



[By Email]

**The Rt Hon Victoria Atkins MP**  
**Secretary of State for Health and Social Care**

1 May 2024

Dear Secretary of State,

Part of the role of the Joint Committee on Human Rights is to conduct legislative scrutiny in respect of Bills that engage human rights. This includes the Tobacco and Vapes Bill, which had its second reading in the House of Commons on 16 April 2024, due to the measures it contains designed to “create a smokefree generation”. We felt that it would be helpful to share with you, and make public, our views on the Bill as it stands. We also have some questions to which we would appreciate a prompt response.

### ***Effect of the Bill***

As you are aware, the Bill would make it an offence anywhere in the UK to sell tobacco products to anyone born on or after 1 January 2009. The effect of this change in the law would be that tobacco products can continue to be sold to anyone who is aged over 18 now, and to anyone who turns 18 before the end of 2026. It will not, however, be legal to sell cigarettes, cigars and tobacco to those who turn 18 on or after 1 January 2027. Another way of looking at this effect is to say that the minimum age for being sold cigarettes will increase every year from 2027 onwards until ultimately they can be sold to no one.

### ***Relevant human rights***

We consider that three rights from the European Convention on Human Rights (ECHR), brought into domestic law by the Human Rights Act 1998, are most likely to be affected by the Tobacco and Vapes Bill. They are the right to respect for private and family life under Article 8 ECHR, the right to be free from discrimination under Article 14 ECHR and the right to peaceful enjoyment of possessions under Article 1 to the First Protocol ECHR.

#### ***Article 8***

The late Lord Bingham described the purpose of Article 8 as: “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>1</sup> The European Court of Human Rights has held that a key principle underpinning the rights guaranteed by Article 8 is the personal autonomy of the individual, and also that “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>2</sup>

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<sup>1</sup> R (Countrywide Alliance) v Attorney General [2008] AC 719, para 10

<sup>2</sup> Pretty v United Kingdom (2002) 35 EHRR 1



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Article 8 is a qualified right, meaning that interferences with Article 8 can be justified if they are prescribed by law, pursue a legitimate aim and are proportionate to that aim. Recognised legitimate aims include “the protection of health” and “the economic well-being of the country”.

## *Article 14*

Article 14 ECHR prohibits discrimination in the enjoyment of other rights on grounds that have been found to include age. Thus, if smoking was found to come ‘within the ambit’ of Article 8 (i.e. was found to amount to something that forms part of the aspects of private life protected by that Article) then a difference in treatment in the application of a restriction on smoking, based on age, could engage Article 14. However, a difference in treatment will only be discriminatory if it “has no objective and reasonable justification”; that is, if it does not pursue a “legitimate aim” or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

## *Article 1 Protocol 1*

Article 1 of Protocol 1 (A1P1) protects against unjustified interference by the state in a person’s ‘possessions’, a term which has been given a generous interpretation so as to cover matters from physical goods to shares to a licence to serve alcoholic beverages. A1P1 does not, however, include a right to acquire property. Future income constitutes a “possession” under A1P1 only if the income has been earned or where an enforceable claim to it exists. A1P1 also includes within it recognition of the principle that States are entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.

## **Government’s position**

While the Department of Health and Social Care has not produced a separate ECHR memo to accompany the Bill, we note from the brief human rights analysis provided in Annex D of the Explanatory Notes that:

“The Department’s view is that these measures which control the sale of tobacco products without otherwise prohibiting or limiting what individuals can do would not engage the right to private and family life (Article 8). The legislation would not criminalise individuals in the affected cohort for possessing tobacco products or smoking.”

“Alternatively, if these measures are within the ambit of Article 8, the Department considers that any interference (Article 8) and any differential treatment (Article 14) can be justified and is proportionate...The justification for any difference of treatment is that this is necessary in order to introduce the measure to achieve the legitimate aim of the protection of public health.”

“The smokefree generation policy...may engage the right of peaceful enjoyment to the possessions of those businesses affected by an expected reduction in sales of tobacco products to the UK market. If, or to the extent that, Article 1 Protocol 1 (A1P1) is engaged then the Department considers that any interference can be justified and is proportionate.”<sup>3</sup>

Given the brevity of the analysis provided, we decided that we needed to look more carefully at the question of the engagement and compatibility of the Bill with Article 8 and 14 ECHR. We have also considered the implications of the Bill for A1P1.

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<sup>3</sup> [Explanatory Notes, Annex D](#)



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*Given concerns that have been raised about the Bill at Second Reading, including, in particular, that its effects may be discriminatory on the basis of age, do you intend to publish a more in-depth analysis of the Bill's human rights implications?*

## **Relevant case law**

### *Articles 8 and 14*

The leading domestic case on restrictions on smoking and human rights is *McCann v The State Hospitals Board for Scotland*, in which the Supreme Court was asked to decide whether a comprehensive ban on smoking at a psychiatric hospital in Scotland was compatible with Article 8 and Article 14 ECHR.<sup>4</sup> The Supreme Court concluded that a smoking ban within the hospital engaged the Article 8 rights of detained patients. However, this was on the basis that detention meant the few freedoms that remained became more central to the detained person's autonomy. The Court said:

"It is not necessary to decide whether a comprehensive ban on smoking by people at liberty, or at least a ban outside their homes, would so interfere with their private lives as to require justification under article 8. Such people can exercise personal autonomy in many other ways. But there is a need to protect the residual autonomy of a person who has been subjected to long term therapeutic detention by requiring this further intrusion into his private life to be justified."

Despite coming to the view that Article 8 was engaged by the ban affecting detained patients, the Supreme Court concluded that the interference with Article 8 was justified. In respect of whether the ban pursued a legitimate aim, the Court said:

"Having regard to the adverse effects that smoking can have on the health of smokers and others exposed to tobacco smoke, I have no difficulty in agreeing with the Second Division that the comprehensive smoking ban pursued the legitimate aim of the protection of health which is recognised in article 8(2)"

On proportionality, the Supreme Court concluded that the ban was proportionate, but did so largely on the basis of facts that were specific to the particular context of the detention setting.

In respect of Article 14, the Court considered the difference in treatment between detained and other patients and between detained patients and the general public. It found that there was no discrimination, but again in a context that is of limited relevance to consideration of the general ban that would be introduced by the Tobacco and Vapes Bill.

Looking towards the case law of the European Court of Human Rights, that court has not directly considered the question of whether a smoking ban violates the Article 8 or 14 rights of smokers. It is notable, however, that the ECtHR has ruled on cases concerning the harm caused by smoking, concluding that Articles 3 (prohibition on inhuman and degrading treatment) and 8 may be engaged by a failure to protect others from forced exposure to passive smoking.<sup>5</sup>

### *Article 1 Protocol 1*

In *Vekony v Hungary* the ECtHR concluded that denying a licence to a shopkeeper to sell tobacco products, as a result of measures taken to prevent the sale of such products to

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<sup>4</sup> [2017] UKSC 31

<sup>5</sup> See, for example, *Gavrilovici v. Moldova*, no. [25464/05](#), §§ 42 and 44, 15 December 2009, and *Ostrovar v. Moldova*, no. [35207/03](#), § 85, 13 September 2005



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children, did constitute a control of property that interfered with A1P1 rights.<sup>6</sup> While the aim of preventing tobacco being sold to children was a legitimate one, the interference was not proportionate, in significant part because it deprived the applicant of a third of his income with only a very short period being provided to make adequate arrangements to respond to the impending change to his source of livelihood. The Court nevertheless emphasised the wide margin of appreciation available to states in this area.

In *R (British American Tobacco Ltd) v Secretary of State for Health*, the domestic courts rejected the tobacco company's claim that the introduction of standardised packaging for cigarettes violated their rights under A1P1.<sup>7</sup> The Administrative Court reviewed relevant case law, carefully distinguishing *Vékony* on its specific facts, and rejected the claim, noting that:

“The property rights in the present cases directly serve the promotion of a trade which is profoundly adverse to the public interest, and acknowledged by all concerned to be so because of the harm the products cause to health...”

“No individual or company can have an expectation that if it produces and supplies a product that is, or becomes recognised as, contrary to the public interest that it will be entitled to continue to produce and sell that product, or that if the State comes to prescribe or curtail the product in issue that it will be entitled to compensation.”<sup>8</sup>

## **Analysis**

### *Article 8*

There is no question of the key measures in the Bill being incompatible with Article 8 unless criminalising the sale of tobacco products would interfere with the Article 8 rights of the purchaser. The preliminary question in this regard is whether smoking even falls within the concept of private life for the purposes of Article 8, so as to attract its protection. There is no clear authority on this point in respect of general smoking bans – the Supreme Court in *McCann* was careful to make clear that they were not deciding it. While smoking is an activity that many people still enjoy as part of their private lives, Article 8 does not cover any and all activities that can be conducted in private. Furthermore, as recognised by the Supreme Court in *McCann*, individuals are able to exercise their autonomy, protected by Article 8, in a multitude of other ways even if they are unable to smoke. Taking all of this into account, we are unconvinced that smoking is sufficiently core to private life to engage human rights protections.

Nevertheless, in the absence of binding authority (and bearing in mind the finding in *McCann* that Article 8 could be engaged by smoking in some circumstances) it is possible that a court could find that a ban on selling tobacco products, like that which would be imposed by the Bill, does fall within the scope of Article 8. Given that the Bill would clearly provide a legal framework for the ban, the key question for Article 8 purposes would then be whether it is considered “necessary in a democratic society” in the interests of public health and economic well-being.

Plainly there is a compelling public health argument for preventing people smoking. As emphasised in the Explanatory Notes: “Tobacco is the single leading cause of preventable ill health, death and disability in this country.”<sup>9</sup> In this regard, it is notable that the UK has a positive obligation under Articles 2 and 8 ECHR to take appropriate measures to protect the

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<sup>6</sup> *Vékony v Hungary* [2015] ECHR 5 (13th January 2015)

<sup>7</sup> [2016] EWHC 1169 (Admin) and [2016] EWCA Civ 1182

<sup>8</sup> [2016] EWHC 1169 (Admin) (judgment upheld by the Court of Appeal)

<sup>9</sup> *Explanatory Notes*, para 1



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life and health of those within their jurisdiction.<sup>10</sup> This does not require a ban, but it supports the taking of measures considered appropriate to tackle the harm caused by smoking. The UK also has similar obligations under the International Covenant on Economic, Social and Cultural Rights:

## Article 12

“1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases...<sup>11</sup>

*We would be interested in hearing more from the Government on the relationship between these obligations and the Bill. To what extent do you consider the Bill complies with the positive obligations on the United Kingdom under the ECHR and ICESCR to protect public health?*

We note that you have also put forward a strong economic argument in favour of the ban. As set out in the Explanatory Notes:

“It is estimated that the total costs of smoking in England are over £17 billion, including £14 billion per year cost to productivity and £3 billion cost to NHS and social care, whilst the tax raised in excise duty revenue is less than this at approximately £10.2 billion a year.”<sup>12</sup>

While what will eventually amount to a complete smoking ban is a strong measure, which many may consider goes too far, we note that bans on harmful or dangerous substances are not infrequent in the UK, from illegal narcotics to jelly confectionary that poses a choking hazard.<sup>13</sup> We also note that the Bill would impose restrictions and potential sanctions on sellers of tobacco products, not on those who purchase them, which reduces the interference with Convention rights that the measures pose. Taking all of this into account, even if Article 8 ECHR is engaged, the proposed ban appears likely to be considered proportionate or at least to fall within the UK’s “margin of appreciation”, i.e. the discretion given to individual nations that have ratified the ECHR as to how they choose to protect particular rights.

## Article 14

If smoking were to be found to come within the ambit of Article 8, the Bill would also throw up an Article 14 issue, as the measures introduced are designed to establish different treatment depending on a tobacco purchaser’s age (or at least date of birth).

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<sup>10</sup> See *Vavrička and Others v. the Czech Republic* [GC], § 282

<sup>11</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

<sup>12</sup> *Explanatory Notes*, para 3

<sup>13</sup> The use of Konjac (E 425) or Carrageenan (E 407) in mini jelly cups is not permitted as they are a choking hazard. Konjac (E 425) is also not allowed in jelly confectionery. See further the [Food Standards Agency](#)



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The question for Article 14 purposes is whether the difference in treatment between people born before 1 January 2009 and those born after is itself justified. We understand that this difference in treatment pursues the aim of preventing future generations smoking, without forcing everyone who is currently a smoker to immediately stop. Given the health and economic arguments referred to above, as well as positive human rights obligations, this appears to be a legitimate aim. The question then becomes whether or not there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

A measure taken to protect public health, which is being phased in gradually in the way the Bill provides in order to protect future generations, without making it illegal for adults who now smoke to buy cigarettes, appears likely to satisfy the requirements of Article 14. There may, however, be some practical difficulties in future, when vendors will be required to, for example, refuse cigarettes to a 35 year old while selling them to a 36 year old. While we think these are unlikely to be insurmountable or sufficient to undermine the proportionality of the Bill's approach, we are concerned that the Government should be prepared to deal with them. A measure that cannot be practically enforced will be unable to satisfy requirements of proportionality.

*How do you anticipate the prohibition on sales will be operated as the years pass and the minimum age for purchasing cigarettes exceeds 18? What problems, if any, do you anticipate in the enforcement of this rolling 'age limit'? Do you consider any specific practical measures will need to be put in place to mitigate these problems?*

## *Article 1 Protocol 1*

The Bill would prohibit the sale of cigarettes to a certain age group, which is consistent with how the law currently operates. While the group that can be sold cigarettes will gradually diminish year on year, this is very far from the sudden and outright ban that affected the applicant so severely in *Vekony v Hungary*. Furthermore, as indicated by the *British American Tobacco* case, no individual or business that sells a product recognised to be contrary to public interest on both health and economic grounds can expect to be entitled to continue to do so. It appears unlikely that the Bill's gradual ban on smoking would be found to be incompatible with A1P1 rights.

Given the timetable for the Bill, which is due to begin committee stage on 30 April, we would be grateful for a prompt response to our questions.

Yours sincerely,

**Joanna Cherry KC MP**