concern that employers and private sector organisations feel they have been handed the high ground to unfairly discriminate against smokers, even to the extent of constructive dismissal or intrusive surveillance (see section below).

A drift from public health protection to demonization

As with almost all substance regulation, tobacco control moves in a short space of time from a cautiously balanced set of limitations to a prohibitionist trend energised by hatred or fear of the substance itself. The result is that reason can easily give way to emotion, spurring impositions that fuel suspicion and condemnation. This trend results in increasing instances of discrimination and even outright hostility. Open season can effectively be declared on smokers, regardless of how sensitive is their use of tobacco.

Problem statement

It is clear that the state has a duty to take action to protect public health and to minimise harm. This duty is generally understood. The problem however in setting leadership through legislation is that ‘gaps’ are constantly identified and pressure increasingly is applied to fill those gaps. A law that partially bans smoking (say, in certain public places) sets up the question of why further restrictions should not apply. After all, it is argued, if legislation is passed on the grounds of public health, surely legislators should go all the way.

Public health protection enjoys substantial exemption in human rights law, and the pressure on governments to constantly extend restrictions can become irresistible. There is a strong parallel with police powers in that the police will often use the ‘gap’ argument to lobby for seamless powers across a wide spectrum of potential situations.¹⁷ The same rationale is often applied to national security, child protection, and health and safety.

The key question that needs to be resolved is the extent to which tobacco regulation should follow such a seamless approach. Constitutional limitations apply to such trends

for good reason. Freedoms and rights often reside in the gaps within control legislation. Extending the existing regime of controls can result not only in the carnage of rights, but can also bring legislation into disrepute.

It follows that an equation should be found that satisfies not only the state's desire to show health leadership but which also protects the rights of smokers. State leadership cannot be interpreted infinitely but should be seen as a targeted and rational mechanism to improve health and to educate the public.

The contagion effect

One of the most notable and enduring aspects of substance regulation over the past century has been a tendency to create multiple levels of isolation of the commodity in question. This syndrome is not confined to tobacco regulation, but has applied in recent history to almost every psychoactive substance, including alcohol. The consequences for the individual in such cases can be instructive in understanding the potential unintended consequences of tobacco regulation.

The most relevant element of previous attempts at substance regulation is the extent to which mass surveillance and intrusive surveillance of users and suspected users became commonplace. Marijuana use in the 1960s and 1970s provoked such a reaction in some communities.¹⁸ While that condition for tobacco use is still relatively rare, it is important to recognise the trends in order to predict whether tobacco may go down this road.

The contagion effect occurs when norms or laws create additional degrees of separation between the substance and the user. Advertising, promotion and even visibility of the commodity are banned. (In the case of tobacco, moves to impose under the counter storage in retail stores comes to mind.)¹⁹ Paraphernalia are also banned. In some cases positive images of the substance are regarded as

subversive and are eventually made unlawful. This latter condition has been applied to tobacco through a number of legislative bans on scenes of smoking in films. Even activities that are associated with a substance can be subject to prohibition. This trend can be seen in countries where the smoking of herbs and water pipes is included in tobacco regulation.²⁰

As these trends emerge, association with the substance or its users becomes socially unacceptable. Those who associate with users are made the subject of negative public campaigns. The substance itself is progressively linked to criminality, personal devastation and immorality.²¹ Such was the case with opium, and then cocaine in the 1930s.

Finally, as reason yields to myth, concepts such as the 'gateway effect' become popular wisdom. At this point the substance itself takes on the guise of a malevolent force that is capable of corrupting virtue. Citizens are encouraged to take it upon themselves to police use of the substance, resulting in widespread hatred, suspicion and unlawful actions, often of a vigilante nature.

While it may seem far-fetched to imagine that tobacco has achieved these conditions (evidenced, for example, by the prohibition of alcohol in the USA or anxiety over heroin in subsequent decades), the foundations of such trends are well and truly in place in many parts of the world. In some countries restrictions on tobacco equate with major illegal drugs, bringing with it substantial law enforcement powers. New laws in Trinidad, for example, provide for imprisonment for up to six months for smoking in a prohibited area.²²

These conditions create a blueprint for continuing limitations on the rights and privacy of tobacco smokers.

Leadership without sensitivity

One of the gravest risks to liberty and rights occurs when government signals open season on smokers and permits uncontrolled intrusion to occur in the name of public health protection. In such instances government will set out a national framework of minimum requirements, but rarely will it create limitations on excessive controls that may be imposed by lower bodies. Such is the case with the Health Act 2006 in the UK.²³

There are countless such instances where restrictions on smoking are occurring without limitation, and where the resulting rules are both disproportionate and unfair. It is worth exploring some real-world examples.

The FAST National University in Lahore, Pakistan, occupies a swathe of open ground and sparsely scattered buildings. Long roads and green fields create a spacious environment for the bustling institution. Here, at least 20 per cent of people are regular smokers.²⁴

Despite the high incidence of the habit, the university decided to implement a smoking ban, not just in enclosed areas of the university, but across the entire precinct. Even in wide open spaces, far from any habitation, smoking is banned, forcing smokers to travel long distances to indulge, often in terrible weather conditions. The university authorities justified this policy on the basis that an example must be set, and a partial ban would be hypocritical.

Hardship was an unavoidable consequence of wanting to smoke. In a country that struggles daily to achieve a balance of rights and responsibilities, the restrictions are seen by many staff and students as unfair, yet university staff are instructed to hunt for transgressors. Violation of the prohibition can have devastating consequences for students, many of whom are already facing high stress levels in their studies.²⁵

A similar motive created the outright ban on smoking at Hong Kong University. That institution sprawls across a steep mountainside, making travel from one side to the other extremely difficult. And yet, despite the Herculean effort required to walk to the far precinct of the institution, no arrangement was made to permit smoking even in a single designated zone within the university. The ban was seen as unnecessarily harsh, and staff and students routinely flout it. We heard of one disabled veteran academic who, rather than face the ordeal of constant travel, resigned from the university.

Both bans highlight the dangers of asserting moral leadership at any cost. The initiative becomes unwieldy and quickly falls into disrepute. An example could have been set without the need to impose hardship, but in neither case did the authorities intend to compromise. Hence the rules, instead of being motivational, were seen as unnecessary, unfair and were therefore despised.

The UK government too endeavoured to set a moral lead in its 2006 tobacco control legislation. The aim of the then health minister was to take a principled position that smoking was not a generally acceptable behaviour and that the state, wherever possible, would not tolerate it. Parliament was not universally behind this position. A 2006 report by the House of Lords Economic Affairs Committee condemned the position taken by the government, arguing that it was unnecessary.²⁶

A decision was taken, albeit controversially, in Cabinet to permit as few exemptions as possible. The home was the most obvious of these, as was smoking in an open public street. However most populated environs were subject to the ban, including public buildings, workplaces, transportation, pubs and restaurants and even in some circumstances, private vehicles. One general rule that permeated the restrictions was the limitation of smoking in an enclosed or 'substantially enclosed' space.

This 'leadership' soon gave carte blanche to private entities to establish their own high ground. Smoking was soon banned on open train platforms, parks and open-air sport facilities. Many institutions took it upon themselves to use the new law as a justification for a limitless extension of the ban even to areas where smoking could not possibly affect non-smokers. CCTV is used routinely to enforce these rules,²⁷ with operators following smokers with the use of multiple cameras.

As the unfairness and lack of proportionality of the new restrictions became apparent, further surveillance was required to enforce the bans. One park warden in Surrey told Privacy International that he had been instructed to fine smokers even if they were alone in a park and were not littering.

Worldwide, reasoned arguments by councillors to provide a small smoking zone in a large public space are generally ignored.²⁸ Rail commuters facing long delays on the network have complained to rail companies that the outright ban on smoking on platforms is simply unfair. And yet all train company staff are instructed to monitor passengers and take immediate action against smoking even if the activity is on the far end of the platform a hundred feet from any other passenger.

And while national legislation does not specifically ban smoking on open streets, it does not prevent local councils from doing so. While street bans are relatively rare, councils have taken a back door approach by tasking their officers to monitor how smokers dispose of their butts. It has also been reported to Privacy International that staff in some CCTV control rooms (Bromley and Camden for example) are instructed to use cameras to follow smokers to determine where they dispose of their butts, and then to alert community support officers if they are disposed anywhere other than a bin. The key dilemma here is that many smokers are reluctant to put a butt in a bin for fear of causing a fire. However councils generally will

not provide facilities to dispose of butts, and yet smokers are routinely given on the spot fines for dropping their cigarettes into the street gutters. This extension of power to penalise smokers is again seen as grossly unfair by many who would use cigarette bins if they were provided.

In 2010 a Nottingham man who had gone to the trouble of dropping his butt down a drain was given a fine. The penalty was later overturned by magistrates who concluded that it had no legal basis.²⁹ Cash-strapped councils are seeing smokers as a potential source of revenue. A Black Country pensioner was handed a £75 penalty for merely dropping ash onto the pavement.³⁰

Surveillance of smokers has reached the point where several local authorities were found to be using anti-terrorist powers to covertly enforce smoking bans.³¹

Increasingly, smokers are required to produce identity documents at retail outlets. Some UK cities and outlets, such as Blackpool and Tesco, have embraced the Challenge 30 campaign in which anyone who looks under the age of thirty must provide identity before being allowed to purchase cigarettes.³² This is a recent extension of the Challenge 21 and Challenge 25 campaigns.³³ There are numerous accounts of people near the age of 40 who have been required to show ID.³⁴ Rights advocates correctly argue that the requirement to disclose identity should be confined to circumstances of necessity, not whim.

The unnecessary and disproportionate identification, monitoring, tracking and penalising of smokers is in part a repercussion of the creation of unfair regulations. That a national government has nurtured such a situation does no credit to genuine efforts to promote better public health.

Societal trends reflected in day-to-day life

Privacy International receives thousands of complaints each year from members of the public throughout the world. Increasingly, the number of smoking-related complaints reflects a concern about persecution of smokers and surveillance of their activities. Part of the motivation for writing this report stems from these complaints.

While tobacco related complaints constitute a small fraction of the overall number received by PI, they are increasing in comparison to cannabis-related complaints. Importantly, they represent a valid concern that some people believe open season has been declared on smokers and that their privacy is being unjustifiably compromised.

The anxiety being expressed to PI often involves overzealous employers or colleagues. One woman in the UK working at a hairdresser's complained that she was hounded out of her job because of constant harassment by work colleagues. She had a cigarette during breaks, but was lambasted as a "risk to the reputation of the company". Her supervisor contacted the woman's mother and children to find out how much the employee smoked at home and a camera was installed in the outside area of the premises to monitor her smoking.

Another woman from Scotland complained of constructive dismissal following her supervisor's tactic of setting up a disco light and electric foghorn that were activated whenever she went for a cigarette break. Her non-smoking workmates joined in this 'fun' with a variety of techniques, but the woman was unable to cope with the humiliation and resigned.

Perhaps the most absurd example of stupidity and discrimination in the workplace came from a long distance truck driver working the London-Edinburgh run. The man, a contractor, drove the return route as a sole driver twice

a week. The company he worked for demanded that he refrain from smoking in the cab. The basis of this demand was that a non-smoker had to check the odometer each week. When the driver pointed out the idiocy of this demand and protested that not a trace of smoke could be detected in the cab (he stopped smoking two hours before the completion of the journey and kept the windows open), his contract was terminated. Self-employed trades people have been fined for smoking in their own vehicles, even when no other person is present.³⁵

The problem of harassment, unfairness and discrimination goes beyond the workplace. Another complainant, a university student, said security at his local nightclub had become so obsessed by the smoking ban that anyone found with cigarettes was given a full body search, because – as one manager explained – “people who smoke probably do drugs”. The Association of Chief Police Officers (ACPO) has expressed a similar and largely unfounded justification for increased road surveillance on the basis that drivers of defective cars are more likely to be criminals. When the complainant approached East Sussex police to raise concern about the body search policy he was told that the club was within its rights to make such judgments.

A teenager from Denmark contacted PI in 2009 to complain that his parents had installed covert visual and audio surveillance equipment in the balcony of his room to find out if he was smoking. Such equipment is freely available in many countries. Schools across Europe have been reported to national data protection regulators for setting up cameras in toilet areas ostensibly to catch smokers. PI has received many similar complaints in the past, but these have related to concerns over the use of illegal drugs.

Such instances reflect the unfortunate situation that limitations of national smoking laws are rarely reflected in the reality of people’s day-to-day lives. Legislators may

believe they are setting an example through such laws, but this sort of signal creates a chain of events that cannot easily be controlled.

Writing in the Sunday Times, Jeremy Clarkson observed:

The smoking ban, then, has had a devastating effect, not just on pubs and clubs – which are closing at the rate of one every four hours – but on society, which has now become divisive and bitter.³⁶

The division and bitterness Clarkson refers to is reflected in the countless instances of everyday discrimination and control faced by smokers.

Consider the case of ‘Anna’, a 21-year-old IT student at a UK college. Anna lived with her parents, along with a younger brother. The parents had been traumatised when they discovered that the boy had been experimenting with tobacco smoking with his friends. Both former smokers, the parents took it upon themselves to establish a testing regime in the house. At least once a week they would subject both the daughter and the son to a hair follicle nicotine test. Anna felt humiliated by this treatment and after numerous rows with the parents left to live with university friends. Her brother, then 17, soon joined her.

Anna, when speaking to Privacy International about the incident, could not understand why the parents had become so obsessed, and why they were so dogmatic about the use of the nicotine tests. She did however observe that the parents – perhaps ironically – saw the issue as a matter of trust.

A union official contacted PI in 2009 to complain that his members had been subjected to random nicotine tests “for no good reason whatever”. The employer, a white goods manufacturer, merely stated that the tests were permitted under the terms of the employment contract.

The trades union suspected the policy came down purely to a matter of dislike of smokers by senior management. At the time of writing the union was still seeking legal advice on the matter.

There also appears to be an early trend of insurance companies checking out social networking profiles of health insurance applicants to see whether photographs exist of the applicant smoking. A Californian man complained recently that an insurance company with which he had sought a policy had hunted down his Facebook profile and found a picture of him smoking at a party, despite him stating in the policy application that he had not smoked in three years. Even though the photo was undated, the company demanded the original image as evidence of the date it was taken. When the man refused on the grounds of principle, the policy application was denied.

Scrutiny of social networking profiles has become standard practice amongst employers. A 2009 study revealed that 45 per cent of employers checked the Facebook profiles of applicants, resulting in 35 per cent of applicants being rejected.³⁷ This trend has not been paralleled so enthusiastically by the insurance or the health industries, but anecdotal evidence suggests that companies are eager to use social networking sites as a method of scrutiny. The NHS is already automatically tracking Facebook and Google activity.³⁸

Intrusion into the home

Any claim that the home will always be the domain of free choice for smokers is unfounded. Increasingly, public authorities are moving to impose restrictions on smoking in the home in a variety of circumstances. Legislation passed in the US in recent years shows the following trend:

Justification	Action
Isolation of government staff and contractors	Ban in force while workers are present in the home
Post-divorce visiting settlements	Ban in force during children's visits to parents
Isolation of foster children	Full ban
Isolation of children under care or with health issues or special needs	Full ban
Isolation of all children	Full ban proposed by health advisers
Isolation of neighbours in surrounding houses	Full ban where an adjoining wall or floor exists with another property

The ban on smoking in the home when public sector workers are present is becoming more popular amongst local councils and authorities. The London borough of Sutton began moves to introduce such a ban in 2007, though it was met with strong resistance within the council. Sutton then went a step further by enforcing a ban on smoking from anywhere in or near council buildings and council vehicles, car parks and parks. The policy also puts a stop to cigarette breaks and forbids employees smoking anywhere in public while wearing the council symbol or identity badge.³⁹ According to Sutton's proposed policy, if householders insist on smoking, the staff will refuse to enter and tenants could lose access to council services. Other councils announced they would take a more 'softly softly' approach based on the principle of asking tenants to refrain from smoking, though pressure from chief medical officers is mounting to create nationwide bans.^{40 41 42}

From 2004 the US began introducing state-level bans on smoking around children in the home. This has applied in particular to foster children and children visiting parents

as part of a court order.⁴³ There has generally been strong resistance to outright bans on smoking around children in the home. However the more interesting trend has been one spearheaded by a number of cities in California, which imposes a total ban on home smoking on the basis of smoke drift to neighbouring properties. The town of Belmont for example passed a law in 2007 prohibiting home smoking where there was an adjacent floor or ceiling to another property. The New York Times reported:

Public health advocates are closely watching to see what happens with Belmont, seeing it as a new front in their national battle against tobacco, one that seeks to place limits on smoking in buildings where tenants share walls, ceilings and – by their logic – air. Not surprisingly, habitually health-conscious California has been ahead of the curve on the issue, with several other cities passing bans on smoking in most units in privately owned apartment buildings, but none has gone as far as Belmont, which prohibits smoking in any apartment that shares a floor or ceiling with another, including condominiums.⁴⁴

As with many other cities worldwide, the authorities had established a city-wide smoke-free zone. In the case of Belmont smoking was banned anywhere in the city except in detached homes and yards, streets and some sidewalks, and designated smoking areas outside. Other states have followed suit, most recently in Illinois where public housing authorities in some areas have now banned smoking in private apartments.⁴⁵

Discussion points

The home is afforded specific protection under international conventions. There are strong historical, cultural and legal foundations for this situation, often expressed as the right of the individual to enjoy less

restricted right of expression that might otherwise apply in public.

Article 12 of the Universal Declaration on Human Rights for example states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention on Human Rights establishes:

Everyone has the right to respect for his private and family life, his home and his correspondence.

These and many other legal instruments provide a foundation for considering the extent to which the state can impose restrictions on activities in the home.

These protections have a strong historical foundation. It is not necessary to go back to early Biblical times to discover the significance that was placed by societies on intrusion into the domestic space. Cicero observed, “What more sacred, what more strongly guarded by every holy feeling, than a man’s own home”, while Pitt the Elder in 1763 summarised popular feeling in the words, “The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter.”

Courts are however given wide discretion to provide exceptions to the protections. The ECHR Article 8 principle for example provides that:

There shall be no interference by a public authority with the exercise of this right except

such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

However after many years of case law on the subject it has been established that a number of tests must be satisfied to justify invasion into privacy of the home. While particularly in Europe exemptions can be made for protection of the health or wellbeing of others, states cannot merely pass laws without regard to a number of conditions.

Amongst the most important of these are 'proportionality' and 'necessity'. These tests also apply to other areas of privacy invasion. Authorities need to consider whether the measures being adopted are essential and whether their objectives could be achieved through less invasive or restrictive approaches.

Such considerations must be weighed even more carefully as smoking is restricted in an increasing number of environments. If the state is to reap revenue from tobacco, there is historically a limited amount it can do to restrict its use. And while the state has a duty to protect the health of citizens, it must also balance these obligations with the rights of people who contribute to that revenue.

Contemplating the future

Societies usually compromise their freedoms not through a single act of ruthlessness, but by a series of well-meaning but uncompromising actions in the name of the common good. Those same societies can lose their humanity by expediting action against 'enemies' of the common good by creating exceptions and exemptions from long-standing principles of due process and good governance.

In a similar vein, pragmatic ‘fast track’ solutions to achieving public health reforms can, without care, strike at the heart of the principles that underpin a free society. The goal of evidence-based policy that nurtures fairness and equality has been sacrificed in many aspects of tobacco policy. Instead, an ‘ends justify the means’ philosophy has taken hold of policy makers. A zero sum game in which loss of rights can be traded off against anticipated health benefits has become common practice throughout the world.

The risk to the individual cannot be overstated. As with many other common good positions against the use of other substances, fairness has been replaced by principle. This principle is advanced as a self-evident truth that frequently evades the scrutiny to which other aspects of public policy are subjected.

In the introduction to this report we stated: “The health risks associated with smoking are accepted by the authors of this report and by the supporting organisation. We also acknowledge that governments and other authorities have a role to play educating people, children especially, about those risks”. It is worth restating that position now in the light of all that has been written here. We are not opposed to measures that will protect public health; we are concerned about policies that unthinkingly claim to do so at the reckless expense of freedoms.

This report has set out numerous examples of how a disregard for rights can create a profound effect on individuals and relationships. History provides a clear lesson that once logic and due process is abandoned then the floodgates for intrusion and unfairness are flung open. In most parts of the world the worst elements of this intrusion have not yet occurred, but it is clear that the risk is imminent.

Without care, the future for many smokers will be characterised by discrimination and persecution, even

when their actions are calculated to create the minimum impact on the lives of other people. Tolerance may be replaced by a zeal for recrimination. Such are the risks when the principle of freedom is replaced by the principle of pragmatism.

This report provides clear evidence that a trend is emerging toward discriminatory action being taken not only by national governments, but also by individuals, families, employers, businesses and local authorities. Indeed it can be argued that as control over smoking is devolved and delegated across society, the risk to rights increases.

It is not inconceivable that within a decade anyone suspected of being a smoker may be routinely subjected to polygraph testing, psychometric examination or third-party investigation. Such is already occurring. The right to employment has already been compromised, as has smoking in some home environments. In the future smokers may face a choice between secrecy and social exclusion. Social organisations, landlords, service providers and employers may themselves be deemed irresponsible if they fail to pursue an exclusion policy.

The solution to this dystopia is not to withdraw from genuine efforts to deliver improved public health but to ensure that the measures adopted by government are tempered with reason and common sense. For all of us, smokers and non-smokers alike, the warning of US justice Louis Brandeis should never be far from our conscious mind: “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding”.

References

- 1 Colin J Bennett, the privacy advocates, the MIT Press, 2008
- 2 See <http://www.forestonline.org/about/faq/>
- 3 See in particular J.S.Mill's 1859 text *On Liberty*.
- 4 The European Convention on Human Rights for example acknowledges that there is a duty on government to provide security, but only where other rights are not unnecessarily compromised. Article 17 provides that no one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. This addresses instances where states seek to restrict a human right in the name of another human right, or where individuals rely on a human right to undermine other human rights
- 5 One of the causes of such behaviour by employers is often found in the liability imposed by smoking regulations on employers. Employers are advised that "reasonable measures" must be taken in order to comply with a duty under the law, however these measures are often ill-defined. The 2006 amendments to the Victorian Tobacco Act (1987) make clear that employers may escape prosecution if they could not have known that smoking took place in an enclosed space. Other legislation, particularly in the US, is far less specific about the duty imposed on employers to know whether smoking has unlawfully taken place.
- 6 See 'Big Brother Watch: the state of civil liberties in Britain', 2010 <http://www.bitebackpublishing.com/books/Big%20Brother%20Watch/>
- 7 The current UK coalition government, which came to power partly on a platform of rights, identified hundreds of restrictive laws that had been imposed over the previous decade. Many of these, it was claimed, were unnecessary and heavy-handed. Both parties pledged to repeal many of these laws <http://www.cabinetoffice.gov.uk/news/coalition-documents>
- 8 <http://news.bbc.co.uk/1/hi/world/africa/7497614.stm>
- 9 New York City in 2011 banned smoking in all 1,700 of the city's parks <http://english.peopledaily.com.cn/90001/90777/90852/7296878.html>
- 10 http://en.wikipedia.org/wiki/Anti-tobacco_movement_in_Nazi_Germany
- 11 http://en.wikipedia.org/wiki/Smoking_ban
- 12 <http://galvestondailynews.com/story/183510>
- 13 <http://news.bbc.co.uk/1/hi/world/asia-pacific/2292007.stm>
- 14 UK rail companies for example impose a full ban on smoking anywhere on an open platform, where the national legislation is confined to smoking in enclosed and semi-enclosed areas
- 15 <http://www.dailymail.co.uk/news/article-535808/Movie-smoking-ban-childrens-classics-given-18-certificate.html>
- 16 http://news.bbc.co.uk/1/hi/uk_politics/5321114.stm
- 17 UK police have for example continually argued for an extension of communications interception powers to counter trends in practice and technology. This position is known variously as mission creep or legislation creep. See the London School of Economics analysis at http://www.lse.ac.uk/collections/informationSystems/research/policyEngagement/IMP_Briefing.pdf
- 18 See Korzeniewski, Steven. and Salmon, Charles "Beyond reefer madness: government public relations and the demonization of marijuana" http://www.allacademic.com/meta/p_mla_apa_research_citation/0/9/2/4/2/pages92429/p92429-1.php
- 19 <http://www.odt.co.nz/lifestyle/health/146460/retailers-oppose-cigarette-display-ban>
- 20 S. 1. C 24 <http://www.legislation.gov.uk/ukpga/2006/28/notes/division/6/1>

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- 21 See http://www.bbc.co.uk/worldservice/news/2010/11/101116_pregnantsmoking_kv.shtml as an example of this trend with tobacco
 - 22 <http://www.health.gov.tt/sitepages/default.aspx?id=178#FAQ29>
 - 23 Such laws tend to be permissive and general, setting a high bar for intrusion and embedding few limitations on the imposition of controls. In Britain limitations are generally sought through Judicial Review or appeals to the European courts.
 - 24 <http://www.ncbi.nlm.nih.gov/pubmed/11784477>
 - 25 See comments from students at <http://www.pakstudy.com/index.php?topic=1651.0>
 - 26 <http://www.telegraph.co.uk/news/uknews/1520537/Pub-smoking-ban-is-not-justified-say-peers.html>
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 - 38 <http://www.techwatch.co.uk/2010/11/25/nhs-site-allows-facebook-and-google-tracking/>
 - 39 <http://www.dailymail.co.uk/health/article-412489/Tenants-banned-smoking-home.html>
 - 40 <http://www.121doc.co.uk/news/smoking-ban-in-homes-across-the-uk-4902.html>
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