

**ALCOHOL, TOBACCO AND OTHER DRUGS COUNCIL OF TASMANIA  
2016 BIENNIAL CONFERENCE: RETHINKING PREVENTION  
OPENING ADDRESS BY  
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**Changing behaviour and attitudes: the limits of criminalisation.**

Good morning everyone. Thank you for the invitation to open your conference with its theme Rethinking Prevention: a Broader Agenda. In the light of your theme, I have chosen to talk about the limits of the law and criminalisation in achieving behavioural and attitudinal change. At the outset, I must confess that I fear that you have nothing to learn about prevention from me, a criminal lawyer and criminologist; rather it is the criminal justice system that has much to learn from the public health approach to reducing the use of alcohol, tobacco and other drugs.

Prior to my appointment as Governor of Tasmania, I was an academic, a criminal lawyer, criminologist and law reformer. As a law reformer, my focus has been on the power of the law to bring about change. In sexual assault law reform I advocated change in the way offences are defined, for example, removing the words which gave a man immunity from prosecution for the rape of his wife; changes to the definition of consent and to the meaning of rape; improvements in the way victims are dealt with by the legal system in the hope that victims would be more likely to come forward, offenders more likely to be sanctioned and in the expectation that the incidence of such crimes would decline as a consequence. It was hoped that by amending the legal definition of rape and consent, not only would the legal meaning of rape change but the lay meaning would change as well. That norms surrounding what is rape and what is consensual sex would shift.

In the case of family and domestic violence, law reformers have long campaigned for the recognition of domestic assault as a criminal offence and not just 'a domestic', in the expectation that this would lead to a reduction in domestic violence by it being seen as unacceptable, by it being denounced when it happened and punished rather than condoned.

Aside from legislative reform, I have argued that judges, in their comments on passing sentence in cases of rape and family violence, have the opportunity to change social attitudes and behaviour by challenging and rejecting claims that emotional stress is mitigating in cases of domestic violence or that the fact that the victim of a rape was in a relationship with the perpetrator somehow made the psychological harm to the victim less serious.

As a law reformer, another context in which I have argued that we can use the law to change both attitudes and behaviour is in relation to the physical punishment of children. The Tasmanian Law Reform Institute, in advocating a ban on the physical punishment of children (by abolishing the defence of domestic discipline) argued that a ban could lead to a reduction in community support for using physical punishment to discipline children. We cited Sweden as an example where legislation banning physical punishment of children had apparently had this effect.<sup>1</sup>

However, in the course of my public opinion research I have since found studies which demonstrate that whilst the primary aim of the ban was to alter attitudes to the use of corporal punishment by parents, the Swedish ban did not reduce the level of public support for this form of disciplining children. Support for physical punishment began declining years before the reform was passed and the decline was not accelerated by the law reform. Changes in public opinion may have generated the legal reform but the reverse was not the case.<sup>2</sup> Similarly, in Austria changes in attitudes to corporal punishment preceded rather than followed the banning of it in 1989.

Some public opinion experts, such as Julian Roberts, argue that whilst changing public attitudes has been the goal of statutory reform in relation to many important social issues, such as homosexuality and abortion, shifts in public opinion are unrelated to legislative reform. If this is correct it is disappointing for those with faith in the power of the law. For this paper I have delved into the issue a little more deeply and have discovered that the literature in different disciplines of

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<sup>1</sup> Tasmania Law Reform Institute, *Physical Punishment of Children*, Final Report 4, 2003, p 17.

<sup>2</sup> Julian Roberts, 'Changing Public Attitudes towards Corporal Punishment: the effects of Statutory Reform in Sweden' (2000) 24 *Child Abuse & Neglect* 1027.

social science explaining theoretical effects of laws on attitudes is considerable. For example it is argued that, in theory at least, laws can change attitudes because the enactment of laws (and criminal laws in particular) is a means by which policy makers are able to signal 'good values'. A number of reasons are given for citizens internalising the values represented by the law. Posner, for example, argues that people internalise norms to signal that they are a 'good type'.<sup>3</sup> It is also argued that a high degree of societal visibility and proximity (i.e. the degree to which citizens notice and become directly affected by the policy) makes attitudinal change more likely.<sup>4</sup>

Theory aside, it seems empirical studies supporting the hypothesis that criminalisation affects attitudes is sparse, which explains Julian Roberts's scepticism. But there are studies where such a causal relationship is claimed. In Norway, buying sex became a criminal offence in January 2009 and one of the main aims of the law was to make people more negative towards buying sex. A study surveyed attitudes to buying sex before and after the new law in Norway and in Sweden (which did not change its law). It was found that criminalising buying sex did not have short-term effects on moral attitudes to buying and selling sex in Norway. However, for respondents in Oslo, the capital of Norway, where the sex trade was clearly visible before the reform, there were clear effects on attitudes towards prostitution – the public became more opposed to prostitution. The authors claim this demonstrates that laws and policies can affect attitudes and are more likely to do so the more visible and proximate the changes are to people.<sup>5</sup>

An Irish study of smoke-free laws also supports the proposition that laws may affect attitudes when the change is visible and proximate. This study, using longitudinal data with Irish smokers, and UK residents as a control group, found clear increases in support for a total smoking ban in workplaces and bars and pubs among Irish smokers compared with UK smokers, where there was no such ban at

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<sup>3</sup> Cited by Niklass Jakobsson and Andreas Kotsadam, 'Do laws affect attitudes? An assessment of the Norwegian prostitution law using longitudinal data' *University of Gothenburg, Working Papers in Economics*, No 457, June 2010, p 5.

<sup>4</sup> Jakobsson and Kotsadam, above n 3, p 6

<sup>5</sup> Jakobsson and Kotsadam, above n 3.

the time.<sup>6</sup> If a law makes an undesirable behaviour, such as smoking, less convenient, people can be persuaded to do less of it. Initially the changes are solely behavioural but along the way attitudes about the behaviour can be changed as well.

Use of seatbelts is another area where legislative change may well have led to changes in behaviour and attitudes.<sup>7</sup> I would think that after seatbelt use became compulsory we wore our seatbelts to avoid penalties. So legal regulation changed behaviour directly and the change was at first behavioural. Now many of us wear seatbelts because it the sensible and safe thing to do. Along the way our attitudes about seat belts have change as well. This is good because it lightens the monitoring and enforcement load for the police.

So it seems that sometimes, at least, legal regulation can transform the social meaning of behaviour, changing people's perception of the moral acceptability or desirability of the behaviour. It has been suggested that to be effective:

- The regulator act within its sphere of legitimate interest – so a municipality can change attitudes towards a local issue –e.g. cleaning up after pets or recycling but attempts to affect attitudes towards an international issue are likely to fail (e.g. declaring a nuclear free zone).
- It helps to characterise the behaviour as causing damage not just to those who choose to engage in it but to innocent bystanders as well. So the legal movement against smoking gained traction once the medical risks of 'second-hand smoke' became part of the policy debate. It would be nice to think that it will help to reduce family violence by highlighting the damage it does to children of the relationship, and to babies in utero.
- Gentle nudges towards the attitude object are more effective than hard shoves and hard shoves can lead to backlash.
- If the public knows you are attempting to change public attitudes, the regulation is less likely to work; effective

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<sup>6</sup> GT Fong et al., 'Reduction in Tobacco Smoke Pollution and Increases in Support for Smoke-free Public Places following the introduction of Comprehensive Smoke-free Workplace Legislation in the Republic of Ireland: Findings from the ITC Ireland/UK Survey, (2006) 15 (suppl) *Tobacco Control* 51-58. <http://www.ncbi.nlm.nih.gov/pubmed/16754947m> accessed 10 May 2016.

<sup>7</sup> A Steptoe et al (2002) 'Seatbelt use, attitudes and changes in legislation: an international study' *American Journal of Preventive Medicine* 23(4): 254-9.

propaganda is subtle; messages that are too obvious can induce backlashes and this explains the generally dismal success rates of public information campaigns. Messages are more effective if they make the listener believe others just like them are behaving in the desired way (for example, rates of tax compliance go up and deductions go down when citizens believe other citizens are paying their fair share).<sup>8</sup>

So when law reformers and law and policy makers want to change behaviour they may attempt to accomplish that goal by trying to change attitudes.<sup>9</sup> Sometimes it works and so sometimes it doesn't. Thinking about this I realise that much will depend on the context. Some types of behaviour are easier to change directly than others. For example, mandating seatbelt-wearing and prohibiting smoking in public places can lead to increased seatbelt use and reduced smoking. Things that can be done in private or out of the public eye, family violence, sexual violence, supplying alcohol, cigarettes or other drugs to minors are another matter. Here you need the attitudinal change to precede the behavioural change.

The issue of the relationship between law, moral attitudes and behavioural change is a complex one. I'm also aware that to suggest that the law can lead to attitudinal change which will in turn lead to behavioural change is to suggest that attitudes are strongly predictive of behaviour, so that a change in attitudes, e.g. more people regarding domestic violence as unacceptable and wrong, will lead to less domestic violence. Again disappointingly, my understanding of this is that it is not so simple. The relationship between expressed attitudes and behaviour is more complex, as demonstrated by the literature in social psychology and behavioural economics.

So much for the power of the law, regulating and criminalising to change social norms. I would like to say something more the about power of the criminal law to deter behaviour. In other words its power

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<sup>8</sup> Kenworthy Bilz and Janice Nadler (2014) 'Law, Moral Behaviour and Behavioural Change' in Eyal Zamir and Doran Teichman (eds), *The Oxford Handbook of Behavioural Economics and the Law*, 241-267.

<sup>9</sup> That might not always be the aim. Sometimes it may be symbolic, it may be supported for it says rather than what it does.

to change behaviour directly. Undoubtedly the whole panoply of the criminal justice system to deter proscribed behaviour does have a deterrent effect. Without police, prosecutions and courts there would be more crime. The overall system deters many offences that would otherwise be committed. Similarly, the absence of a specific offence, such as exceeding the prescribed quantity of alcohol or using a mobile phone whilst driving would have an impact on the incidence of the proscribed behaviour. Accordingly, general deterrence can be accepted as part of the justification for the criminal justice system that includes the institution of state punishment and as a justification for the creation of some crimes, although it may not be a sufficient justification for doing so. (Those who argue in favour of decriminalisation of illicit drug argue that the fact some users may be deterred by the prohibition is not a sufficient reason to criminalise for a range of reasons). My point here is that system (or absolute) deterrence is generally agreed to be effective.

The Melbourne Police strike of 1923 which led to over one third of the entire Victorian Police Force being sacked is commonly cited to support the effectiveness of absolute deterrence. It has been reported that once news of the strike spread, thousands poured into the city centre and engaged in widespread property damage, looting of shops and other acts of civil unrest. This lasted two days until the government managed to enlist thousands of citizens, including ex-servicemen to act as special law enforcement officers.<sup>10</sup> A police strike in Liverpool in 1919 and the imprisonment of the Danish police in 1944 had similar consequences.<sup>11</sup> It has been argued that support for absolute deterrence also comes from research that suggests that increasing police presence leads to an increased actual and perceived likelihood of detection and a reduction in crimes rates.<sup>12</sup> The evidence that increased police numbers reduces crime supports the point that increases in the certainty of punishment show a positive general deterrent effect. However, it should also be acknowledged that recent research has qualified the strength of the findings of a significant positive deterrent effect of increases in the certainty of punishment by

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<sup>10</sup> R Edney and M Bagaric, *Australian Sentencing* (2007) 62.

<sup>11</sup> J V Roberts and A Ashworth, in A von Hirsch, A Ashworth and J V Roberts, *Principled Sentencing* (3<sup>rd</sup> ed, 2009) 46.

<sup>12</sup> M Bagaric and T Alexander, '(Marginal) general deterrence doesn't work – and what it means for sentencing' (2011) 35 *Criminal Law Journal* 269 at 270. above n 9.

suggesting that studies should separate and compare deterrable and non-deterrable populations.<sup>13</sup>

*Is there a relationship between sentence severity and crime levels?*

Does increasing the severity of a penalty for a criminal offence lead to a reduction in the commission of it? In other words does marginal deterrence work? There have been many reviews of the deterrence literature which purport to summarise large numbers of studies and draw general conclusions from them about the relationship between sentence severity and crime levels. The majority of these reviews do not support the claim that harsher sentences deter.<sup>14</sup>

Reviews examining specific offences as well as specific types of punishment have found little or no support for the proposition that harsher sentences reduce crime. Criminologists are agreed that there is no evidence that capital punishment is more effective than life imprisonment.<sup>15</sup> The introduction of three-strikes legislation in the US and in the Northern Territory and Western Australia provided an opportunity to test the hypothesis that harsher sentences reduce crime. Reviews of the US studies of three-strikes laws have provided no evidence that increases in penalty severity lead to reductions in crime.<sup>16</sup> And in Australia, initial claims that the laws would operate as a general deterrent were dropped when it became apparent that this could not be substantiated.<sup>17</sup> The introduction of breathalyser offences has been widely accepted as having an impact on road traffic casualties. However, it seems that this is due to an increased perception of the likelihood of

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<sup>13</sup> Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' *Sentencing Matters*, Sentencing Advisory Council, Victoria (2011), 17.

<sup>14</sup> Daniel S Nagin, 'General Deterrence: A Review of the Empirical Evidence' in A Blumstein, J Cohen and D Nagin (eds) *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978); Philip Cook, 'Research in Criminal Deterrence: Laying the Groundwork for the Second Decade' in N Morris and M Tonry (eds) *Crime and Justice: An Annual Review of Research* (1980); Daniel S Nagin 'Criminal Deterrence: Research at the Outset of the Twenty-First Century' in M Tonry (ed) *Crime and Justice: A Review of Research*, vol 23 (1998); Andrew von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); The Halliday Report (2001); Antony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143.

<sup>15</sup> Nigel Walker, *Why Punish?* Oxford (1991) 16; Roger Hood, *The Death Penalty: A World-Wide Perspective* (3<sup>rd</sup> ed, 2002) chapter 7; W Bailey and R Peterson, 'Capital Punishment, Homicide and Deterrence: An Assessment of the Evidence' in M Dwayne Smith and M Zahn (eds) *Studying and Preventing Homicide: Issues and Challenges* (1999); Janet Chan and Deborah Oxley, 'The deterrent effect of capital punishment: A review of the research evidence', (2004) 84; *Contemporary Issues in Crime and Justice*, New South Wales Bureau of Crime Statistics and Research.

<sup>16</sup> Doob and Webster, above n 14, 173-177.

<sup>17</sup> Neil Morgan, 'Mandatory Sentences in Australia' (2000) 24 *Criminal Law Journal* 164.

getting caught rather than increases in the severity of sanctions.<sup>18</sup> Moreover, a new offence was introduced rather than simply a penalty increase for an existing offence.

Policy makers, politicians, judges and magistrates frequently assert that imposing punishment on an offender will discourage others from committing a particular offence. However, empirical evidence supporting the effectiveness of marginal deterrence is lacking. There is no evidence that increasing the *amount* of punishment has a deterrent effect for most crimes, particularly those we are most worried about – violent crimes including sex crimes, drug trafficking, home burglaries, car theft and so on.

All this of course may be well known to those who look beyond the criminal law to change behaviour and adopt instead a public health approach to social problems and responsive regulation – which I understand to mean making criminal sanctions a last resort. I am sure there are many lessons to be learnt from public health successes in dealing with issues such as smoking and road traffic fatalities.

### *Smoking.*

Daily smoking in the general population in Australia declined between 2010 and 2013 and has almost halved since 1991 (from 24.3% in 1991 down to 12.8% in 2013). The proportion of dependent children exposed to tobacco in the home has decreased from 31% in 1995 to 3.7% in 2013. The range of national tobacco control measures includes excise increases, education programs and national campaigns, plain packaging, graphic health warnings and prohibiting tobacco advertising, promotion and sponsorship. State strategies include minimum age restrictions on purchase of tobacco products, retail display bans, bans on indoor public spaces and increasingly on outdoor spaces.

Modifying sociocultural norms played a critical role in reducing tobacco use. It is my understanding that the key to this was the ban on advertising and promotion along with education campaigns. For much of the twentieth century, cinema, television and advertisements portrayed cigarettes as symbols of modernity, autonomy, power and sexuality.

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<sup>18</sup> H Lawrence Ross *Deterring the Drinking Driver: Legal Policy and Social Control* (1982); Ross Homel 'Penalties and the Drink Driver: A Study of 1000 offenders' (1981) 14 ANZJ Crim 225; D Riley, 'Drink Drivers and the Limits of Deterrence' (1985) 24 *Howard J* 241.

Strategic use of media, education, celebrities, peers, teachers and physicians served to shift sociocultural norms towards cigarettes as symbols of weakness, irrationality and addiction.<sup>19</sup> As I mentioned earlier, it has been suggested that a turning point in changing smoking behaviour occurred in the US when it emerged that non-smokers were being harmed by second-hand smoke.<sup>20</sup>

So by halving the proportion of those who smoke, the strategy to reduce the harm that tobacco smoking causes has been effective. The criminal justice system appears to have played a minor role in this. There are a number of offences in relation to smoking – I have found eight criminal summary offences and one disciplinary offence (smoking at a college). There is also a prohibition on children smoking, but it does not state that it is an offence and no penalty is specified.<sup>21</sup> The prohibition on sale or supply of tobacco products to those under the age of 18 is the means by which the prohibition is sought to be made effective. No doubt it is important to have these prohibitions including prohibitions on smoking on public transport and in smoke-free areas backed up by a statutory prohibition with a penalty. Smokers risk an on-the-spot fine of at least \$260 if they smoke in a smoke-free area. The Irish research I referred to earlier suggests that the smoking bans in public places have had the desired effect on both behaviour and attitudes.

Of course smoking still remains a problem. About 20% of Tasmanians smoke and this is the second highest rate in Australia. We have high rates of youth smoking and one third of teenage mothers smoke during pregnancy. The government's proposed strategy is to lift the smoking age, first to 21 and then to 25. This makes some sense in the light of the claim that almost all habitual smokers started smoking by the age of 25, or as Simon Chapman puts it, the number of people who ever take up smoking after the age of 25 is as rare as rocking horse poo. And there are the facts that two thirds of all smokers will die from smoking related diseases and smoking causes more deaths than drug and alcohol abuse combined.<sup>22</sup>

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<sup>19</sup> D Mozaffarian, D Hemenway and D Ludwig (2013) 'Curbing gun violence, Lessons from Public Health Successes' *Journal of the American Medical Association* 309(6) 351-352.

<sup>20</sup> Bilz and Nadler, n 8, p 248.

<sup>21</sup> *Public Health Act 1997* (Tas), s 63.

<sup>22</sup> Tim Greenaway, AMA quoted by Lauren Wladhuter, 'Tasmanian plans to lift legal smoking age to 21 or 25 could be world first' ABC News, 21 December 2015, <http://www.abc.net.au/news/2015-12-21/state-plan-to-lift-tasmanias-legal-smoking-age-above-18/7044622>.

It would be interesting to know the effect of increasing the legal smoking age from 16 to 18 in Tasmania in 1998. No doubt it would be difficult, if not impossible, to disentangle the increase in the smoking age from the other tobacco control measures introduced at the same time.

There is some American research which shows the effects of increasing the buying age to 21 are promising. Dozens of American cities have increased the buying age and states such as San Francisco and Hawaii have followed. The city of Needham, Massachusetts, raised the buying age to 21 more than a decade ago, in 2005, and a recent survey of the region's youth showed that teenagers in Needham smoked less tobacco in the past 30 days than their peers in neighbouring communities. That 2015 study showed that reported smoking rates dropped from 13% to 7% among teens in Needham from 2006 to 2010. This drop was larger than the 15% to 12% decrease seen in neighbouring communities that did not raise the buying age.<sup>23</sup>

Arguments for raising the age include the fact that research suggests that tobacco use, particularly nicotine exposure, can harm the developing human brain. Moreover, the brain doesn't stop developing during the teenage years, but continues until about age 25.<sup>24</sup>

The contrary arguments include retailers' concerns such as the Tasmanian Small Business Council's concern that it would reduce cigarette sales (the intended outcome) and have an effect on the viability of small businesses.<sup>25</sup> Simon Chapman opposes raising the smoking age using civil liberties arguments. The legal adult age for many significant rights is 18. At 18 you can vote, sign contracts, get married without parental consent, join the armed forces, provide sexual services, be involved in the production of pornography, get a tattoo or body piercing, be sentenced to imprisonment in an adult prison and so on (I have added to Chapman's list). He argues:<sup>26</sup>

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<sup>23</sup> K Schneider et al (2016) 'Community reductions in youth smoking after raising the minimum tobacco sales age to 21' *Tobacco Control*, 25(3) 355- 359.

<sup>24</sup> Laura Geggel, 'The Brain Science Behind Raising the Tobacco Buying Age to 21' Live Science, March 4, 2016, <http://www.livescience.com/53947-brain-science-smoking-age-21.html>

<sup>25</sup> Wladhuter, above n 22.

<sup>26</sup> Simon Chapman, 'When is a smoker an adult? Why we shouldn't raise the legal smoking age to 21' *The Conversation*, March 30, 2016.

.. in all these areas sentience and responsibility are assumed. The freedoms involved carry consequences (both positive and negative) for which those engaging in those freedoms should take personal responsibility. I find that argument pretty hard to disagree with.

I support nudging smoking choices by taxation policy, packaging, warnings and information campaigns, ingredient controls and not forcing no-smokers to breathe second-hand smoke. But redefining adult is a step too far.

I would like to look at another aspect of the criminal justice response to juvenile smoking repression and to ask the question: are we effectively enforcing the laws we already have? Chapman argues Big Tobacco enthusiastically supports symbolic efforts to reduce retail access to tobacco by putting notices in shops advising that kids will not be sold cigarettes and encouraging prosecutions of retailers who sell. They know the signs are useless, that retailers are rarely prosecuted and, most of all, how vital to their future it is to capture and hold teenage smokers as customers.

Chapman quotes a study which showed that, in 2011, 40% of Perth shops were found to be selling tobacco to children. With prosecutions for selling cigarettes being uncommon, many would reason that the risks of being caught selling, let alone being fined are miniscule. He points out that kids' intelligence networks would quickly spread the word of which shops will sell cigarettes and so access to them is not difficult. Why not then do as he suggests and ban any shop or shop owner found selling tobacco to minors from having a retail licence?

First, we need to ask if retail violation of the prohibition on sales to children is a problem in Tasmania. It seems that it may no longer be one – in 2010 the non-compliance rate was found to be just 2% statewide compared with 17% in 2008 and non-compliance rates ranging from 48% to 78% between 1998 and 2002.<sup>27</sup> Regular testing of compliance, publication of results and active enforcement through prosecution seemed to have been effective. There does not seem to be more recent data on the compliance rate nor is data on prosecutions since 2012 published.

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<sup>27</sup> Quit Tasmania, *Suitcase to Glovebox, Retailer Compliance Survey 2010*.

Hypothetically, then, if we needed to deter retailers from selling to children (or to young adults if the smoking age increases) would imposing a penalty such as licence cancellation work?

For general deterrence to have any chance of being effective the conditions must be favourable: the risk of detection must not be too remote; the penalty should be publicised adequately; the penalty should be perceived as a deterrent and potential offenders must consider the risks rationally. In general, for many offences the clear-up rates are so low that the risk of detection is quite remote; few know what the penalties are; we do not know what is perceived as a deterrent and in any event many crimes are committed without the offender addressing the risks rationally.

The deterrence literature suggests that there is a good chance that an offence like selling cigarettes to minors could be an offence which is susceptible to general deterrence. This would require:

- The risk of detection must not be too remote. Currently, it appears that it is in Western Australia. Where there is a high rate of non-compliance, surveillance of cigarette sales needs to be greatly improved. In the US it seems that actively enforcing compliance has become a national requirement linked to state funding and retailer violation has decreased from 40% to 9%.<sup>28</sup> A quick search revealed that there is a wealth of literature on this issue alone.
- Next it would require a penalty that is both well publicised, known to potential offenders and perceived by them as a deterrent. What is likely to be perceived as a deterrent? Loss of the right to sell tobacco products is likely to have this effect. Currently the penalty for selling tobacco products to a minor in Tasmania is a maximum penalty of 50 penalty units for a first offence. However, in Singapore, as well as being fined, retailers are punished by having their licence suspended for 6 months for a first offence and revoked for a second offence or for selling to a child in school uniform.<sup>29</sup> The infringements are well publicised in Singapore. Channel News Asia has reported that in the last three years 25 retailers

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<sup>28</sup> R J Williams et al (2014) 'Trends in Underage Tobacco Sales: An Update on the past decade of compliance checks in Hawaii, 73(10) *Hawaii Journal of Medicine and Public Health* 315-321.

<sup>29</sup> [http://www.hsa.gov.sg/content/hsa/en/News\\_Events/Press\\_Releases/2014/hsa-suspends-the-licences-of-six-retailers-caught-selling-tobacco-to-unde.html](http://www.hsa.gov.sg/content/hsa/en/News_Events/Press_Releases/2014/hsa-suspends-the-licences-of-six-retailers-caught-selling-tobacco-to-unde.html)

outlets have had their licences suspended and 22 have had them revoked.<sup>30</sup> It is true that a tobacco seller can now have their licence cancelled in Tasmania for committing an offence against the Act. Is this well known? It is not mentioned in the section creating the offence, which said the penalty is 50 penalty units (\$7,700). Rather the possibility that the Director may cancel the licence to sell tobacco is in a later section (s 74A). It is mentioned in the Tobacco Retailers Guide, published in 2012.<sup>31</sup> Has the Director ever cancelled a licence? If the risk of incurring this penalty is perceived as too remote, it will not work as a deterrent.

General deterrence has the potential to be effective in relation to the sale of tobacco products to minors. Knowing the potential of general deterrence as a regulatory mechanism, but also its limitations and conditions for success, is important. This is not just relevant in relation to the issue of regulating tobacco products but also in relation to regulation of alcohol use and other drugs.

One of the problems that the criminalisation of illicit drugs faces is that the conditions for general deterrence to be effective are so difficult to satisfy. I am now going to sidestep the issue of criminalising the use of illicit drugs and move on to the issue of one-punch laws.

### *One-punch laws.*

All too often the criminal law is called in aid to solve a social problem. It can be an instantly satisfying political response to public anxiety about a form of conduct that has been given media publicity. About two years ago there was a rash of new offences with mandatory penalties to deal with the problem of alcohol- or drug-fuelled violence in public places. New South Wales, Victoria and Queensland introduced new offences – one-punch or coward-punch laws with mandatory penalties. At the same time, at least in the case of New South Wales and Queensland, the one-punch laws were part of a much broader multi-faceted and more nuanced response. In Queensland the plan to tackle alcohol- and drug- fuelled violence aimed to change the culture that leads to antisocial violent behaviour but the plan had the populist element of one-punch laws with a mandatory penalty.

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<sup>30</sup> <http://www.channelnewsasia.com/news/singapore/3-retailers-punished-for/2422206.html>

<sup>31</sup> *Tobacco Retailers Guide: From 1 March 2012*, Department of Health and Human Services, Public and Environmental Health,

And in New South Wales two one-punch deaths in Kings Cross, the second on New Year's Eve 2013 just metres from the first, led to intense debate about alcohol-fuelled violence in Sydney. The package of measures included early lockout measures, a freeze on liquor licences, more public transport, public education about drinking and mandatory minimum sentence of 8 years imprisonment for the new crime of assault causing death and mandatory minima for certain violent offences when the offender is intoxicated. This was despite the fact that the Attorney-General had earlier spoken out against mandatory penalties, stating they were an expensive and ineffective crime-fighting tool.<sup>32</sup>

Thinking about these bifurcated policies led me to the realisation that the approach of public health advisors becomes hijacked with these populist add-ons. In Victoria the Premier stated that a mandatory penalty for 'coward-punch manslaughter' was designed to send a clear message to potential offenders, and deter them from committing unspeakable acts of cowardice. He added that 'people should step back and think before they throw a punch'.<sup>33</sup>

And yet we know that harsher penalties are not an effective crime strategy. In the case of intoxicated offenders the conditions for general deterrence to operate effectively are absent. An intoxicated person is not likely to step back and think before they throw a punch. He is not going to stop and make a judgement about risk and reward before acting. This kind of focus on increased penalties suggests that the problem of alcohol-related violence can be addressed by tough sentences and distracts attention more effective means of addressing the problem.

If the criminal law is not the answer to alcohol and drug fuelled violence, what is? I am interested in understanding more about the demand reduction side of the equation – about changing attitudes and behaviour in relation to alcohol and drug use.

Taxation is one way to nudge demand reduction. And I have mentioned architectural nudges, such as forbidding smoking in public buildings, which can also persuade people to do less of it. And it has been argued that these kinds of behavioural changes can lead to attitudinal change

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<sup>32</sup> Quoted in *New South Wales Parliamentary Debates*, Legislative Council, 30 January 2014, p 26574 (Adam Searle, deputy Leader of the Opposition).

<sup>33</sup> 'Victoria Increases Coward Punch Death Sentences to 10 years'. *The Australian* (17 August 2014).

about the morality of the behaviour.<sup>34</sup> Nudging and choice architecture is new language for me but clearly it has an important role in dealing with social issues such as alcohol and tobacco.

Social marketing campaigns also have a prominent role in tackling social issues including harmful behaviour arising out of the use of alcohol, tobacco and drugs. Here again there is much to be learnt from theory and research about the role of communication in social change and from the evaluation of successful and unsuccessful campaigns. Clearly a social issues campaign, such as one to encourage responsible alcohol consumption, can't just rely on a catchy idea. Instead the campaign should be informed by behavioural theory and empirical evidence as to why audiences think and behave in particular ways, what motivates and influences them and so on.<sup>35</sup>

In conclusion, I would like to congratulate the conference organisers for this Alcohol, Tobacco and other Drugs Council Biennial Conference and I wish you a most stimulating and useful few days.

Thank you.

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<sup>34</sup> Bilz and Nadler, above n 8, p 248.

<sup>35</sup> Linda Brennan and Lelde McCoy, 'Social issues campaigns – a new way forward', paper delivered at 2015 PRIA National Conference, Hobart.