

**Legislative Assembly for the  
Australian Capital Territory**

**Smoking in Cars with Children (Prohibition)  
Bill 2011**

**Explanatory Statement**

**Circulated by the authority of  
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# Smoking in Cars with Children (Prohibition) Bill 2011

This explanatory statement relates to the Smoking in Cars with Children (Prohibition) Bill 2011 as introduced to the Legislative Assembly.

## Overview

This Bill introduces a ban on smoking in cars when children are present. Every Australian jurisdiction, with the exception of the Northern Territory, have legislated to make smoking in cars when children are present an offence.

The purpose of the offence is to regulate smoking in vehicles where children are present on a *road or road-related area* (terms defined by the *Road Transport (General) Act 1999*). A vehicle for the purpose of this legislation is a motor vehicle but does not include a campervan that is in use as a home, eg. set up for sleeping, or a motorcycle. Note that “car” is used in the title of the Bill and in this explanatory statement rather than motor vehicle but should be taken to refer to a motor vehicle.

The proposed legislation, however, raises human rights issues for this jurisdiction. Given this, a human rights assessment of the proposal has been included in this explanatory statement.

## *Human Rights Assessment*

Section 12(a) of the *Human Rights Act 2004* (HRA) provides that everyone has the right “*not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily*”. The suggestion has been made that it is arguable that this right is engaged when it is proposed to place restrictions on smoking<sup>1</sup> as an interference with the right to privacy.

It has only been recently in *R (N) v Secretary of State for Health* [2009] EWCA 795 that Article 8 of the European Convention on Human Rights (a comparable provision to HRA section 12(a)) and smoking was considered. Prior to this, case assessments of the concept of private life and home life have been considered in different contexts by United Kingdom courts (*Pretty v United Kingdom* [2002] 35 EHRR 1; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52) and by the European Court of Human Rights. Pursuant to section 30(1), the judgments of foreign and international tribunals may be considered when working out the nature and extent of a right in the HRA. It should be noted that the text of international rights documents, such as the European Convention on Human Rights, can be different to the comparable provisions of the HRA. For

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<sup>1</sup> See Standing Committee on Justice and Community Safety (performing the functions of a Scrutiny of Bills and Subordinate Legislation Committee) (7<sup>th</sup> Assembly) Scrutiny Report No. 14, 9 November 2009, page 19.

example, Article 8's formulation is "respect for his private and family life, his home and his correspondence".

In *R (N) v Secretary of State for Health*, the appellants' argument was predicated on protection of a person from interference by the State for that which he chooses to do within the privacy of his own home. The appellants also argued that Article 14 was engaged by the policy of the State. Article 14 is concerned with prohibiting discriminatory treatment. The majority of the Court did not accept that Article 8 or Article 14 were engaged.

For the purposes of this assessment however, the proposition is accepted that the right to privacy protected by section 12(a) is engaged and therefore the restriction needs to be justified under section 28. The nature of the right being considered under section 12(a) relates to privacy rather than the home. While some might consider the car to be an extension of their home, this would require an "extensive interpretation"<sup>2</sup>. A car, therefore, is not arguable as a home for this assessment.

Section 12(a) provides that a person has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Lord Bingham in *R (Countryside Alliance) v Attorney General* expressed this view of Article 8's purpose:

It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.<sup>3</sup>

It is from this view that it is proposed to assess section 12(a), though a formal consideration of section 28 will also be undertaken. The question therefore:

Is the intrusion on the right of a person's privacy through a ban on that person's ability to smoke in a car when children are present a "good reason"?

Some assistance is provided by Article 8(2), which specifies limitations that can legitimately operate on the right. Article 8(2) provides that there may be:

no interference by a public authority except 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.

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<sup>2</sup> Standing Committee on Legal Affairs (performing the functions of a Scrutiny of Bills and Subordinate Legislation Committee) (6<sup>th</sup> Assembly) Report No. 28, at page 16, upon referring to section 12(a) and cars stated "this view requires an extensive interpretation to the concept of "home"". In a response from the Minister for Territory and Municipal Services attached to Report No. 3 of the 7<sup>th</sup> Assembly on comments to the Dangerous Substance and Litter (Dumping) Legislation Amendment Bill 2008, the Committee was referred to case law that the 'home' was a place a person lives and where private and family life develops (see page 2 of the response).

<sup>3</sup> [2007] UKHL 52 at paragraph 10.

Two limitations are considered directly relevant, the “protection of health or morals” and “protection of the rights and freedoms of others”. Protection of the rights and freedoms of others would include section 11 of the HRA, protection of the family and children.

Before addressing the relevant limitations, HRA section 8(2) (Article 14) should be assessed for possible engagement. In *R(N) v Secretary of State for Health* Article 14 was raised by the appellants as being able to protect them from the “discriminatory nature of the restrictions on smoking”<sup>4</sup>. Article 14 prohibits discriminatory treatment on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The comparable provision to Article 14 in the HRA is section 8(2), everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind. The majority of the Court found that if the “right to smoke” did not come within the ambit or scope of Article 8 then it did not come within the ambit or scope for the purpose of Article 14.

The nature of the distinction or discrimination for the purpose of section 8(2) might be described as adults without children being present in their cars being able to smoke. This is compared to adults with children present in the motor vehicle not being able to smoke in their cars. To put it another way, the proposal might be argued as discriminatory towards the family unit (parent or older sibling driving while children are in the car).

Can it be argued that the restriction is discriminatory because it singles out a class of people, adults with children present in the motor vehicle not being able to smoke in their cars? It is suggested that the answer is no. If it is thought that it is, the level of impact of the restriction is limited to the duration of a car journey and therefore the limitation can be demonstrably justified (discussed further below).

#### *Protection of health or morals*

In *Pretty v United Kingdom* the European Court of Human Rights considered Article 8. The Court observed,

the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.<sup>5</sup>

On this observation, the choice to smoke is protected by the right to privacy even though it may be harmful and life threatening to the individual is a proposition that could be made. However, the choice associated with smoking

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<sup>4</sup> [2009] EWCA 795 at paragraph 53.

<sup>5</sup> [2002] 35 EHRR 1 at paragraph 62.

may be limited if it can be demonstrated that it is injurious to the health of others, eg. children.

Environmental tobacco smoke (ETS) (also known as secondhand smoke) generally affects children more because of their developing bodies. Exposure to ETS is a recognised risk factor for the development or worsening of asthma. ETS also increases the risk of other illnesses such as pneumonia, bronchitis and middle ear infections. There is also evidence that more serious diseases can occur from exposure to ETS, such as cancer and cardiovascular disease. The United States Surgeon General 2010 report, “How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease” has concluded any exposure to tobacco smoke, even the occasional cigarette or exposure to ETS, is harmful. The report also states:

When individuals inhale cigarette smoke, either directly or secondhand, they are inhaling more than 7,000 chemicals: hundreds of these are hazardous, and at least 69 are known to cause cancer. The chemicals are rapidly absorbed by cells in the body and produce disease-causing cellular changes.<sup>6</sup>

The effect from ETS has been shown to be greater from smoking that occurs in the confined space of a car. A New Zealand study measuring fine particulate levels in a car with a person smoking inside found that air quality in a car was similar to that found in a typical smoky bar, whether the window was down or partially down<sup>7</sup>.

The evidence has long been clear that smoking is injurious to the health of others, in particular, children. A child is unable to leave an environment where smoking is occurring easily. Depending on their age, they may not even be able to express a view to a person smoking in the car that it is harming them and that they would like them to stop. This evidence requires that the Territory take steps to prevent or reduce the harm to children from ETS.

It would be desirable to ban smoking in a car altogether, however, the least restrictive approach is proposed. The Bill proposes to ban smoking in a car only when a child or children are present (note for the purpose of the proposal, this is any person under the age of 16). By virtue of this restrictive approach, the interference with the right to privacy is limited.

#### *Protection of the rights and freedoms of others*

The protection of the family and children is guaranteed by section 11 of the HRA. Under section 11(1), the family unit is entitled to be protected by society. Section 11(2) provides that every child has the right to protection needed by the child because of being a child. It will be the likely situation that in nearly all

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<sup>6</sup> US Surgeon General, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease*, page iii.

<sup>7</sup> Edwards R, Wilson N, Pierse N, “Highly hazardous air quality associated with smoking in cars: New Zealand pilot study”, *NZ Med J.* 2006, 11:U2294.

instances, a child will be in the car driven by a family member, most likely their father or mother. It is also possible a child will be in a car driven by an older sibling.

In *Johansen v Norway*, the European Court of Human Rights observed:

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8.<sup>8</sup>

In *Johansen*, the domestic measure was care and protection legislation. The Court concluded, however, that national legislation for placing children in care serves the purpose of 'protecting the rights and freedom of others', the child, and so the interference was justifiable.

Applying the court's reasoning, the protective intervention by the Territory with its proposed ban on smoking in a car by an adult while a child is present protects that child's rights. The best interests of the child means that a protective intervention can be justified. This is even more so when a child has less power to negotiate with an adult about being in the car with a person who is smoking, which may be their parent. It is suggested that the family unit is not disrupted to any significant extent by the adult being prevented from smoking for the duration of a car journey within the ACT.

#### *Necessary in a democratic society*

When considering Article 8, there must also be an assessment as to whether the interference was "necessary in a democratic society", a similar test to section 28(1) of HRA - is it "demonstrably justified in a free and democratic society". In *R (N) v Secretary of State for Health* Keene LJ quoted the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69 at 80:

The means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The principal objective is to protect children from other people's ETS. A ban will essentially reduce children and young people's exposure to ETS. By reducing their exposure when in a car this may well have the further effect of reducing their exposure in other parts of their lives. By utilising the means of a ban on smoking in a car when children are present, this restriction is temporary and does not create a complete ban. It is very much a situational ban – there must be a car, there must be smoking and there must be children present.

However, before being able to conclude whether the interference is necessary in a democratic society, the means by which the purpose is achieved needs to be considered. To give effect to a ban, a criminal offence is proposed. Further, it

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<sup>8</sup> (1997) 23 EHRR 33, paragraph 52.

is proposed that this be a strict liability offence. The application of strict liability has been accepted in the Territory as engaging the right to be presumed innocent (section 22(1) of the HRA). The presumption of innocence is, in its simplest form, that a person be treated as not having committed any offence until the State, through a prosecution, adduces sufficient evidence to satisfy an independent and impartial tribunal that the person is guilty. That is, a court should not begin proceedings with the preconception that the person has committed the offence.

Strict liability offences are considered to engage the presumption of innocence because the burden of proof is shifted to the defendant in that the person may have to raise a defence to prove their innocence. Generally the principle is that a defendant is not obligated to offer a defence. It is for the prosecution to prove, beyond a reasonable doubt, the person is guilty. However, unlike a fault element offence, for a strict liability offence the prosecution is only required to prove that a person had committed the physical element of the offence.

Consequently, strict liability offences are usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and protection of the revenue. There must be clear, legitimate, grounds for a strict liability offence. In the Canadian case of *R v Wholesale Travel Inc*, Cory J described the development of strict liability offences as:

Regulations were . . . enacted to protect the vulnerable – particularly the children, men and women who laboured long hours in dangerous and unhealthy surroundings. Without these regulations, many would have died. It later became necessary to regulate the manufactured products themselves and, still later, the discharge of effluent resulting from the manufacturing process. There is no doubt that regulatory offences were originally, and still are, designed to protect those who are unable to protect themselves.<sup>9</sup>

Strict liability offences are thus created in response to empirical evidence and community expectation that something be done to regulate a certain activity. Therefore, it is usually desirable that strict liability offences only be proposed where a defendant can reasonably be expected, usually because of his or her professional involvement, to be aware of the requirements of the law. However, other circumstances permit the application of strict liability, eg., community expectation.

In January 2009, the Minister for Health released a discussion paper to canvass the community's view. The majority of submissions received supported a regulatory option (three regulatory options were canvassed). The ACT Children and Young People Commissioner conducted a survey in February 2009. The

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<sup>9</sup> Cory J (judgement of L'Heureux Dube and Corry JJ), [1991] 3 SCR. 154, paragraph 18.

survey found three out of four children and young people would not be happy to sit in a car with someone who was smoking and 67% of children and young people also thought that adults should be banned from smoking in a car when there is a young person with them.<sup>10</sup> The Commissioner undertook the survey to inform his response to the consultation paper and assure himself children and young people were consulted on issues which affect them, consistent with Article 12 of the United Nations Convention on the Rights of the Child. This Article also states that their views should be seriously considered.

In terms of data for the prevalence of adults smoking in cars where children are present, the ACT does not currently collect this information. South Australia recorded in 2005 that 31 percent of smokers with children under 14 years of age smoked in their vehicles. In 2008, this proportion had dropped to 18 percent a year after South Australia introduced their ban<sup>11</sup>.

A lesser consideration but still a relevant one is to note that all other Australian jurisdictions, with the exception of the Northern Territory, have legislated to make smoking in cars when children are present an offence. In those jurisdictions, the offence can be characterised as strict liability (only in jurisdictions that have enacted the Model Criminal Code, the ACT and the Commonwealth, is an offence required to be stated to be strict or absolute liability). A person travelling in the ACT from another jurisdiction would therefore be on notice that smoking in a car when children are present is an offence because of the law in their home jurisdiction.

It is submitted that strict liability is appropriate in the human rights context for this proposal. It fulfils the purpose to “protect those who are unable to protect themselves”. The mistake of fact defence expressly applies to strict liability offences as do other defences in part 2.3 of the *Criminal Code 2002*.

### *Conclusion*

It is suggested that the object of protecting people under 16 years of age from environmental tobacco smoke is of sufficient importance to justify limitations on the right to privacy protected by section 12(a). There is good reason for the Territory to legislate for a ban on a person’s ability to smoke when children are present. The extent by which the right protected by section 12(a) is impaired is no more than is necessary.

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<sup>10</sup> <http://www.hrc.act.gov.au/res/2%20Smoking%20In%20Cars.pdf>

<sup>11</sup> Cancer Council South Australia, Tobacco Control Research and Evaluation Centre.



## Clauses

**Clause 1** declares the name of the Act to be the Smoking in Cars with Children (Prohibition) Act 2011.

**Clause 2** provides for the commencement of the Act. Commencement is to be by written notice by the Minister. Commencement by notice provides the government with the ability to delay commencement, particularly where a new law requires the community to be informed about the legislation. Note, under section 79 of the *Legislation Act 2001*, a law that is postponed, eg., by providing for commencement by written notice, the law is commenced automatically six months after its notification date.

**Clause 3** provides that the dictionary at the end of the Act is part of the Act. This is a standard clause included in all Acts.

**Clause 4** provides that notes in the Act are explanatory and not part of the Act. This is a standard clause included in all Acts.

**Clause 5** provides that other legislation, eg., *Criminal Code 2002*, applies to offences in this Act. This is a standard clause included in all Acts. It is intended to draw the reader's attention to the provisions of the Criminal Code, Chapter 2, General Principles of Criminal Responsibility. It also provides a reference to penalty units. A penalty unit is currently \$110 for an individual and \$550 for a corporation.

**Clause 6** provides for the meaning of smoke and what is a smoking product for the purpose of smoking under the Act. This section is modelled on section 5B of the *Smoke-Free Public Places Act 2003*. Its purpose is to provide a clear definition of smoke for the purpose of the Act and the offence at clause 7.

**Clause 7** provides for the key provision of the Bill, making it an offence to smoke in a vehicle with a child. In order to impose a ban on smoking in a vehicle with a child, it is necessary to make it an offence. The offence provides that a person who is 16 years old or older commits an offence if the person smokes in a vehicle that is on road or road related area and a child under 16 years of age is in the vehicle. It is a strict liability offence. The defences of the Criminal Code, including mistake of fact, are available.

Subclause (3) provides that in a prosecution for an offence that evidence that a person in the vehicle appeared to be under 16 years old is proof of that matter in the absence of evidence to the contrary. This is known as an evidentiary provision and would require a defendant, if desired, to raise evidence to disprove the evidence. However, if the defendant chooses to do so it would only be to the evidential burden. This means that the defendant would only have to point to evidence that suggests a reasonable possibility that the contrary applies, that is that the person was 16 years or older.

Placing the burden on the defendant engages the presumption of innocence, protected by section 22(1) of the HRA. Of necessity, the application of such a provision in circumstances does require some value judgments to be made vis-a-vis the HRA. It needs to be considered whether imposing the burden on the defendant is permissible as a reasonable limitation under section 28 of the HRA.

The Human Rights Assessment above provides a discussion on the judgement that has to be made about the value to the community of a provision that undercuts the presumption of innocence and measures that are implemented for the protection of children. It is submitted that the provision is an additional measure in advancing the purpose of the legislation, which is to protect children from the harmful effects of environmental tobacco smoke. There should be a high degree of importance attached to this objective, especially as the protection of children is recognised by section 11(2) of the HRA. It is submitted that the provision is a reasonable limitation.

**Clause 8** provides for the powers of police officers in relation to motor vehicles. Police powers are included in the Bill to ensure that police have sufficient authority to require the driver of a vehicle to stop where an officer suspects on reasonable grounds that an offence has been committed under this Act. The clause gives the police the power to require the driver of the vehicle to stop the vehicle. They also have the power to require that they produce their driving licence and state their name, date of birth and home address. Once the vehicle is stopped the police officer may require the person who is suspected of committing the offence (which may not be the driver) to stop smoking. They can also require that they state their name, date of birth and home address and produce an identification document. Subclause (4) provides for the types of identification documents that can be produced to the police officer.

Subclause (2) provides that a person commits an offence if the person fails to comply with the requirements made by the police officer on the person. It is a strict liability offence.

The primary method of enforcement by the police of the offence at clause 7 will be through an infringement notice scheme. Infringement notices, also known as on-the-spot fines, are an administrative sanction operating as an adjunct to the court system. An agency may serve an infringement notice where the nature of the offence would not justify the resources required to establish the offence in court in the first instance. The *Magistrates Court Act 1930* provides a number of safeguards, including seeking a review of the notice. Additionally, an individual served with an infringement notice can always elect to have the Territory prove its case against them in court. A regulation under the *Magistrates Court Act* has been prepared to commence on the commencement of the *Smoking in cars with Children (Prohibition) Act*.

## **Dictionary**

The dictionary provides definitions for terms used in the Bill, including driver licence, smoking product and vehicle. A vehicle for the purpose of this legislation is a motor vehicle but does not include a campervan that is in use as a home, eg. set up for sleeping or for living, or a motorcycle. The intention of excluding a campervan is to avoid the application of the Bill to circumstances where a person is on a road or road-related area but they are essentially set up as a home. The purpose of this legislation is to regulate smoking in a car when a child is present. A campervan that is set up as a home is not a car during the time it is set up as a home. The exclusion of motorcycle should be for obvious reasons.