

## **Additional Comments**

### **Senator David Leyonhjelm – Liberal Democratic Party**

1.1 While I am in broad agreement with the thrust of the committee's report, I wish to add comments on matters that came before the committee that either fell outside the inquiry's terms of reference or could not be properly addressed in a short interim report.

1.2 My comments fall under three headings: politics, advertising, and economics.

#### **Politics**

1.3 Several public health organisations made much of the concept of 'stewardship', and the Committee's report (on pages 5–6) provides an outline of its meaning.

1.4 I think it is important to note that conceptually, 'stewardship' has its origins in political philosophy, particularly the work of Professor Phillip Pettit. Professor Pettit's work was in turn a response to the scholarship of Professor Isaiah Berlin.

1.5 Pettit claimed to have developed a third conception of liberty, distinct from Berlin's negative (freedom from interference) and positive (freedom to live as one's true self) liberties: liberty as freedom from domination.

1.6 The three concepts may seem similar, but in practice they have produced vastly different systems of political order.

1.7 According to the 'negative' conception of liberty, people are free simply to the extent that their choices are not interfered with. There are many variations on this, depending on how exactly one wants to define 'interference', but they all have in common the basic intuition that to be free is, more or less, to be left alone to do whatever one chooses.

1.8 Berlin associates this idea of negative liberty with the classic English political philosophers Hobbes, Bentham, and J. S. Mill, and it is today probably the dominant conception of liberty, particularly among contemporary Anglo-American political theorists. In Mill's well-known words, 'the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs'.

1.9 In the positive sense, a person or group is free to the extent that they exercise self-control or self-mastery. However, it is not agreed what exactly constitutes self-mastery. According to one influential account, to be 'positively free' is to be able to act on one's second-order desires.<sup>1</sup>

1.10 For example, the addicted smoker may be free in the negative sense not to smoke - since no one actually forces him to - but he is not free in the positive sense

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1 In Harry Frankfurt, 'Freedom of the Will and the Concept of a Person', in *Free Will*, Gary Watson (ed.), Oxford: Oxford University Press, 1982.

unless he can actually succeed in acting on his presumed second-order desire not to keep smoking.

1.11 There are well known and troubling implications in the positive conception of liberty. For the most part, these stem from the problem that freedom in the positive sense would seem to license fairly extensive coercion on behalf of individuals' allegedly 'real' interests—for example, coercively forcing a smoker to quit on the presumption that this is, in fact, what he really wants to do (even if he doesn't say so).

1.12 Freedom as 'non-domination', by contrast, is best defined as structural independence – as the condition of not being subject to the arbitrary or uncontrolled power of a master. Pettit—who developed this 'republican' conception of freedom—argues that a person or group enjoys freedom to the extent that no other person or group has 'the capacity to interfere in their affairs on an arbitrary basis'.<sup>2</sup> On a plausible rendering of the term 'domination' as arbitrary or uncontrolled power, freedom in what Professor Pettit calls 'the republican sense' consists in the secure enjoyment of non-domination.

1.13 These conceptions of liberty can seem similar. However, liberty as non-domination is not the same as liberty as non-interference. There is a real and substantial difference between the former's view of liberty as independence from arbitrary or uncontrolled power, and negative liberty as non-interference. On the view of negative liberty as non-interference, any sort of public law or policy intervention counts by definition as an interference and, ergo, a reduction in freedom. Being committed to the 'non-interference' view of negative liberty, liberals thus tend to be more suspicious of government intervention.

1.14 In the 'republican sense' of political liberty, or non-domination, public laws or policy interventions need not necessarily count as reductions in freedom. Provided the law or policy is adopted and implemented in an appropriately non-arbitrary manner, citizens' freedom is said to remain untouched.

1.15 Indeed, if the law or policy ameliorates dependency, or curtails the arbitrary powers that some exercise over others in the community, citizens' freedoms may be enhanced. A practical example would be anti-discrimination law, which by preventing the exercise of arbitrary employer prejudice against, say, a particular race or gender, ameliorates dependency on the welfare state (since people with jobs require little or no welfare). This leads naturally to the theory of 'stewardship' as an appropriate role for government, given that government is seen as a legitimate means by which to curtail dominance.

1.16 However, it is worth noting that 'stewardship' is not part of Professor Pettit's conception of liberty, but was developed by the UK's Nuffield Council on Bioethics (NCB), particularly in its report *Public Health: Ethical Issues* (2007), cited extensively in the PHAA submission, as outlined by the committee in its interim report.<sup>3</sup>

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2 Pettit 1999, p. 165.

3 Public Health Association of Australia, *Submission 172*, p. 6.

1.17 In sum, the role of public health in the formulation of public policy is intimately linked to the governing conception of liberty in a given society. In my view, as a society we have moved too far away from negative liberty, and thus seem impaired in our ability to simply leave people alone.

## **Advertising**

1.18 As mentioned on page 7 of the committee report, a number of submissions addressed the idea of 'industry domination', particularly through advertising. Other submissions questioned the evidence base for 'advertising-based domination', or even whether it exists. This issue fell outside the scope of the inquiry's terms of reference, but the debate is both intense and fraught and people who have taken an interest in the matters raised by the inquiry deserve some background.

1.19 The PHAA argued both in its submission and before the committee, based on the 'stewardship concept', that what may be seen as coercive or intrusive state intervention is actually the state's attempt to counter the vested interests of industry. The PHAA submitted that personal choice is already dominated by industry:

Where influence of individuals is so strongly dominated by forces around them, it is much more difficult to make well-informed, responsible choices compared to when there is a balanced view presented on a level playing field.<sup>4</sup>

1.20 They argued that it is the role of the state to act in the public interest, against domination by industry:

There is a constant push, especially from certain sectors of industry, to be free from government interference. This fails to recognise a government's responsibilities to protect the health and safety of the community, and to place the interests of public health ahead of those of vested interests.<sup>5</sup>

1.21 An example of domination by industry, as argued by PHAA, is the advertising of "junk" food aimed at children:

Domination by industry in marketing of junk food to children, for example, plays a key role in the obesity epidemic. Governments have an option of countering the domination in the market place by junk food companies and delivering a level playing field by investing the same amount of money into marketing fruit, vegetables and good nutrition messages. However, rather than spend huge amounts of taxpayers money in this manner government can achieve the same level playing field, countering the domination, by introducing regulations that restrict the extent of marketing of junk food to children.<sup>6</sup>

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4 Public Health Association Australia, *Submission 172*, p. 7.

5 Public Health Association Australia, *Submission 172*, p. 7.

6 Public Health Association Australia, *Submission 172*, p. 7. PHAA also listed alcohol and tobacco advertising as examples of domination by industry.

Embedded within this argument are a number of claims, contested by other submitters and witnesses before the committee. First, whether advertising by industry even constitutes 'domination' as conceived in Professor Pettit's schema is an open question. There is considerable debate among political theorists and jurisprudential scholars on this point, and even Pettit has modified his views over time. Much of his scholarship has focussed on the idea of 'arbitrary power' exercised by governments, although more recently he has spoken of 'uncontrolled power'.<sup>7</sup> His main focus is on the rule of law and the dangers of excessive discretion, matters of relevance to the state, not the private sector.

1.22 Second, even if, at a theoretical level, advertising by industry can be construed as a form of domination, there is the empirical question of whether it does, in fact, 'dominate' adults' personal choices. Christopher Snowdon of the UK's IEA pointed out that '[t]here is a huge amount of economic evidence showing that advertising does not increase the size of a given market and is only useful in increasing market share for a given company'.<sup>8</sup> The Institute of Public Affairs also pointed out that the evidence base suggesting advertising influences subsequent behaviour is weak.<sup>9</sup>

1.23 Similarly, attempts to correlate media consumption with later activity in other fields—playing violent video games and subsequently committing crimes of violence, for example—have never been borne out by research.<sup>10</sup>

1.24 Finally, in considering the plausibility of dominance by industry and advertising, there was little acknowledgment of the possibility that the state can also dominate, and not just in a dictatorship. Democracies have interned entire populations (Japanese-Americans, German-Australians) in wartime, exercised extensive and coercive control of entire populations during times of peace (Australian Aborigines, LGBTI people), practised widespread censorship and surveillance, and engaged in mandatory sterilisation on the flimsiest of pretexts, including in the name of 'public health'.<sup>11</sup> There was also no serious attempt to justify the claim that state dominance is preferable to that of corporations or advertisers, or why individuals are deemed incapable of resisting the influence of either.

## Economics

1.25 A number of submissions argued that certain products generate flow-on costs to the economy which are considerably in excess of the revenue obtained through taxing those products. This position is outlined by the committee in its interim report.

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7 Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, 2012, p. 58.

8 Mr Christopher Snowdon, *Submission 186*, p. 1.

9 Institute of Public Affairs, *Submission 160*, p. 26.

10 See 'The Effect of Video Game Competition and Violence on Aggressive Behavior: Which Characteristic Has the Greatest Influence?' *Psychology of Violence*, 2011, Vol. 1, No. 4, 259 – 274.

11 See Thomas Leonard, *Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era*, Princeton 2016.

1.26 While Pigouvian tax levied on markets that generate negative externalities is an accepted part of mainstream economics, it is well known that measuring externalities in such circumstances is difficult. Pigou himself noted that 'it must be confessed, however, that we seldom know enough to decide in what fields and to what extent the State, on account of [the gaps between private and public costs] could interfere with individual choice'.<sup>12</sup>

1.27 Mr Snowdon cited research by Dr Eric Crampton, Dr Matt Burgess, and Dr Matt Taylor arguing that the economic costs detailed in much of the literature are largely spurious, as they fail to distinguish between public (or 'social') costs and private costs, in addition to failing to appropriately weigh benefits as well as costs to the individual consumer.<sup>13</sup>

1.28 Crampton et al point out that weighing costs and benefits, as well as distinguishing between private and public costs, are fundamental to economics. They note:

[public health] studies typically ignore or deliberately blur the distinction between internally and externally borne costs. These studies calculate social-cost figures that generally include a large proportion of costs falling on the drinker and on other parties more typically considered to be in contract with the drinker, which economists usually identify as private and not policy-relevant.<sup>14</sup>

1.29 In short, lost productivity and early mortality are not costs to the taxpayer. These costs are private, incurred by the drinker or smoker and sometimes his employer.

1.30 Crampton et al are particularly critical of Collins and Lapsley, the headline public health study that seeks to quantify public or 'social costs'.<sup>15</sup> They argue that Collins and Lapsley ignore the laws of economics, disregarding benefits while purporting to engage in a cost-benefit analysis. They note:

Consumer enjoyment forms the bulk of the economic benefit consumers receive from the consumption of alcohol; counting these benefits as zero allows [Collins and Lapsley] to convert private but potentially unanticipated costs of alcohol consumption into policy-relevant social costs.<sup>16</sup>

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12 Pigou, A.C., (1954) *Some Aspects of the Welfare State*. Diogenes 7 (6).

13 'The Cost of Cost Studies', *Working Paper*, Department of Economics and Finance College of Business and Economics, University of Canterbury cited in Mr Christopher Snowdon, *Submission 186*, p. 2.

14 'The Cost of Cost Studies', *Working Paper*, Department of Economics and Finance College of Business and Economics, University of Canterbury cited in Mr Christopher Snowdon, *Submission 186*, p. 4.

15 Collins, D. J., & Lapsley, H. M. 2008. The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004/05. Dept. of Health and Ageing.

16 Collins, D. J., & Lapsley, H. M. 2008. The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004/05. Dept. of Health and Ageing, p. 16.

1.31 Crampton et al illustrate the difficulty of undertaking a cost-benefit analysis without considering benefits by means of an analogy:

By way of analogy, consider the case of skiing. Every skier bears risk; a very small proportion of skiers are killed. If we were to consider the net costs of those skiers involved in a serious accident, we would be right, to a first approximation, to ignore the benefits of skiing for those victims of accidents, since any benefits would be trivially small relative to the magnitude of the costs they incurred. However, it would be wrong to conclude from this examination of victims that skiing imposed massive net social costs. No estimate of any activity's value, and no policy implications, can be derived from an assessment limited to the downside risk of an activity. The benefits of alcohol consumption enjoyed by those drinkers who ex ante consumed as much alcohol must be weighed against the harms borne by those who become alcoholics or suffered another adverse consequence. Only in this way is it possible to make economically meaningful statements about net costs, whether of alcohol consumption or of any other activity.<sup>17</sup>

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**Liberal Democratic Party**

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17 Collins, D. J., & Lapsley, H. M. 2008. The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004/05. Dept. of Health and Ageing, p. 17.