

# The McNanny State

How Scotland is becoming  
a puritan's playpen



Brian Monteith

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June 2018

Foreword by Allan Massie CBE

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## About Forest

FOREST (Freedom Organisation for the Right to Enjoy Smoking Tobacco) was founded in 1979 to support and defend adults who choose to smoke a legal consumer product. We campaign against excessive regulations including outdoor smoking bans and unnecessary government intrusion into people's personal lives and private spaces. In Scotland we have campaigned against the pub smoking ban, the ban on the display of tobacco in shops, the ban on smoking in hospital grounds and other anti-smoking measures we consider pervasive or unnecessary. High profile supporters include artist David Hockney, musician Joe Jackson and Oscar-winning screenwriter Sir Ronald Harwood.

## About the author

Brian Monteith is a writer and public relations consultant, working across both political and commercial sectors. He was spokesman for Forest in Scotland from 1994-1998 and subsequently served as a member of the Scottish Parliament in its first two terms (1999-2007), initially as a Conservative and latterly as an independent. He retired stating that he "would rather return to commerce than be a one-man band swimming against the treacly tide of collectivism in the Scottish Parliament". He now works between Toulouse, London and Edinburgh and has been a regular political commentator for the Scotsman since 2009 and City AM since 2016. He has written two books, 'Paying the Piper: From a taxing lament to a rewarding jig' and 'The Bully State: The end of tolerance', both of which looked at the growth of government, why it should be resisted and how it might be reversed.

## Foreword by Allan Massie CBE

WRITING of his time as a Conservative and Unionist parliamentary candidate before 1914, John Buchan remembered that while Tories were better-born, the Liberals were sure they were born better.

As Brian Monteith demonstrates in this masterly survey of the almost twenty years of devolved government in Scotland, we are now in the grip of a political class that is complacently certain of its moral or ethical superiority, a class that in its ineffable conceit has no doubt that it knows what is good for us, and does not hesitate to legislate accordingly. The Church of Scotland and the Roman Catholic Church in Scotland may have lost much of their old authority, but that authority has been transferred to the political class, or been annexed by its members. Scotland today is governed by men and women belonging to the class of beings whom Robert Burns resented and mocked as the “unco’ gude”. Ever since the Scottish Parliament came into being in 1999, the politicians have chipped away at the liberties of the people.

Brian Monteith calls Scotland today a McNanny state. Fair enough, you may say, for we have a state where the politicians, like Nanny, know what is best for us and are determined to teach us good behaviour. Yet the term is unfair to Nanny. A good Nanny prepared the children in her care to grow up, to be free of her, to become eventually responsible young adults. The Scottish state today treats adults as people incapable of managing their own lives and, if they are parents, as people who cannot be trusted with the unfettered care of their children. So it’s not a Nanny, or McNanny, state. It’s more like a soft fascist one: soft because there is no violence or brutality, no castor oil or camps for delinquents; yet fascist because the logic of its policies is that politicians are the masters,

not the servants of the people, while the people must be pressed into a way of life as approved by the “unco’ gude”.

Like hard big-F Fascist states, our soft small-f fascist one recognises the family as a subversive force, potentially subversive at any rate. So children are first fed, as Monteith reports, with propaganda that will render them critical of their parents, a policy pursued by the Fascists in Italy, Germany, and the nominally Communist Soviet Union. Next, our Scottish Government made its resentment and distrust of the family explicit by introducing its proposal that every child should have a state-appointed guardian, a ‘named person’ responsible for overseeing the child’s welfare from birth to adulthood. Opposition has seen the plan somewhat diluted and its implementation delayed. You would however have to be a trusting innocent not to realize that once the proposal has been enacted, then the ‘ratchet-effect’, as seen, and so well described by Monteith, in the operation of anti-smoking and anti-drink legislation, will begin; restrictions on parental rights will be tightened and the power of the named person and the state will be extended.

Robert Burns used laughter as a weapon against the unco’ gude - see ‘Holy Willie’s Prayer’. We ought likewise to mock the self-righteousness of today’s Holy Willies, and expose their hypocrisy. One example – a small but significant one – is the readiness to grant charitable status to a political pressure group like ASH Scotland. This body, formed to lobby against the tobacco industry and, by extension, with the purpose of restricting the freedom to smoke, gets the bulk of its income from taxpayers. The smokers it persecutes are taxpayers, disproportionately highly taxed ones indeed. So they are compelled to finance an organization that harasses them.

Politicians can always find good reasons to curtail liberties, invoking the General Interest, as they do

so. In this the Scottish Government is no worse than others. But it is still bad. Brian Monteith's examination of the consequences of devolving power to Holyrood is measured – more measured than this indignant foreword – and cogent. He recognises more clearly than most that the extension of government is always presented first as a boon and blessing, and time may pass before it is felt as a burden and a curse.

He calls for action. I hope, without much confidence, that it is not too late for his call to be answered, and we elect politicians who respect inherited liberties and speak up for the common sense of people, and against the prejudices of the Unco' Gude.

Allan Massie  
June 2018





## Introduction

*“The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good is not a sufficient warrant.”*  
John Stuart Mill, 1859

SINCE the Scottish Parliament came into being in 1999 it has passed over 300 bills that have been given royal assent and are now the law of the land. Notably they include a bill to ban smoking in all enclosed public places. This was the first ban of its type in the United Kingdom and became the template for similar reform in Wales, England and Northern Ireland.

Following the political lessons of how easy it was to deliver such sweeping change, appetites were whetted for more social experiments. A noticeable pride was taken amongst those who had supported devolution that the Scottish Parliament was the first in the UK to make such an intrusion into people’s lives. Moreover, there was a tangible sense that the UK’s four legislatures or assemblies were now in competition to see who could be first to deliver further prohibitions justified on the grounds of public health.

Since 2006, when the smoking ban was enforced, the Holyrood parliament has extended its ban on smoking in all enclosed public places to include smoking within fifteen metres of hospital buildings, while the minor exemption of allowing prisoners to smoke in their cells is also being rescinded. Not to be outdone by central government, some local authorities are talking about extending the ban to outdoor spaces other than children’s play areas where ‘voluntary’ bans are now the norm.

On alcohol, the reform of the licensing system was hijacked by individual politicians to introduce restrictions

around off-sales. This was followed up by the controversial ‘minimum pricing’ of alcohol that has now been imposed by the Scottish Government after it cleared court appeals challenging its legality. Without waiting to see if this significant intervention works there are already demands to increase the minimum unit price and introduce further restrictions on the availability of alcohol across the licensed trade.

Looking to other areas where lifestyle choices could be limited or removed altogether, new laws or campaigns have been introduced and are still being conceived. Not content with demonising smoking tobacco, or drinking alcohol beyond ever-reducing yet arbitrary limits, campaigners now want to demonise consumption of fats, sugar, salt and carbohydrates. In the mind of this author, Scotland is without doubt heading down a path of puritanism through stealth.

This report seeks to look at what the growing evidence around these social interventions tells us about the campaigns for and against them becoming law, the claimed impact and unintended consequences of the new restrictions, and where the experience might lead us in the coming years.

For those concerned about the erosion of personal freedoms, the growth of the nanny state and its evolution into a bully state – or simply the efficacy of promised outcomes that justify more and more legal controls but which rarely ever deliver their goals – this must be a worry. The experience of many Scots shows that the Scottish Government and its public health activists will stop at nothing to distort the truth in order to convince people that the various bans are necessary, are working and should therefore be expanded upon.

Of course, when a perceived ‘problem’ stubbornly remains

– or, more typically, has not declined faster than the long-term historical trend – that too can be justification for further intervention. For public health professionals looking for funding to sustain their growing network and laws to justify their existence, the Scottish Parliament and its 129 members – the vast majority of whom work on the principle that ‘something must be done’ – is both a cash cow and a stamp of legitimacy.

Other social interventions have included a proposal to require every new born child to register with a state guardian who will have a range of powers that could, ultimately, lead to a child being taken away from its parents. While the reasonable people advocating a state guardian talk in reasonable tones and make reasonable arguments about physical and mental care, it doesn’t require a great leap of the imagination to anticipate that in time smoking in the home, consuming alcohol beyond the recommended limits and other social sins (a child ‘allowed’ to become obese, for example), could see the state intercede between parents and children.

Has Scotland really become so different from the rest of the UK or is it just that it’s ahead of the game with the other home nations jostling to catch up? Where do the ideas for social intervention come from? Are they from the ground up with the public clamouring for more controls, or is it top down with the public grudgingly accepting the erosion of freedoms on the say so of ‘experts’ who know better than them? And who is pushing for the restrictions, who are the vested interests, and how are they funded?

There is also the question of how the debate is conducted. Where are the voices, especially in the Scottish Parliament, willing to speak out and challenge the assertions of the neo-prohibitionists? Whatever happened to those genuine Liberals who once commanded the heights of Scottish politics?

As a former Scottish Conservative MSP I can attest that it was usually left to the Tory group to defend what had become the otherwise abandoned position of individuals having the right to make their own choices. Now however there appear to be times when the Scottish Conservative opposition reminds me of the strange case of the dog that did not bark. Likewise, who in the media is speaking out for the ordinary pleasures of ordinary people? Does no one believe in 'live and let live' any more?

If this report helps encourage people to question whether further prohibition, greater intrusion and less individual freedom will make us healthier and happier, then it will have been worthwhile. If it fails in that respect then, after a few years, I shall return to the subject to consider whether my observations and warnings were right.

Brian Monteith  
June 2018



# 1. Holyrood and the politics of intervention

*"The love of liberty is the love of others; the love of power is the love of ourselves."* William Hazlitt, 1819

THE Scottish Parliament was born to be different. Of course it was always intended to bring a greater degree of scrutiny and accountability to the elected ministers of the parliament's new executive, who replaced ministers formerly appointed by the prime minister to the Scottish Office.

But while there were some idealistic campaigners who believed in government being closer to the people, what really drove the political and chiefly partisan support was the belief that a Scottish Executive, later rebranded the Scottish Government, could be different politically to the UK government. In the context of the 1990s this meant anything halting 'Thatcherism' at the border and then, in the new millennium, Blairism. For Labour supporters in particular it also meant slaying the Scottish nationalism that threatened what had become, since the early 1960s, the Labour party's heartland.

Labour, which had once been divided on devolution, was now able to say it had delivered a Scottish Parliament, that Scottish independence was therefore not required, and never again could another poll tax be foisted upon a Scottish people that had not voted for it.<sup>1</sup>

The Liberal Democrats, the inheritors of Scotland's traditional party of 'home rule', saw the devolution settlement as the realisation of what they had been arguing for throughout the twentieth century and was worthy of celebration in itself.<sup>2</sup> The SNP had opposed devolution as not going far enough, but for the

referendum joined the cross party ‘Yes-Yes’ campaign<sup>3</sup> fearing the party could not be seen to be against a Scottish parliament, no matter what powers it had.

The Scottish Parliament was born therefore into a world where politics was dominated by nationalism and the need on both sides of that debate to prove Scottish exceptionalism. This affected even the Scottish Conservative party, which had been against devolution after Margaret Thatcher became leader, and was completely routed in the general election of 1997, losing all eleven MPs in Scotland. The party decided not to campaign in the referendum that followed. After the public vote in favour of a tax-raising parliament, the party then put forward candidates and contested the inaugural election in 1999, winning eighteen of the 129 seats and regaining a voice in Scottish politics.

The first administration was formed by a formal Labour-Liberal Democrat coalition with Labour’s Donald Dewar as first minister. Following his untimely death in October 2000 his position was taken by Labour’s Henry McLeish who resigned in November 2001 after he had failed to declare the sub-letting of his House of Commons’ parliamentary offices. Following an internal Scottish Labour party election, McLeish was replaced by Jack McConnell, who went on to win the 2003 election and form another coalition government with the Liberal Democrats.

The story of the genesis of devolved government in Scotland is important because it sets the scene for the increasingly interventionist approach taken by politicians north of the border in matters of individual freedom and personal lifestyle choices. Having created the Scottish Parliament, a question often asked was what to do with the powers it brought. The political context was that the UK economy had recovered well from the 1991 recession and the new Labour government in Westminster, led by

Tony Blair and Gordon Brown, had inherited robust public finances. Blair and Brown had presented themselves as modernisers and their commitment to public service reform was shared by all three administrations led by Dewar, McLeish and McConnell who undertook to institute change in the devolved areas they had powers over, such as education and health.

There was an initial flurry of activity in the first administration but these mostly involved improved pay settlements for teachers, doctors, nurses and other public sector workers rather than institutional reform. The major departures from Westminster practice were the introduction of a graduate endowment system, whereby university tuition fees were waived in return for a compulsory but modest contribution to a bursary scheme for poorer students, and the introduction of 'free personal care' that extended aspects of NHS healthcare provision for elderly patients.

While much legislation was passed, arguably justifying the need for a Scottish parliament, a great deal of heat was expended on issues such as banning fox hunting, the initial stages of land reform, and unexpected events such as the Higher exams' crisis and the ballooning cost of building the new parliament building. Pressures for legislative changes in public health, while gaining column inches for campaigners, had not yet attracted a great deal of political support, but that all changed in the second administration despite no party advocating significant interventions in public health in their 2003 election manifestos.

The move by the Republic of Ireland to ban smoking in all enclosed public places had attracted a great deal of interest in Scotland, putting pressure on the Labour-Lib Dem coalition to travel some way down the same path. In July 2001 SNP member Kenny Gibson had proposed a

Regulation of Smoking bill, with the cross party support of Dr Richard Simpson (Labour), Bill Aitken (Conservative) and Robert Brown (Liberal Democrats). Gibson lost his seat in 2003 but the issue was taken up by another SNP member, Stewart Maxwell.

A new MSP, Maxwell introduced a private bill to ban smoking in pubs and restaurants where food was served.<sup>4</sup> It didn't have the support of McConnell's government but it attracted a great deal of interest as it went through the parliament's committee process. Following a brief visit to Dublin in August 2004 to see for himself the impact of Ireland's smoking ban, Jack McConnell (now Lord McConnell of Glenscorrodale) let it be known he was considering similar legislation in Scotland.<sup>5</sup> Crucially, the lack of a robust response from other politicians or businesses that would be affected directly, indicated that a ban was possible politically and in 2005 McConnell confirmed he would introduce his own bill that would go even further than Maxwell's private bill.<sup>6</sup>

If passed Scotland would 'denormalise' smokers by banning them from all enclosed public spaces, including bus stops and even private members' clubs. Maxwell consequently withdrew his bill and McConnell was cheered on by the current first minister Nicola Sturgeon who was then the SNP's shadow health minister. As Scotland's two largest parties joined ranks it was clear there would be little problem obtaining a parliamentary majority.

As a member of the Scottish Parliament myself I had no problem with banning smoking in some enclosed public places, but I objected to the extent of the proposals and the tone of the campaign. First, making smokers pariahs would not have been acceptable had they been any other minority group. Second, I didn't agree that private businesses such as pubs, bars and clubs were



‘public places’. They were, and are, private domains where the proprietor should be allowed to permit or prohibit smoking according to the interests of the business.

During the parliamentary procedures, when I was being lobbied by campaigners on both sides, I attended a one-day seminar hosted by the Scottish licensed trade at a hotel right next door to the Holyrood parliament. All 129 MSPs were invited to come and meet publicans and hoteliers from their constituencies. Such was the lack of concern for community pubs and bars, I was the only MSP to turn up. Forcing publicans, hoteliers and club owners to eject a substantial number of their customers on to the streets, to be huddled in Scotland’s often cold and inhospitable climate, was legalised bullying. It was officially endorsed coercion and today those responsible are still extremely proud of it.

The defenders of lifestyle control and social engineering – the Labour and Liberal Democrat administrations and the Scottish Nationalists – told us to ignore the economic threats the hospitality trade feared would engulf them. They claimed the fall in smoking rates and the consequential improvement in the nation’s health would be worth it. It hasn’t turned out that way. Extravagant claims about the health ‘benefits’ of the ban continue to be repeated even today, yet they would struggle to stand up in a court of law.

It is sometimes asked why Scottish politicians – tacitly supported by a compliant media that rarely questions public health professionals as robustly as it does football managers, for example – are quite so happy to push the nanny state agenda? Is it something to do with Scotland’s Presbyterian history? Is health the new religion, replacing the influence of the Protestant or Catholic churches? Or is public health socialism in a new guise? Frankly I think it’s neither of these things.

Neither Calvinist Presbyterianism nor conservative Catholicism have much influence in modern day Scotland. Each has their flock but few if any politicians draw on theological or scriptural influences when developing new policies. While uncompromising public health policy does at times appear quasi-religious, I prefer to see its growth as rent-seeking. It is always in the interests of the professionals to justify more research and more intervention and this requires more control. There is never enough money and never enough laws. More of both is always demanded.

Whatever is required will always mean further employment for 'experts', more resources for their departments and quangos, additional laws to police, but Scotland is no different in this respect from the rest of the UK, which has experienced a similar burgeoning of such demands, or other democratic regimes with public sectors pumping up the clamour for more and more regulations. Where Scotland is different is that it has a nationalist dimension, even amongst unionists who on many occasions ape the nationalists to try and cut across their support.

Thus we have the Scottish Parliament competing against other UK parliaments and assemblies to be the first to introduce some new prohibition or restriction. When, for example, the minimum unit price for alcohol was introduced supporters boasted that Scotland was the first country in the world to adopt the policy. Faux patriotism doesn't measure if the policy is good in itself. It merely proclaims Scotland to be the first to try something as an example of exceptionalism, particularly from the rest of the UK. There is rarely any trepidation that there may be good reason why no other country has gone down that road.

In time, when the evidence is weighed up objectively and

we are able to admit that all their claims for their neo-prohibition policies were counter-productive, Scottish politicians will hopefully come to terms with the fact that being the first to introduce bad policy is not in itself a good thing. Instead the passing of the Smoking, Health and Social Care (Scotland) Act 2005 was celebrated by politicians and campaigners and many still claim it to be the best thing the Scottish Parliament has achieved after nearly twenty years of its existence.

A year after the smoking ban was enforced in March 2006 a seminar was organised in Edinburgh to tell the world how Scotland was leading the way in tobacco control. Trumpets sounded (metaphorically at least) when it was announced that the number of admissions for heart attacks had fallen by seventeen per cent since the introduction of the ban.<sup>7</sup> If it sounds unbelievable it was unbelievable because it wasn't true. Nor would it be the last half-truth to be told as the devolved Scottish Parliament strove to be different.



## 2. Smoking gun or water pistol?

*“Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each other to live as seems good to the rest.”* John Stuart Mill, 1859

SUNDAY 26th March 2006. Nothing much seemed different from the previous weekend. The Old Firm won their football matches, the weather was poor and the odd empty beer can tumbled down the road. But it was different, very different indeed. The UK’s first ban on smoking in enclosed public spaces was in force in Scotland and suddenly people were standing huddled outside their local haunts sparking up and blethering away while trying to keep warm.

There was a sense of curious expectancy. Would smokers confront bar staff when asked to step outside or put their smokes away? Would the police be called to mediate and even make arrests if and when tempers flared? I certainly considered it a risk and had said as such. In the end the introduction of the ban passed, not with a bang or a whimper, but with silence. Stigmatised and marginalised, hectorated and humiliated, smokers had little stomach to fight back against the relentless barrage of publicly-funded criticism. They simply shrugged their shoulders and stepped outside, mostly without complaint. *They were used to being treated that way.*

Crucially the Scottish hospitality industry was divided on the issue when a ban was first proposed. The Scottish Licensed Trade Association was against legislation, but only to a point. The SLTA opposed the regulations banning smoking in pubs and hotels but it wouldn’t support exemptions for private members’ clubs, no doubt fearing that customers would clamour to join the relatively small

number of working men's clubs, bowling clubs, golf clubs and the like. It was a self-defeating strategy because the comprehensive ban simply became a plague on all houses, and bars in every sector closed. Had the SLTA been able to support and convince the Scottish Executive to allow some exemptions, possibly on the basis of a licensing agreement that required a minimum standard of air quality, this might later have been used as a means to extend the exemption to pubs that met the same standard. Instead, in order to protect its members, the SLTA was firmly against exemptions and it became every publican for him or herself.

Even in the most disreputable and violent of bars, smokers knew their place. After all, they were often joined outside by bar staff taking a break. The decision to make policing of the law the job of the proprietor was a key factor in achieving compliance. Smokers would rail at the intrusion, openly curse first minister Jack McConnell, but they didn't blame the landlord. Proprietors were simply doing their job and no-one wanted to see them prosecuted. Soon it even became fashionable to step outside to smoke. The running joke was that the conversation was always better with the smokers who were outside having a laugh than with those staring at their pints inside the howf. It wasn't unusual for non-smokers to step outside too, just for the craic. I even knew a few lapsed puffers who would cadge a smoke off mates to be part of the company.

Most publicans had been unsure how to react. Prior to the ban there was little or no investment in facilities for smokers, and therefore few smoking terraces or covered areas. It really was down to luck if a pub had an outside area it could set aside for smokers. Eventually some proprietors realised that if they had even half-decent facilities, maybe some wicker seats, an awning or parasol – better still a heater or two – they might attract customers looking for a bar in which to smoke and drink. Within a

year or two there were even awards for the best outdoor smoking areas.

Typically however public health authorities demonstrated their mean streak, finding ways to dispute whether a smoking area was within the law and threatening to prosecute those who took even minor liberties with the letter of the law. One example was in Edinburgh where a former private club had become a public bar with a covered smoking terrace that appeared almost completely enclosed when the law required that it must be fifty per cent open to the elements. The solution was simple but clever. The owners' lawyer had discovered that the boundary wall was not on his client's property but on the land owned by a neighbouring bar that backed on to his client's property. As long as the awning wasn't fully extended, the smoking terrace was complying with the regulations and customers could smoke and drink in relative comfort but protected from the wind and rain. Not for long, though. Edinburgh City Council jobsworths inspected the property following an anonymous complaint by a councillor who had attended a reception there. Faced with the threat of a costly prosecution the owners backed down and the smoking terrace was abandoned.

Another example of over-zealousness was brought to my attention only this year when visiting another Edinburgh bar in Stockbridge. A fine establishment with a high standard of furnishings and decor, serving upmarket food and a wide selection of drinks, it had a comfortable outdoor terrace available to smokers. There were square wicker sofas with soft seating, coffee tables but, strangely, no ashtrays. When I asked a waitress where the ashtrays were she told me that if we wanted to smoke my wife and I had to stand against the balcony railing because the owner had been told by local officers that no-one could smoke while occupying the seats as they and the wooden tables represented "a fire risk". As far as I'm aware there

are no laws or by-laws that impose such restrictions but, again, the licensee thought it sensible not to contest the instruction.

Throughout the debate that prefaced the introduction of the smoking ban in Scotland, advocates continued to peddle the idea that pubs would benefit. According to Cancer Research UK, twenty-four per cent of 1,000 adults polled in a survey said they were more likely to visit a pub after the ban, while ten per cent said they were less likely. Jean King, the organisation's director of tobacco control, said, "Making pubs and bars smoke-free gives workers the protection they deserve and creates a more appealing place to go to for your social drink with friends." But a clearly exasperated Paul Waterson, chief executive of the SLTA, responded, "How organisations like Cancer Research ... can suddenly become experts on the licensed trade - they should stick to their own area. We said before the ban came in that there would be winners and losers in business, but that there would be more losers. And so far that would seem to be the case."<sup>8</sup> He was not wrong.

Inside Scotland's pubs the absence of tobacco smoke was undoubtedly popular with some customers. The change didn't work for everyone however and the regulars who were abandoning pubs were not being replaced by new customers. For publicans the problem was serious. Many punters were clearly deciding to stay away. Instead of sitting in the pub, having a chat with mates over a drink and a smoke, they were smoking and consuming cheaper shop-bought booze in the comfort of their own home.

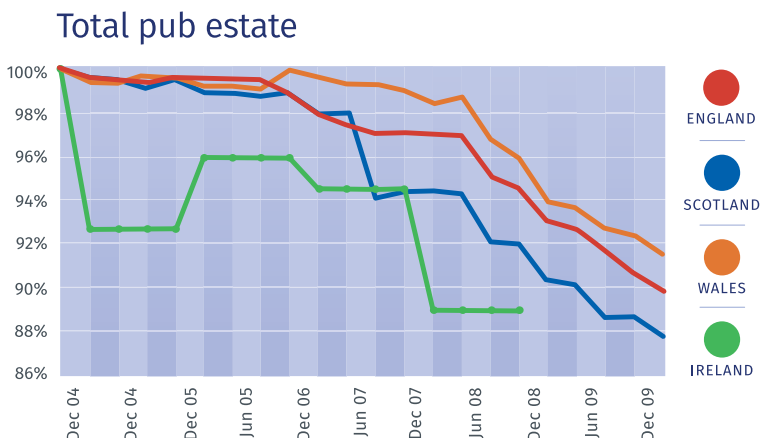
Trade dropped. Pubs closed. Most noticeably it was usually the pubs that served local communities that were worst affected, with town centre bars more likely to attract passing trade and revellers out for the night. The higher retail and office driven footfall also meant town centre bars could justify offering profitable food to offset the loss



of alcohol sales but there simply wasn't the demand for it elsewhere. Scotland's pub estate declined dramatically. This is a fact repeatedly refuted by the smoke police but the evidence is undeniable.

In a UK survey conducted in 2009, seventeen per cent of adults said they were more likely to go to a pub than before the smoking bans that had by now spread across the whole country, against fourteen per cent who said they were less likely to do so, a potential three per cent growth in custom. Unfortunately for landlords, when the same question was asked of smokers alone – whose number amongst pub customers was, until the smoking bans, double the proportion of adults who smoke and therefore almost half or more of many pubs' customers – the position was reversed, with twenty-five per cent of smokers less likely to go to pubs than before the ban and only eleven per cent more likely, a potential loss of fourteen per cent.<sup>9</sup>

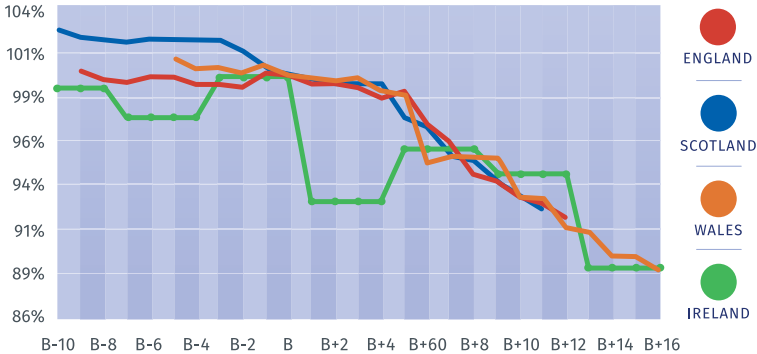
The effect can be seen in Table 1 (below), demonstrating how the pub estate was essentially stable before the introduction of smoking bans yet declined dramatically in the immediate aftermath.



Source: CGA Strategy Ltd and Revenue Commissioners of Ireland

Be it Scotland, England, Wales or Ireland – which was the first country to introduce a comprehensive smoking ban in 2004 – the trend in all four nations was the same. By placing a timeline of the number of pubs in the different jurisdictions so that the introduction of the smoking bans is at the same axis point, it can be seen (Table 2) that the trend matches closely and, crucially, starts before the ‘great recession’ of 2008. After eleven quarters the pub estate in Scotland had declined by 7.1 per cent, in Wales by 7.3 per cent, and in England by 7.6 per cent.

### Pub estate in relation to date of smoking ban (B)



Source: CGA Strategy Ltd and Revenue Commissioners of Ireland

### Dates of introduction of bans across Ireland and the UK

<b>Ireland</b> 29 March 2004	<b>N. Ireland</b> 30 April 2007
<b>Scotland</b> 26 March 2006	<b>England</b> 1 July 2007
<b>Wales</b> 2 April 2007	

In December 2004 the Scottish pub estate stood at 6,677. By the time of the ban in March 2006 it had fallen to 6,610, a drop of 1.1 per cent. Within four years of the introduction of the smoking ban the pub estate in Scotland had fallen by a staggering 11.1 per cent. In 2017, eleven years on,

the number of pubs in Scotland had fallen even further, to 4,645, a fall of 29.7 per cent. While there were other factors at play, including the rise in beer duty, tighter drink drive limits from 2015 and an economic recession (now long passed), the dramatic increase in pub closures can clearly be seen to have predated all of those factors and began *following* the introduction of the smoking ban. The suggestion that the ban had little or no effect on pub numbers is baseless. It had exactly the impact the licensed trade and campaigners such as Forest said it would, and to what benefit?

The principle aim of the ban was, we were told, to protect people, bar workers in particular, from the alleged effects of environmental tobacco smoke. That was only part of the agenda however. As the health secretary, Labour's Andy Kerr, repeatedly made clear, the goal was really to "denormalise" smokers. "The keynote provisions in the bill are the provisions that will deliver a smoke-free Scotland. They will protect the people of Scotland from second-hand smoke, improve public health and denormalise smoking in our society."<sup>10</sup> There was no evasion, no embarrassment. Smokers were being targeted deliberately and made pariahs by the state.

The urge to denormalise smoking was shared by the SNP's Shona Robison (the current health secretary) who declared that, "Just as important, [the ban] will also have long-term benefits, because it will denormalise cigarette smoking. I have said all along that, for me, that is probably the most important element of the bill. The ban will have a huge impact on future generations. We know that far too many children perceive smoking as a normal activity because everyone around them smokes. It is important for society to put across a different message and tell those children that smoking is not a normal activity and that they should not take it up. The bill provides that important counterbalance in those children's lives."<sup>11</sup>

Strange, then, that the obvious consequence was not to denormalise smoking per se but to denormalise smoking indoors. In fact the bill managed to normalise smoking outside, for now children could openly see adults congregating outside pubs, bars and cafes where previously they were hidden from view indoors. Ironically, these same adults looked like they were having a good time. They were chatting, having a laugh and obviously enjoying each other's company, not just smoking as they walked along the street. Alternatively, if they weren't socialising outside, they were smoking at home in front of the kids.

There is only one word to describe the approach of the health minister and his fellow anti-tobacco campaigners – zealotry. No quarter was given, no amendment allowed for special dispensations, extenuating circumstances or exceptions that might make smoking appear an everyday or normal practice. Although ostensibly designed to protect workers from environmental tobacco smoke, even when studies showed that 'passive' smoking did not present a significant danger to non-smokers, no exemption could be permitted.

Consequently, when I moved a number of amendments – to allow for actors to smoke on a stage, including using fake cigarettes and cigars without tobacco; for Scotland's twelve cigar shops to be able to allow their products to be sampled by staff or customers (as happens in New York's cigar shops, where a similar smoking ban was introduced in 2003); and for airports to be allowed to have smoking rooms for anxious travellers about to fly – each one was rejected out of hand. Denormalisation could not be challenged.

I had done my research and even won the backing of the actors' union Equity and others from the dramatic world, like Mark Thomson, artistic director of the Royal

Lyceum Theatre in Edinburgh. According to Thomson, “I don’t think smoking is cool, but this ban represents an editing and a censoring and it is completely unnecessary and hysterical.”<sup>12</sup> I pointed out that plays such as Oscar Wilde’s *Private Lives* opens with Amanda and Elyot Chase standing with their cigarettes in holders, not even smoking. But not even that would be allowed under the new legislation. Yet smoke machines that belch out a fug to create a dramatic effect (and always cause me to cough) would be permitted. The opera *Carmen* actually starts with the changing of a guard outside a tobacco factory where cigarette girls appear and light up – and there are countless examples where smoking is intrinsic to a scene – but instead of allowing directors to direct and actors to act with cigarettes, pipes or cigars, the minister told the arts industry to “get round these issues by being creative”<sup>13</sup> rather than be true to the art. MSPs Carolyn Leckie and Stuart Maxwell suggested people use “their imagination”.<sup>14</sup>

Maxwell thought he was being clever when in a parliamentary debate he produced a fake cigarette that produced a puff of talcum powder that momentarily looked like smoke, but I pointed out to him that you had to blow it to make it work. No matter how good actors are, they can’t blow and talk at the same time.

Health secretary Andy Kerr summed up the prohibitionists’ attitude to my amendment when he said, “We are seeking to present smoking, including smoking in a dramatic performance, as not being a normal social activity, so I ask our arts community to think about that. We are trying to denormalise smoking.”<sup>15</sup>

In August 2006, at the Edinburgh International Festival of the Arts, the late Mel Smith damned the stage ban when he declared, “Adolf Hitler was anti-smoking. You couldn’t smoke at Adolf Hitler’s dining table, so he’d be pleased,

wouldn't he? Congratulations Scotland.”<sup>16</sup> Smith's portrayal of Winston Churchill in *Allegiance* included him lighting and puffing on a cigar but the city's chief environmental officer threatened to remove the venue's licence and shut it down. On stage at the Edinburgh Fringe you can be fully naked, urinate, curse, blaspheme and simulate copulation with abandon, but smoke? That's not normal.

Other shows had to be changed. *The Unprotected*, which features Liverpool prostitutes smoking copiously, had them drinking tea instead. The stage production of *Get Carter* also had to ditch the fags while the biopic *Bill Hicks: Slight Return* had the actor playing the comedian without the iconic cigarette hanging from his lips.<sup>17</sup> The zealots had won and censorship at the world's largest arts festival became the new norm. Later, when the smoking ban was introduced in England, smoking was allowed on stage but Scotland's tartan taliban has never relented.

A further amendment challenged the idea that someone charged with smoking would be guilty until he or she proved their innocence in court, a situation that turned on its head centuries of Scots and UK law where people are presumed innocent until proven guilty. That too was rejected on the grounds that it would make it harder to prosecute offenders caught smoking in premises where it was banned and would therefore make the new law less effective. Thankfully the logical extension of that defence – that we should change all of our laws to a presumption of guilty when charged with every accused having to prove their innocence – has not been adopted, yet.

When the smoking ban was enforced it naturally had some unintended consequences, one of which resulted in workers being sacked for smoking during breaks. In Inverurie, Aberdeenshire, seven nightshift employees at a supermarket were sacked for breaking a new company policy that prevented them smoking during their breaks.<sup>18</sup>

Daytime workers could leave the building to smoke outside but for security reasons nightshift staff could not, but now they couldn't smoke inside either. There had been a smoking room but the ban meant that it was closed. Seven employees were caught on CCTV smoking and dismissed.<sup>19</sup>

In 2007 an employee of twelve years' service was sacked by a company in Dundee for smoking on the wrong side of a fire door. Prior to the ban there had been designated areas for smoking indoors but after the ban they had been removed.<sup>20</sup> Due to difficulties with production, a worker was temporarily free at the beginning of his shift and decided to have a break. He went to the staff locker room, opened the fire door and sat at the door smoking. His supervisor saw him and he was immediately suspended from work. A disciplinary hearing was held during which he admitted smoking in breach of policy and expressed remorse. He claimed he had been suffering from depression and had felt under pressure in his work and asked the disciplinary committee to take into account his long service. He was dismissed just before Christmas for gross misconduct for the one instance of smoking on the grounds that he had ignored clear instructions not to smoke inside the factory. His appeal to an employment tribunal was dismissed.<sup>21</sup>

These, then, were some of the consequences – unintended or otherwise – the smoking ban had on ordinary working people and publicans trying to make a living. In search of a smoke-free utopia, politicians had replaced a nanny state with a bully state.





### 3. How the smoking ban failed

*“The urge to save humanity is almost always a false front for the urge to rule.”* H.L. Mencken

JUST as the economic impact of the smoking ban was downplayed, so the health benefits were always exaggerated. Indeed so keen have supporters of the smoking ban been to talk up its impact that some significant myths were created that today would be dismissed as ‘fake news’.

One of the fundamental reasons for bringing in the ban, arguably the main reason, was to ‘denormalise’ smoking and thus drive down the adult smoking rate. In this goal the smoking ban has made no measureable contribution. The smoking rate amongst adults in Scotland has been in a long-term decline for several decades. In 2003 it was at twenty-eight per cent and by 2008 it was at twenty-six per cent. It took a further three years to reach twenty-three per cent before climbing to twenty-five per cent in 2012. The downward trend then resumed, falling to twenty-one per cent in 2013 and plateauing around that mark ever since.<sup>22</sup>

Given this historical trend – built, I would argue, on smoking being less fashionable and public attitudes favouring a healthier and fitter lifestyle – we can expect the smoking rate to continue its downward trend. We should not be surprised however if the rate of decline decelerates as a more committed group of smokers (those who enjoy smoking and don’t want to quit) remains resistant to the pleas of politicians and anti-smoking campaigners. The rapid growth of the e-cigarette market from 2012 to 2016 appears to be stalling so the main influence on smoking rates will, I expect, be general social trends not further bans and other anti-smoking measures.

Associated with the fall in the smoking rate were the claims for how this would result in the improvement in the health of the nation. The reality about the debate around the bill is that it was simplistic. The Scottish Government's bill enjoyed copious amounts of assertion, partisanship and prejudice but produced no evidence that was tested and a great deal of circumstance that was treated as fact. For example, the evidence for the effects of environmental smoke is a statistical porridge and the basis of the ban on the threat from environmental smoke was the equivalent of superstition masquerading as statistical probability that was treated as fact.

Where smokers and most other people will agree is that smoking is unlikely to be good for you physically but the degree to which it is bad for you is probably determined by an individual's genetic make-up and the extent to which they smoke. As with all toxins it's the dose that matters.

It's because the science behind the claims of health benefits of a smoking ban was unproven that the positive impact was always likely to be exaggerated. The degree to which false claims were made would be laughable were they not treated so seriously by the politicians who sought justification for their actions and journalists looking for headlines first and supporting evidence later (if at all).

Prior to the smoking ban a survey carried out by YouGov of 2,071 respondents for Churchill Home Insurance suggested that the incidence of accidental deaths by fire in dwellings in Scotland could increase because fifty-four per cent of smokers said they would stay at home so they could smoke and drink alcohol at the same time. Supporters of the ban denied that an increased fire risk might be an unintended consequence.<sup>23</sup> However, the facts that have emerged since are less reassuring.

There had previously been a decline in the number of accidental deaths from fire in dwellings from a high point in 1999/2000 but this was arrested after the smoking ban when it leapt from thirty-two in 2006/07 to fifty-four in 2007/08. The gradual decline then began again and took nine years before settling in 2016/17 at a rate lower than before the smoking ban. The falling trend is put down to improved fire service prevention practices that came after the smoking ban and the growth in household smoke detectors, so it can be expected that the downward trend would continue, albeit recommencing from a higher starting point.

### **Accidental fatalities from fires in Scotland**

2006/07	32
2007/08	54
2008/09	49
2009/10	48
2010/11	43
2011/12	47
2012/13	36
2013/14	25
2014/15	28
2015/16	33
2016/17	31

Source: FireScotland.gov.uk

Due to repeated changes in the publishing methodology over the period it is no longer possible to identify the number of deaths where ignition of the fire was caused by smoking or smoking materials (as it used to be), but it

remains possible that the smoking ban was a contributory factor to halting the decline in such deaths and that they would by have been lower than they are now.

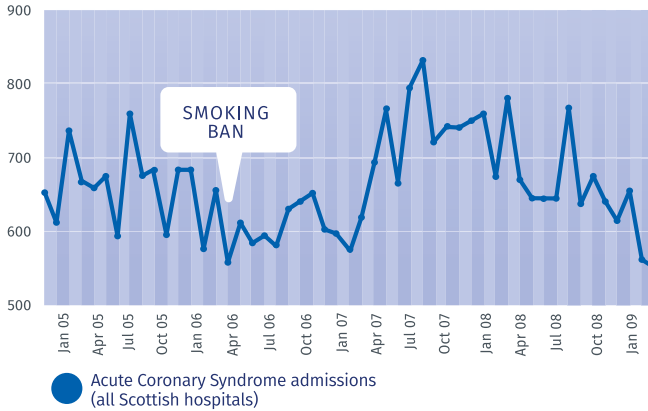
Claims about improved health outcomes are just as difficult to attribute to the smoking ban. In 2007 Professor Jill Pell told delegates at an international conference held in Edinburgh to celebrate the smoking ban as hospital admissions for heart attacks in Scotland had fallen by over seventeen per cent. According to Pell, “What we were able to show is that among people who are non-smokers there was a twenty per cent reduction in heart attack admissions. This confirms that the legislation has been effective in helping non-smokers.”<sup>24</sup>

The study was a masterclass in how comparing one set of statistics with another group that sounded similar but were quite different can be accepted into political folklore. It’s like comparing lemons with limes. They might both be citrus fruits but they have quite different tastes and appearances.

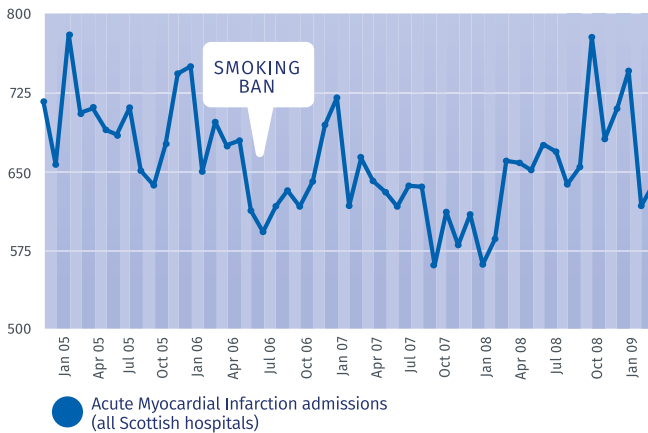
Greater inspection of the official statistics by Chris Snowdon, now head of the Lifestyle Unit at the Institute of Economic Affairs, revealed that in the first year of the smoking ban the established downwards trend of admissions for acute coronary syndrome (acute myocardial infarction and angina) continued, falling 7.2 per cent, not seventeen per cent overall (and twenty per cent for non-smokers) as claimed in Pell’s 2008 article in the *New England Journal of Medicine*.

More astonishing was the evidence that in the second year following the smoking ban admissions for heart attacks increased by 7.8 per cent – and for the next two years remained above the level of where it was at the time the smoking ban was introduced. The reduction in admissions had not been accelerated by the smoking ban, nor had the

trend continued – it had reversed. It was not until 2009 that ACS admissions finally dropped below where they were at the time the smoking ban was introduced.<sup>25</sup>



What Pell had done was take a sample of statistics from a limited number of hospitals selected by her and then extrapolated these across Scotland rather than take the readily available evidence from all hospitals in Scotland.



For acute myocardial infarctions alone (see above) the graph still shows the downward trend in admissions

being arrested and then, at best, rising and falling in 2007, rising in 2008 and by 2009 being above where it had been at the time of the smoking ban. Snowden captured the story of the statistics well, writing, "If the 2006-07 decline had really been the result of the smoke-free legislation, it would be expected for rates to remain low in subsequent years. The fact that Scottish hospitals have seen an unusually sharp rise, despite the smoking ban being rigorously enforced – suggests that whatever lay behind the 2006-07 dip, it was not the smoking ban."<sup>26</sup> In December 2007 *The Times* included Pell's study in an article headlined 'The worst junk facts of 2007'.<sup>27</sup>

Another of the regular assertions that keeps appearing in the media is how the smoking ban has benefitted sufferers of asthma. Yet the evidence is at best inconclusive and often entirely contradictory to that claim. The truth is that since the smoking ban the number of deaths in Scotland from asthma has not fallen. Rather, in every year but one (2014), the number has been higher following the ban and is now at its highest this century. In 2016 there were 133 recorded deaths from asthma, sixty-two per cent higher than the eighty-two deaths in 2006.<sup>28</sup> Official statistics also show that deaths from asthma attacks are now higher in England and Wales<sup>29</sup> and in Northern Ireland<sup>30</sup> since the years their bans on smoking in enclosed public places were introduced.

After the claim about heart attack admissions in 2007 another contentious claim was circulated in 2010 when the same Professor Pell asserted that the smoking ban had led to a fall in admissions of children suffering from asthma attacks. According to Pell, "Before the smoking ban came into force, admissions for asthma were increasing at a mean rate of 5.2 per cent a year. After the ban, admissions decreased by 18.2 per cent per year, relative to the rate on 26 March, 2006."<sup>31</sup>

Although most people might agree that reducing the chances of children inhaling tobacco smoke would be a good thing, they might also conclude that a public smoking ban would have a marginal effect at best. After all, even before the ban, smoking was prohibited in most public buildings including every classroom and most sports venues, play centres, fast food restaurants and other places children might be expected to congregate. The main effect of the smoking ban (which outlawed smoking in the workplace) had relatively little impact on children. Most family friendly restaurants already had no-smoking policies and children were rarely seen in your typical Scottish pub. In fact, it would be reasonable to expect that more adults would be smoking at home in the vicinity of the children than before. So why would there be fewer hospital admissions?

Again, a review of the NHS statistics revealed a different picture. The highest number of asthma admissions at the time of Professor Pell's claim was 2,633 in 2006, the year the smoking ban came into effect. For every year immediately preceding the ban (2000 to 2005) the number of admissions was lower, in 2003 falling as low as 1,803. Using the financial year as opposed to the calendar year (which is more helpful as the smoking ban came into effect at the end of March 2006), the NHS figures show the same peak in the year *after* the smoking ban, with the years before and after both being lower. By comparing admissions for children for the ten-month period of 2009 against the peak year of 2006, when the smoking ban was introduced, Pell was able to highlight the most extravagant variation, but not one that matched against the other years before the smoking ban.

The cause of asthma attacks remains a controversial area with a fifteen year study in Sweden pointing the finger at factors such as hard flooring<sup>32</sup> while others suggest fitted carpets offer a greater risk.<sup>33</sup> A study of 4,600 children

in New Jersey found that, for pre-school children, damp bathrooms and mould were the only household factors associated with asthma diagnosis.<sup>34</sup> Smoking doesn't even merit a mention.

### Scottish deaths attributed to asthma

Year	Deaths
2006	82
2007	112
2008	103
2009	93
2010	91
2011	94
2012	89
2013	105
2014	72
2015	122
2016	133

Source ICD10 Summary list

Today Asthma UK continues to campaign for further restrictions on smokers and for a tobacco levy to fund stop smoking services. But it also claims that two-thirds of asthma deaths could be avoided through better basic care. Given there is already a smoking ban in enclosed public places this admission suggests there are more effective steps available to reduce asthma deaths than targeting smokers and smoking.<sup>35</sup> It also shows how blind campaigners can be to evidence that contradicts their prejudices.



If Asthma UK is correct and smoking is a significant cause of asthma attacks then one might speculate that the increase in deaths is possibly due to more people smoking at home and would it not be better therefore to allow smoking in some licensed premises with a minimum standard of air conditioning?

A particularly tendentious argument in favour of the smoking ban was made by Scotland's chief medical officer Dr (now Sir) Harry Burns who in 2006 argued that within twenty years lung cancer would be reduced to just a few hundred cases a year.

According to Dr Burns, "Imagining Scotland with no lung cancer is no trivial speculation. In the 1960s, one in 100 men died of lung cancer. Today, rates are falling all the time and, thanks to the smoking ban, I expect the reduction in deaths to accelerate until dying from the disease becomes a rare occurrence."<sup>36</sup>

The facts tell a different story. Ten years after the smoking ban was introduced the incidence of lung cancer has been increasing even though smoking rates have been falling for forty years.

The health claims for the smoking ban just do not stack up. Whether it's heart or asthma attacks there has been no perceptible fall that can be attributed directly to the ban. Based on these claims, however, we are edging ever closer to the prohibition of combustible tobacco. It's becoming more expensive; the places it can be consumed are more restricted; the product is sold in unattractive plain packaging and generally out of sight; and there is a large illicit market that makes it available (often with variable quality standards) beyond the measurement of official statistics.

### Lung Cancer & Mesothelioma in Scotland Diagnosis and deaths by year

<b>Year</b>	<b>Diagnosis</b>	<b>Deaths</b>
1992	4931	4308
1993	4810	4299
1994	4778	4237
1995	4736	4221
1996	4903	4125
1997	4707	4106
1998	4649	3984
1999	4526	3961
2000	4567	3948
2001	4386	3915
2002	4704	4039
2003	4561	3893
2004	4747	3923
2005	4702	4009
2006	4830	4062
2007	4963	4115
2008	4958	4080
2009	5147	4147
2010	5050	4055
2011	5206	4178
2012	5286	4189
2013	5345	4120
2014	5512	4117
2015	5160	4047
2016	5045	4035

Despite this, smoking still has its loyal consumers (many of whom smoke not because they are addicted but because they enjoy it) and although they may be a minority group the majority of smokers aren't going to stop any time soon. Those who want smoking driven underground should learn from the failure of the near fifty year 'war on drugs' and instead of demonising smoking and smokers find a civilised compromise where adults who wish to smoke can do so without being harassed and denormalised.



General  
Information



This is a No  
Smoking area

Passengers and staff are advised  
to use the designated smoking  
area located at the entrance

## 4. Thin end of the wedge

*“Freedom is not worth having if it does not connote the freedom to err. It passes my comprehension how human beings, be they ever so experienced and able, can delight in depriving other human beings of that precious right.” Mahatma Gandhi, 1931*

BEFORE I continue, let me explain that I do not write as a smoker in the traditional twenty-a-day sense. Although I enjoy the occasional cigar, my parents’ smoking put me off cigarettes for life. Instead I write as one who believes that those who seek to control our lifestyles not only have no right to but, even if they did, are going about it the wrong way. My father, a genuine smoker, died from secondary cancer following the lung cancer he had recovered from. So I know all about the risks, realities and pain but he, like me, would never have thought he had the right to tell people what personal lifestyle choices they should make.

Ignoring people’s right to live their lives as they see fit, spending on tobacco control in Scotland has increased fifteen-fold since 1999 from £1.45 million to over £22m. There is however no evidence, no spike in the statistics, that proves unequivocally that the advertising ban, the smoking ban, the packaging and display ban, the ban on tobacco vending machines or the prohibition of smoking in cars carrying children, has had any significant effect above and beyond the historical decline in smoking that began way back in the 1960s. Indeed, the largest and most significant fall in smoking rates took place between the mid Seventies and early Nineties, long before the most draconian anti-smoking policies were introduced by the devolved Scottish Parliament.

The fact that it is becoming harder to get smokers to quit – and the goal of a ‘smoke free’ Scotland by 2034 is looking ever more elusive – suggests there is a hard core of

smokers who are far more resistant to what politicians or society might think and are far more likely to resist further restrictions. Despite that, further anti-smoking measures are in the pipeline because one thing is certain. If the interventions had worked they would be used to justify more action, but because most of them have failed we're told that *stronger* action is needed. For those seeking power over our lives it's heads they win, tails we lose.

Banning smoking in hospital grounds is a classic example of unnecessary and heartless state intervention in people's lives. Smokers huddling outside hospital entrances may not look great but we have to ask why they are there? It's because smoking rooms inside hospitals were banned and smokers – patients, staff and visitors – were forced outside, usually without any shelter or seating. Smoking in the open air doesn't harm anyone else. For some it does however provide comfort in a stressful situation, and what could be more stressful than staying in hospital for several weeks or visiting a sick relative? Staff too are often under immense pressure. If you smoke why should you be prohibited from nipping outside for a quick cigarette?

Smokers, who contribute at least four times more in tobacco-related taxation than it costs to treat smoking-related diseases, regularly flout bans in hospital grounds because they are unjust and unenforceable. Health boards and politicians must think again and allow smoking areas or shelters because the current law is not only unfair, it's a shocking indictment of our 'caring' NHS. Hospital smoking bans discriminate against patients who are least mobile or independent. They put at risk the careers of staff who have devoted their lives to looking after others but now face disciplinary action for smoking, or allowing others to smoke, in prohibited areas. Witness accounts have even reported patients leaving hospital grounds in their dressing gowns so they can have a cigarette.

At Ninewells Hospital in Dundee the external seating area dubbed its 'fresh air garden' was temporarily closed in February this year because smokers had started to use it. Authorities claimed they were "helping the communities that use our services to lead healthier longer lives."<sup>37</sup>

Instead of showing a compassionate face the Scottish Government introduced a law through the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 that means smokers will in future have to be a minimum distance from a hospital building before they can smoke or they will be committing a criminal offence, not just a breach of hospital regulations. In the final debate before the bill was passed health minister Maureen Watt managed to say in the same breath that it was necessary to denormalise smoking but the bill did not stigmatise smokers.

It's a very strange logic that concludes that denormalising people by threatening them with prosecution for something as trivial as smoking in the open air does not stigmatise them. Her exact words were, "Creating the offences of smoking and of knowingly permitting smoking within a perimeter around buildings on national health service hospital grounds is an important step towards continuing to denormalise smoking behaviour and achieving our ambitious target. As I have said before, the bill is not about stigmatising smokers."<sup>38</sup>

The Scottish Conservatives supported the bill, including the provision for making criminals of patients who smoked too close to a hospital building. With no opposition in the final 'debate' the vote was brought forward to 3.50pm and everybody knocked-off early for the day.

So what's next? We can deduce a great deal from the statements, conferences and seminars that take place across Europe and around the world. One perennial issue is smoking outdoors. Throughout the discussions over the

2006 smoking ban, the cross party tobacco control group, led by Irene Oldfather MSP, pressed the health minister Andy Kerr to consider extending the ban to the external areas of pubs, restaurants and cafés. Even on the day that the bill was finally passed, Oldfather forced a debate on her amendment to include pavement tables and beer gardens on the grounds that it would be unfair for non-smokers who want to enjoy a meal, snack or drink outside in good weather to do so surrounded by smokers. “That is unpleasant for the seven people in every ten who do not smoke,” she said.<sup>39</sup>

It didn’t occur to Oldfather that it might be “unfair” for smokers to be denied access to a comfortable smoking room indoors or that, having been forced to smoke outside even in the most inclement weather, they might then not be able to eat or drink outside if they wanted to smoke. For Oldfather the concept of choice was limited to non-smokers. In the end the amendment was withdrawn as the health minister said it was a “step too far”. The bill, he claimed, was evidence-based and “there is not enough evidence to support the argument that environmental tobacco smoke in an unenclosed setting is harmful.”<sup>40</sup> He also felt the amendment risked compromising the enforcement measures, possibly thinking there would be greater resistance if smokers had nowhere else to go.

Interestingly the SNP’s Shona Robison, the current health secretary, also opposed extending the ban to outdoor areas. First, on the grounds that it would undermine the specific focus on enclosed spaces. Second, that it would turn people against the bill. “As far as possible,” she said, “we must try to take the public with us. We know that the move is controversial and that views on it are mixed, but I believe that a majority of people in Scotland support the bill and that we would lose public support by trying to extend the ban into outside areas. That would be a step



too far. It would be overly-zealous.”<sup>41</sup> It will be interesting to know whether Robison still believes extending the smoking ban to outdoor areas such as outdoor dining areas and beer gardens would be over-zealous.

The prohibitionists were never going to be content with a ban on smoking in all enclosed ‘public’ places. At a conference in 2005 BMA Scotland had already voted for the government to raise the age at which cigarettes could be purchased from sixteen to eighteen. Only a few months after the smoking ban was introduced they were making fresh demands for the restriction to be introduced – by a parliament that had thought it right to legalise gay sex for sixteen and seventeen-year-olds. A year later the BMA Scotland had its wish and the purchasing ban for under eighteens was introduced, meaning you could get married, sign up for the armed forces, drive a car and have sex with any other partner, all legally, but you couldn’t purchase cigarettes to smoke after sex.

BMA Scotland chairman Dr Terry said, “Experience from other countries has shown that raising the age to eighteen, when introduced along with other tobacco control measures such as smoke-free enclosed public places and education programmes, can have a positive effect on reducing the number of young smokers. By raising the purchase age of cigarettes to eighteen, ministers would send a clear message that Scotland considers tobacco use among young people to be a problem that must be addressed.”<sup>42</sup>

From official statistics the smoking rates amongst adolescents had been falling for fifteen-year-olds year-on-year since its high in 1996 – when it was twenty-nine per cent – to nine per cent in 2013. For thirteen-year-olds the corresponding high was eight per cent in 1998, falling to two per cent in 2013.<sup>43</sup> Arguing that these continuing trends are down to raising the purchasing age in 2007

is simply not provable, especially when so many other factors are at play.

Although the law is national with no local variations or exemptions, the ban on smoking in enclosed public places is administered locally by councils and the police. It's no surprise then that local councils are increasingly getting involved in extending the smoking ban to the outdoor areas they control, or would like to control, starting with children's play areas but threatening to include parks, beaches or 'family friendly' festivals and other events (including bonfire night in Dundee!).<sup>44</sup>

In December 2015 the City of Edinburgh Council announced new guidelines that extended the smoking ban to play parks, car parks, courtyards and council premises.<sup>45</sup> The following April Aberdeenshire Council gave consideration to banning people from smoking (or using electronic cigarettes) in their own cars if they were located on council property. The policy paper stated, "[A ban on] smoking within cars parked within Aberdeenshire Council car parks is included within the scope of this policy ... is applicable to all councillors, employees, volunteers, contractors, visitors and service users. All staff will co-operate fully with the policy, and any breach will be viewed as a disciplinary matter ..."<sup>46</sup>

As well as prohibiting the sale of tobacco to seventeen and eighteen-year-olds, in September 2009 MSPs voted to ban cigarette vending machines and the point-of-sale display of tobacco products. In December 2015 the Smoking Prohibition (Children in Motor Vehicles) Bill, was introduced by Liberal Democrat MSP Jim Hume and passed unanimously by the Scottish Parliament. Anyone caught smoking in a private car with a passenger under the age of eighteen faces an on-the-spot fine of £100 or a fine up to £1,000 if they challenge the spot charge and go to court and lose.

In April 2017 the *Scotsman* reported that there had been no fines for adults in Scotland smoking in their cars with children present as police didn't have on-the-spot tickets to serve. All they could do was refer alleged offenders to the procurator fiscal's office and there had only been one such incident, in Kirkcaldy, Fife.<sup>47</sup> No prosecution had yet been brought. Documents released under a freedom of information request showed that the Scottish Government had told the police the month before the law was introduced on 5th December 2016 that "enforcement is not a priority".<sup>48</sup>

It was also reported that local councils had been told to use the first six months to educate the public rather than issue fines. In the first year of a similar ban in England and Wales only one fine was issued, in Northumberland, with only a handful of warnings issued by other forces. The Police Federation commented that enforcing the law had been "very difficult".<sup>49</sup> BMA Scotland called for a complete ban on smoking in cars, irrespective of children being present or not,<sup>50</sup> while the Law Society of Scotland had earlier gone even further, calling for the smoking ban in cars with children present to be extended to cover e-cigarettes too.<sup>51</sup>

An ASH Scotland poll found widespread support for the ban on smoking in cars carrying children. This was no surprise because the evidence showed that even smokers had long since recognised that the practice was, at best, inconsiderate. The fact that there have been so few instances of prosecutions or referrals to the procurator fiscal's office since the ban was introduced suggests that not only was smoking in cars with children not common practice before the ban, the legislation was unnecessary virtue signalling.

While further outdoor smoking bans are being mooted, an even more insidious proposal was floated in 2017 – a ban

on smoking in 'social housing'.<sup>52</sup> What this means is that council housing and housing association tenants will be told that their landlords have decided that from a certain date, as part of their tenancy agreement, they will no longer be able to smoke indoors in the home they rent. As usual the justification is to protect children from their parents' tobacco smoke, the same argument used to ban smoking in cars carrying children. While many parents choose to go outside to the back garden for a smoke, such an option is not always available to those who live in apartments and flats. Should they step outside onto a balcony, the common stair, or the communal gardens? No, because a social housing ban will inevitably include balconies, common stairs and areas surrounding the properties.

But what about enforcement? There are two possible routes. The first is for central government to regulate so that tenants of council and housing association homes will no longer be allowed to smoke in such properties. Landlords will have to comply and new tenancy agreements will be issued to new and existing tenants. The second is that social housing landlords will be given the power to outlaw smoking in the home. They may begin by banning smoking in the gardens and common stairs before moving on to the homes themselves but the endgame is clear. Constantly hanging over tenants will be the thought that breaking any new tenancy agreement by smoking in their own home could lead to their eviction and the problem of finding new accommodation for themselves and their family. And so the noose will get tighter and tighter.

This will be the thin end of the wedge of course because the argument will eventually follow that it's unfair for tenants of social housing to be prohibited from smoking in their homes when those in privately rented accommodation can. The regulations will then be extended to ban smoking in privately rented

accommodation as well. It doesn't require a great leap of the imagination to realise that the next logical step will be to ban smoking in everyone's home, even if they own it. That may be a little further away but we know how it will be achieved – by arguing that children have to be protected from even a whiff of tobacco smoke, just as they are in cars, and that the easiest way to police such an arrangement is to have an outright ban on smoking in all houses – rented or owned. Eventually we will have reached the point where there are so few places left to smoke, in public or in private, that many more smokers will be forced to quit or face prosecution. That, in truth, is the only way the Scottish Government can conceivably meet its 'smoke free' Scotland target by 2034 and it will involve some of the most coercive and illiberal policies one can imagine.

A ban on smoking in the home will face opposition because even supporters of the existing smoking ban are unconvinced it's right. The *Daily Record*, for instance, stated that "a public health campaign on why it is wrong to expose children to second-hand smoke would be far more effective than Big Brother legislation that takes the power of the state into living rooms."<sup>53</sup> The anti-smoking group ASH Scotland has suggested that tenants could have a choice between non-smoking and smoking accommodation. CEO Sheila Duffy told the *Herald*, "The move could lead to entire buildings, stairwells, and communal garden areas becoming smoke-free zones, with tenants at risk of breaching agreements if they allow smokers to light up."<sup>54</sup>

The next step will be to reduce choice until there are no options at all. We saw this with the demands for no-smoking railway carriages, which most people thought was reasonable, but the number of smoking carriages was steadily reduced until all smoking carriages were outlawed. Smoking was banned initially on commuter and

then inter-city trains. A similar thing happened with short-haul and, finally, long haul aircraft. Likewise cafés, pubs, bars and restaurants. Those that could offer a choice of smoking and non-smoking rooms or sections often did so, but that wasn't enough for the anti-smoking brigade who campaigned long and hard for complete prohibition.

Anyone who thinks further anti-smoking legislation won't be forthcoming, especially if Scotland can lead the way, is fooling themselves. If smoking can be banned on private commercial properties it can be banned on private personal properties. All it requires is a majority of politicians in Holyrood willing to bully and cajole a section of the population they calculate will be compliant, and that has never been a problem in the past.

Another irritant to tobacco controllers is the "inadvertent appearance of tobacco or cigarettes in social media, music, television and film" and how it "may have hampered the efforts of the policy actions, to some extent".<sup>55</sup> How annoying it must be to watch mainstream TV programmes such as *Lewis* (2009-15) where Detective Inspector Hathaway is constantly sparking up, or *Endeavour* where Detective Inspector Thursday smokes a pipe and practically everyone except Morse smokes.

Other ideas being mooted include a 'minimum price for tobacco' similar to that introduced for alcohol in Scotland, although such is the high level of excise duty (together with VAT) that the issue of low cost brands is nothing like that with alcohol.<sup>56</sup> What such a policy could do though is give the Scottish Parliament the ability to raise prices although the additional margins over the standard price would benefit the tobacconists rather than the government and would also open up a new and attractive line in for intra-UK smuggling.

## 5. Alcohol control

*“Every form of addiction is bad, no matter whether the narcotic be alcohol or morphine or idealism.”* Carl Jung, 1963

ORIGINALLY suggested at forty pence a unit, then officially proposed at forty-five pence and finally introduced at fifty pence a unit, Scotland now has a compulsory minimum unit price for alcohol sales, with the difference between the cost price and the minimum retail price lining the retailers’ pockets. It’s a world first for Scotland but it doesn’t seem to have occurred to the neo-prohibitionists that there may be good reasons for that.

The battle by the SNP to introduce this flagship policy has been a long one, going back to the days when Nicola Sturgeon was Alex Salmond’s health secretary. All sorts of claims are being made in defence of the policy. It will help hardened alcoholics to reduce their dependency; it will even out health inequalities and lead to a reduction in alcohol related illness and crime. I have my doubts because I believe the problems of alcohol misuse are cultural and introducing a minimum price across the board for everyone to pay is unlikely to alter cultural attitudes, at least not in the way envisioned.

Some of the policy’s advocates are happy simply to wave the saltire and hail it as another first for Scotland. If it’s proposed by “oor Nicola” and Scotland is a world leader then it has to be good. Others fall for its ease and simplicity. “Make booze dearer? That will stop the alcoholics drinking!” Even David Cameron embraced the policy and wanted to introduce it in England. The point he didn’t get was that, unlike in Scotland, the UK Treasury has the power to increase excise duty on certain ‘problem’ drinks such as white cider (high alcohol content for relatively low price) but has so far chosen not to use it.

Indiscriminate price fixing affects people indiscriminately. It does not target those with alcohol problems or those who display anti-social behaviour. Myths have been peddled to justify what is really an indiscriminate attack on moderate and responsible consumers such as the preposterous claim that low taxes have helped alcohol become cheap.

Taxes haven't fallen. They have in fact increased, especially on beer. The reality is that until the recession in 2008 disposable income grew faster than alcohol taxes. Alcohol in the UK is still highly taxed, as the evidence of lower prices across Europe shows, and it's easy to find places in Scotland where there are no supermarkets but only small expensive corner shops. Yet here under-age youths are still huddled in a bus shelter drinking more than is good for them.

The most obvious problem is that while the introductory unit price of fifty pence will annoy the many moderate drinkers forced to pay more, it's unlikely to change our behaviour. This is already upsetting the neo-prohibitionists who support the blanket price hike but want it set at a higher rate. For now they are happy to see the policy introduced and will bide their time, all the while calling for an increase from fifty to seventy pence per unit until they get their way. The cynic in me says we can therefore expect a minimum price hike following the next Scottish Parliament election.

When that happens the public will come to realise that the policy is nothing other than prohibition for the hoi polloi by the back door, an attempt to price alcohol out of the pockets of poorer Scots. It will be yet another example of the professional classes, who believe they know best, telling the working classes how to live their lives. Meanwhile, on their ample taxpayer-funded pay scales and final salary pensions, they will skip down to the wine



merchant and load up the Volvo with a case of cheeky Chianti Classico or delicious Pouilly Fuissé – because they can afford it.

I know people find this hard to believe but, contrary to the regular scare stories, the hard evidence shows life expectancy of teetotallers is lower – yes, lower – than for moderate (or what are now called ‘hazardous’) drinkers and no better than what most people call heavy drinkers. Only alcoholics can expect to have shorter lives than teetotallers. I don’t advocate drinking to excess but the claim that a glass of wine or whisky a day shortens your life is statistically wrong. Indeed, alcohol can have beneficial effects such as keeping the arteries open, which reduces heart attacks (the main reason moderate drinkers are less likely to die before teetotallers).

Introducing a policy that might encourage some people to stop drinking (as many advocates no doubt hope it will) is not in terms of health outcomes necessarily a good thing. Also, despite the regular news reports of people doing stupid or violent things to themselves or each other under the influence of alcohol, alcohol consumption in Scotland is actually the lowest it has been for twenty years.<sup>57</sup> The argument that minimum pricing is necessary to reduce alcohol consumption is therefore misguided.

What Scotland does have is a cultural problem with alcohol and the answer to that is to change our cultural attitudes. We can see that because alcohol consumption in Scotland is and always has been higher than in England. ‘Scots drink more than the English’ is not worthy of a headline because it’s no different from ‘Dog bites man’. Making it harder to obtain alcohol, making it more expensive and demonising people who enjoy a drink won’t change the negative aspects of our drinking culture. All it will do is change how we obtain alcohol and what we drink or consume to achieve its desired effects.

In other European countries where beer, wine and spirits are significantly cheaper, the drink cultures are different. When in France I can buy a ten-litre box of excellent quality wine at a vineyard for £19 (less than £2 a litre) yet I see no drunks on the streets, no alcohol-fuelled excesses in the cafés and bars. The same goes for when I visit other countries. Alcohol tends to be drunk slower, maybe a glass or two at lunch and a glass or two in the evening. Binge drinking is rare and alcohol is often drunk with food. Even in northern Europe where overall alcohol consumption is higher in some areas than in Scotland, aggressive drunken behaviour is less common. Seeking to encourage slower drinking while consuming it with food in a family environment would surely be a more productive approach, and one that the drinks industry could embrace and support.

Instead the neo-prohibitionists stigmatise people for drinking and we are reinforcing a counter culture that encourages slamming down as much strong alcohol as quickly as possible rather than savouring the many benefits it offers. As for the argument about tackling health inequalities, we are back to the absurdity of raising prices for the poorest in society just to 'teach them a lesson'. People who go to food banks are entitled to have a drink if only once a week to gain respite from their difficult lives. How they will do that when a bottle of vodka has gone up forty per cent from £9.99 to £13.35 is not explained. How this policy will help inequality is beyond the ken of the neo-prohibitionist zealots. Everyone else knows something else will be sacrificed in favour of the bottle of vodka.

Hardened drinkers who are already or on their way to becoming alcoholics won't be put off by a bottle of vodka going up to £13.35. They may change what they consume, maybe switching to a drink such as Buckfast which isn't affected by the new policy, or they may sacrifice food for

booze or find more damaging ways to finance their habit. But they will continue to find a way of getting their fix. That is what alcoholics themselves have been saying but the zealots aren't listening. Meanwhile we all pay more and the price hike goes to the supermarkets. I fail to see how any of this resolves Scotland's problem with alcohol. Who said devolution would stop us being treated like guinea pigs?

The Scottish Licensed Trade Association opposed the smoking ban but supported minimum pricing of alcohol. The unit price is too low to make a difference to prices in pubs and bars that have faced stiff competition from the lower prices offered by supermarkets and were hit badly by the lower Scottish drink-driving limit. It's an example of how groups like the SLTA are driven (understandably perhaps) by their own interests, but supporting minimum pricing is a double-edged sword because it accepts the principle of coercing consumers to reduce their alcohol consumption.

In addition, an increase in the unit price could eventually force some bars to raise their prices against their will and against their best interests. It also allows politicians, egged on by the public health professionals who operate across different sectors such as tobacco, alcohol and food, to divide and rule over commercial interests. This is important because their customers rarely have a consistent or organised voice with which to challenge the false assumptions and twisted statistics of the public health bullies.

There are poorer people who get drunk and drink far too much but it's not their relative poverty that makes them drink, it's lack of opportunity or the hard knocks they have taken. It's possibly the loss of a dear friend or other emotional triggers that has left them bereft, but it's not the price of booze. Likewise heavy boozers who are poorer

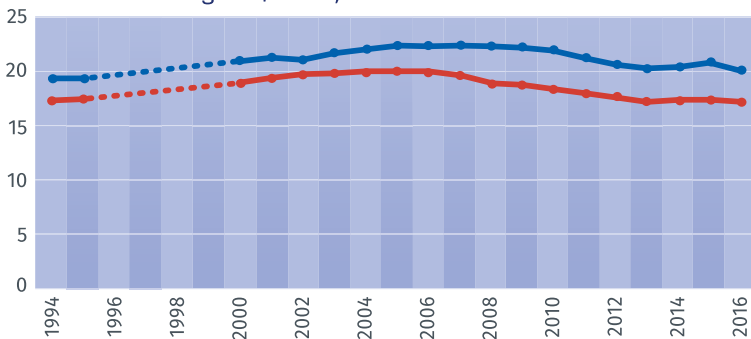
will find ways of getting alcohol – they always have – and people involved in bar room brawls won't stop because of the cost of a dram.

The lesson neo-prohibitionists have failed to understand is that temptation is always before us and the price of temptation is rarely about the cost. It's about need. It has everything to do with our culture that says it's alright to drink heavily, smash a few skulls and then be applauded as a hard man. That's a cultural issue and changing the price or availability of alcohol won't address it.

A look at the figures relating to ill health and alcohol consumption also refutes the need for the policy that seeks to punish everyone. The graph below shows the trend *sales* of alcohol falling:

## Alcohol sales in Scotland in 2016

Units of alcohol sold per adult per week,  
Scotland and England/Wales, 1994-2016



SCOTLAND

**20.2**  
units

sold per adult  
per week in 2016

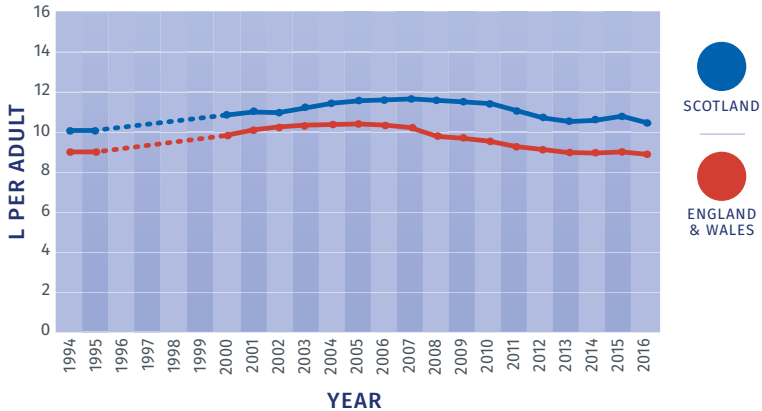
ENGLAND  
& WALES

**17.3**  
units

sold per adult  
per week in 2016

The second chart shows the trend consumption of alcohol falling:

## Volume of pure alcohol sold per adult in Scotland and England & Wales 1994-2016



Source: Nielsen/CGA sales dataset [off-trade sales from 2011 onwards adjusted to account for the loss of discount retailers; see [Appendix 1](#) for more details]

If we then look at the figures for deaths through chronic liver disease we can see they are falling too. A concern that's justified is the growth in hospital admissions relating to alcohol consumption, but my interpretation of these figures is that the problem relates to the concentration of drinking, what we have come to know as binge drinking. Attempts to solve this by limiting happy hours in bars in 2009 have been self-defeating however and have had no beneficial impact. A number of bars in Scotland adopted the practice of promoting low cost drinks over a 72-hour period to comply with the law – resulting in £2 pints and £6 bottles of wine – reducing the cost of alcohol for longer periods, the exact opposite of the intended restriction.<sup>58</sup> People on a night out are clearly consuming alcohol over a shorter period than previously.

### Scottish deaths attributed to chronic liver disease

Year	Deaths
2006	1162
2007	1080
2008	1059
2009	952
2010	978
2011	909
2012	790
2013	824
2014	821
2015	797
2016	894

Source ICD10 Summary list

Minimum pricing of alcohol is just the beginning. The manifesto for the Scottish Parliament elections of 2016 from Alcohol Focus Scotland, the primary taxpayer-funded lobbyists, included the introduction of the fifty pence minimum unit price (natch); increasing alcohol taxes *in addition* (my emphasis), particularly on high strength cider and spirits; introducing prominent health warnings on all alcohol products; introducing mandatory calorie, ingredient and unit labelling; removing alcohol advertising in public places (including billboards and public transport); phased removal of alcohol sponsorship of sports, music and cultural events; removal of alcohol cinema adverts from non-18 rated films and before the

9.00pm TV watershed; introducing a national policy to reduce availability of alcohol, and introducing a social responsibility levy on alcohol retailers.

Does that sound familiar? Higher taxes, banning advertising in all but a few circumstances, prominent warnings on labelling and packaging, banning sponsorship of events, a retailer's levy? All of these have either been introduced or demanded for tobacco products. So what would follow next? First, the minimum unit price would be pushed up closer to seventy pence per unit. And after that? Behind the counter sales? A display ban? Plain packaging? Punitive taxation?

Who is going to put a stop to this? Do the drinks manufacturers, the licensed trade and the off-trade retailers have enough clout? Don't bet on it. The template has been established and they'll be treated the same as the tobacco companies, marginalised and portrayed as self-interested and only out for profit, purveyors not of pleasure but of death. Their evidence will be ridiculed and dismissed while the saintly virtues of their opponents in the public health industry will be amplified and applauded. Their customers will be portrayed as victims, and the statistics will be twisted and distorted to present demands for further action in the best possible light.

The minimum unit price wasn't the first assault by Holyrood on Scotland's association with drink. Restrictions on special offers ('buy one get one free' and 'buy 3 for £10') introduced in October 2011 represented a total misunderstanding of how retailing works and how customers behave.<sup>59</sup> If I want to buy a dozen bottles of Deuchars IPA and one shop offers me twelve for the price of eight that's the shop I'll go to, not so I can buy more, but because it will save me money. Not surprisingly a 2013 study by the Behaviour and Health Research Unit found the ban failed to reduce the amount of alcoholic drink purchased by shoppers.

Another assault on moderate consumption made it illegal for supermarkets to award loyalty points for the purchase of alcoholic products, including chocolate liqueurs.<sup>60</sup> The argument is that buying alcohol should not be rewarded but the restriction revealed that such measures do not just target the heavy drinker (to whom loyalty points are of no consequence) or the underage youth drinking illicitly (who will not have a loyalty card that would reveal the owner's date of birth).

They are an attack on all consumers, the overwhelming majority of them moderate drinkers who just happen to buy their Sunday bottle of wine with their weekly shop. The ban was introduced in 2011 following an amendment to the 2010 Alcohol (Scotland) etc bill lodged by former GP SNP MSP Ian McKee and accepted by the Scottish Government.

Loyalty cards are about loyalty to a particular retailer not a particular range of goods or a particular brand. I can't think of any time I have decided to choose to buy alcohol at Sainsbury's to obtain Nectar points over a local wine merchant without such a scheme. "Hey, Jamie, go an' get anither bottle a' Buckie, will ye – an' go to Morrisons so ye get ra points!" is not something that often heard in the housing schemes of urban Lanarkshire – or anywhere else in Scotland.

If messages are required to change the drinking culture of Scotland then denormalising the behaviour of all drinkers is going to prove a grave disappointment. In my opinion what is required is to ensure that loutish, alcohol-fuelled behaviour is not tolerated but is treated severely by better equipping the police to round-up troublesome drunks and providing the courts with the power to issue strong punishments. Instead our police numbers are at their lowest in ten years and the SNP government is softening sentences. Far stiffer fines would target those people who



have been shown to be irresponsible and are most likely to reoffend again by ensuring they have less money in their pockets to spend on booze.

It would have the effect of raising the unit cost of alcohol but only to those problem individuals whilst leaving the law-abiding public to enjoy their favourite tippie in peace. It's the criminal behaviour of drunks the government should be denormalising, not that of moderate, law-abiding drinkers.

**BIG BROTHER**



**IS WATCHING  
YOU**



## 6. Social control

*“Judgment is given to men that they may use it. Because it may be used erroneously, are men to be told they ought not to use it at all?”* John Stuart Mill, 1859

INTERVENTIONS on smoking, alcohol, food and other aspects of our lifestyle are justified on the grounds of public health but in reality the motivation is largely about controlling people's lives and maintaining a highly lucrative public health industry.

Today public health involves itself in the politics and economics of poverty (because wealth or the lack of it can influence health), education (because ignorance can influence health) and inequality (because that covers all the other bases). This gives all types of organisations, including health boards, licence to clamour for further 'preventative' interventions that are backed up with the force of law and can criminalise behaviour that were – only a few years ago – accepted as normal. It also opens the door to other forms of individual control designed to achieve wide ranging social objectives.

We now have a Scotland where the government intends every person below the age of eighteen to have a 'named person' – a state guardian, usually in the form of a school teacher – who will have a legal responsibility to monitor the raising of every child for its 'wellbeing'. It's the ability to use legislation to shape society by future norms that has created concern about the state guardian and the role this 'named person' might play. What appears at first to be an innocent enough attempt to improve the operation of local authority social work services has become fraught with controversy because the more people studied what was proposed the more potential for something sinister appeared.

### Age restrictions

The following are edited lists of what you can do without the agreement of parents or guardians once you reach a certain age in Scotland:

16

**At 16** in Scotland you can: consent to lawful sexual intercourse with any gender; get married or enter into a civil partnership; leave home and apply for housing with the local council; buy wine, beer, cider or perry to drink with a meal in a restaurant only, but not in a bar, off-licence or supermarket; leave school; get a job and pay National Insurance; be prosecuted in the justice of the peace, sheriff or high courts; be sent to a young offenders' institution; consent to medical treatment; change your name by deed poll; get a skin piercing; apply for a ten year passport; and, vote for your local councillor or member of the Scottish Parliament.

17

**At 17** you can: hold a license to drive a car; hold a private pilot's license; train to be an officer in the armed forces; and, give blood.

18

**At 18** you can: vote in an election for your local MP and MEP (European parliament); stand for election as a local councillor, MP or MSP (Scottish Parliament); be liable to register and pay the council tax; serve as a juror; buy alcohol in licensed premises and consume alcohol in a bar; work in a bar and be licensed to serve alcohol; buy cigarettes and tobacco; see any film or hire any video/DVD; place a bet and possess fireworks; hold a credit card; be tattooed and hire or buy a sunbed; hold a basic commercial pilot's license and a licence to drive a medium-sized goods vehicle.

The Children and Young People (Scotland Act) 2014 sought to ensure a state guardian would be appointed for every person under the age of eighteen from a list including a midwife, health visitor, head teacher, deputy head teacher or guidance teacher, depending on the age of the child. The Scottish Government said the named person would be the single point of contact if a child or their parents wanted information or advice, or if they wanted to talk about any worries and seek support. Crucially, though, it would also be a point of contact for other services if the named person had any concerns about a child's wellbeing.

Objections were raised about the law, primarily by some religious charities, on the intrusion into family life and how the role of the named person could diminish that of the family. Others were concerned that the state guardian could take on the role of reporting back to social services if wellbeing became defined in terms that, in the future, become more intrusive. The potential for parents to fall foul of the law in ways not considered now but developed later by governments – for example, after constant lobbying of agencies seeking to push their public health agendas' into the home – could turn what was meant to make the sharing of social welfare information easier soon become a method to direct and control parents.

There was also the absurdity that in the so-called progressive Scotland the named person law would apply to sixteen and seventeen-year-olds, creating a situation whereby people of that age group would be able to get married and have consensual sex and vote for their lawmaker – but would still be watched over because they would not yet be considered responsible adults.

The question is, if central or local government takes the decision that a further push is required to eliminate a 'social ill' such as smoking, drinking or eating to excess, what lengths will it go to in requiring parents to stop? At

what point will officials be unable to resist using state guardians to bully parents? This is not as alarmist as it might seem. In 2006, according to *The Times*, Dundee City Council had threatened to remove children from their foster parents unless the parents agreed not to smoke in the home: 'Smokers who already have foster children under five in their care face having them removed if they smoke at home. The conditions are being introduced ahead of a ban on smoking in public places, which will give Scotland some of the world's most draconian anti-smoking laws. However, critics have branded the latest regulations as irresponsible and over-the-top, claiming that officials are putting political correctness before the needs of children. Murdo Fraser, deputy leader of the Scottish Conservatives, said: "It would be horrific to see children taken from their homes where they are otherwise happily settled simply because one of their parents is a smoker."'

Dundee lecturer and smoker Stuart Waiton, a rare and brave campaigner for civil liberties in Scotland, told the *Scotsman* his childrens' school was teaching pupils to lecture their parents about the dangers of tobacco. The father-of-two said: "My childrens' teachers are educating them to educate me not to smoke, which I find profoundly insidious." His children had made a point of showing him a no-smoking poster they had made at their school. "Ironically, they had spelt it incorrectly, with 'smocking' instead of smoking. I thought that was brilliant as I am always saying: if only your teachers educated you – rather than trying to socialise you to socialise me – you might actually be able to spell."<sup>61</sup>

It is not too big a leap to see that parents could be threatened directly or indirectly about the care of their children not meeting official standards with regard to their smoking and drinking, or the children's consumption of sugar, salt and fats in their diet. Failure to respond could

see the state taking children from their parents and into care, all because they smoke in the presence of their kids, exceed government guidelines about the number of units of alcohol they should drink each week, or provide their children with 'wrong' diet.

The Scottish Government has already limited alcohol promotions from retailers in Scotland and is now considering powers to limit portion sizes in restaurants or supermarket food offers.<sup>62</sup> A role for the state guardians concerning the provision of a nutritional diet has already been flagged. It's not fanciful to anticipate the day, not far off, when parents will be reported to the authorities by named persons for smacking their children, smoking in front of them or feeding them the wrong meals. The penalties will vary but could stretch to children being taken away from their parents and into the care of the state. Likewise, couples looking to foster or adopt children in desperate need of a home could be denied the opportunity to share their love because they don't conform to the state's new puritanical regime.<sup>63</sup>

It is not unusual for a teacher to ask pupils to write about their recent holiday or weekend. What if, in a few years, a teacher in Scotland, who happens to be a named person for many in his or her class, reads about Jack telling how his sister Olivia was smacked by mummy for drawing in wax crayon on the walls of the gîte they were staying at? Jack goes further and writes how, when they got home, his parents threw a party for mummy's thirtieth birthday and they were all smoking, drinking and dancing – in the house! What pressure will that teacher be put under to report the breaking of new laws that could lead to the parents being punished and the children put under greater scrutiny by the state, and possibly taken into care?

The inherent weaknesses of the policy was exposed and opened to ridicule when in January 2016 one of the

first teachers to be listed as a potential 'named person' was struck off the teachers' register and placed on a list of persons deemed unfit to work with children in any capacity.<sup>64</sup>

Following appeals by campaigners through the courts – going all the way to the Supreme Court – those challenging the bill won safeguards on aspects of data retention.<sup>65</sup> As a result opposition parties were able to agree to delay the bill's progress in committee and the Scottish Parliament voted to delay its progress until a later date. It remains SNP policy to proceed, with Big Sister Nicola Sturgeon saying it would be in the best interest of children. The state's children, that is, not the parents' children.



## 7. Creeping prohibition

*"It is all very well to say 'this is justified because it is in the interests of the common good'. The fact is that the liberty of the individual is part of the common good also."*

Duke of Edinburgh, 1976

THE Scottish Parliament is now in its fourth session. Between 1999 and 2003, with the exception of the botched ban on fox hunting (which attacked such a small minority that it was a political no-brainer for the bullies of Holyrood), there was little obvious intervention to expand the McNanny state. The reason was that there was enough controversy to be dealing with through the escalating cost of the new Scottish Parliament building (originally flagged by Labour ministers at £40 million but eventually costing £431 million). There was also the unfortunate death of Donald Dewar and the resignation of Henry McLeish and all the related distractions of Scottish Labour party leadership elections that followed.

Introducing new Scottish Executive-led restrictions on control or consumption of tobacco, alcohol, food and sex in such a maelstrom of controversy would have been difficult. This meant that where there was a possibility for intervening it was often headed off at the pass by adopting what was called a 'Sewel motion' – named after the Labour minister Lord Sewel who introduced the convention – whereby Westminster would not normally legislate on devolved matters in Scotland without the consent of the Scottish Parliament. In practice this meant the Scottish Parliament would 'sign over' to Westminster the passing of a law if in principle it voted to agree to it.

However the Scottish Parliament is different from Westminster in that the 129 MSPs can propose a private bill without requiring to come high in a draw that gives members parliamentary time. MSPs are therefore able to

bring forward all sorts of legislation in the hope that a relatively light government programme leaves room for various reforms. All they have to do is convince fellow members in committee and plenary sessions. This can also mean that political games can be played where one party might bring forward a bill to change the law to embarrass another party, especially if it is in government in Westminster or Holyrood.

One such occasion was the passing of a ban on tobacco advertising in Scotland. The Labour government in Westminster had proposed to take action (it had been a 1997 manifesto commitment) and following publication of its bill the Scottish Parliament had passed a Sewel motion in January 2001, proposed by the Scottish Executive, to give consent for Westminster to legislate on the issue. With the calling of the 2001 general election the UK bill ran out of time, however, and it was then dropped from the Queen's speech for the first session of the new parliament.

That gave the SNP's then shadow health spokesman, Nicola Sturgeon, the opportunity to push for Scottish legislation, embarrassing the UK department of health and the Labour-Liberal Democrat Scottish Executive for its inactivity, despite past assurances to act. On 1st October 2001 she brought forward a private bill to ban tobacco advertising in Scotland, claiming that such a law would save 300 Scottish lives a year by reducing smoking rates. In the end the UK government passed the Tobacco Advertising and Promotion Act 2002 and Sturgeon's bill wasn't needed, although it undoubtedly would have passed had it been put to a vote.

The move by Kenny Gibson, another SNP MSP, to introduce a private Regulation of Smoking bill in November 2001 to ban smoking in places that served food, was a demonstration that members of the Scottish Parliament could at key moments act alone and strike their own blow

for restrictions on our lifestyle choices. Another example was when, in the passing of the Scottish Executive's new licensing act, the Glasgow MSP Frank McAveety moved his own amendment to restrict the opening of off-sales so they couldn't begin until 10.00am, instead of the existing time of 8.00am.

Intriguingly, the Liberal Democrats and the former Labour health minister Susan Deacon voted against the amendment (she later told me she thought it ridiculous that people could not purchase a bottle of wine on their way to work to take to a later event) splitting the administration's coalition. McAveety's amendment was passed with SNP and Tory support (in order to embarrass the Labour-Liberal Democrat executive) by 92 to 27 votes (I voted against).<sup>66</sup> The restriction still stands to this day and is a regular nuisance to ordinary shoppers who find that at certain times they can drink in bars but can't buy alcohol to take home.

These early initiatives by MSPs showed the appetite for intervention that existed right from the start and heralded the more concerted executive efforts that began as soon as the political landscape allowed. And, just as smoking was targeted by the Labour and Liberal Democrat executive, so the SNP administration, elected in the third session in May 2007, was keen to make its own mark.

A number of ideas were put forward. One that stood out was raising the age at which consumers could purchase alcohol in an off licence to twenty-one, proposed by the SNP justice secretary Kenny MacAskill and supported by health secretary Nicola Sturgeon. Scottish pubs had traditionally sold spirits in quarter or fifth of a gill whereas England had more commonly sold spirits in a sixth of a gill.<sup>67</sup> MacAskill changed it so that Scotland adopted the standard practice of only 25ml of spirits and requiring wine to be available at 125ml alongside any

other measures. Other restrictions introduced in Scotland included an end to happy hours and other drinks' promotions such as OAPs being able to get a free half pint with their glass of whisky in the quiet afternoons.

The restriction on 18 to 20-year-olds being unable to buy alcohol was ridiculed, not least by pointing out that undergraduates would not be able to celebrate passing their degree by buying a bottle of champagne but could go to the pub and drink one there. The same would apply to 18-year-olds celebrating getting married or becoming parents. Having suffered a defeat in parliament on a motion proposed by Conservatives and backed by Labour, MacAskill withdrew that idea but the main thrust of the proposals remained.<sup>68</sup>

Another issue where it was possible to act in advance of Westminster concerned the drink-driving limit. MacAskill's drink-drive legislation was passed by the SNP government and introduced at the end of 2014. The drink-drive limit in the UK of 80mg in 100ml of blood was set in 1968 when the breathalyser system was introduced, but across the rest of continental Europe the level had more generally been set at 50mg per 100ml. The SNP saw an opportunity to differentiate Scotland (always a political goal) while claiming to save lives. There was, though, another agenda – reducing Scotland's consumption of alcohol by seeking to discourage people from drinking in licensed premises. By making it harder for drivers to drink even a half pint of beer or a small glass of wine, the odds were they wouldn't drink alcohol at all, nor would they be persuaded to drive their friends to a pub or bar.

The Scottish Licensed Trade Association's 2015 'state of the nation' survey of 600 premises found fifty-five per cent experienced a fall in like-for-like sales compared to the previous year. The drop in turnover wasn't restricted to alcohol sales but included a thirty-eight per cent

drop in food sales too. The largest decline was in the countryside and tourist locations where thirty-nine per cent of premises recorded sales dropping over ten per cent year-on-year. Only eighteen per cent of respondents were confident of seeing any increase in their trade in the coming year.<sup>69</sup>

Commenting on the survey, Paul Waterson, chief executive of the SLTA, said, "Our industry is totally committed to the responsible retailing of alcohol and the creation of a vibrant economy in Scotland, but we do not believe that the draconian penalties linked to new drink driving legislation are effective and proportionate. We have been very clear we are not against the changes themselves but the fact that the penalties have not been adjusted. That has been a real barrier to people driving from the pub even if they are confident they're under the limit. You might think people will just come out to drink soft drinks with a meal but that's not what we're seeing. People are staying away."<sup>70</sup>

The reason for the impact on pubs, yet again dismissed by politicians as unimportant, wasn't difficult to find. Some licensees were recording a thirty per cent fall in midweek takings that was the result of two changes in customer attitudes. The first was that fewer workers were stopping off on the way home to have a drink. If they wanted alcohol they could go into the supermarket with its convenient parking and low prices and take a bottle of wine or some beers home with them. The second development was fewer people going out for a meal or celebration, even though they might not be the designated driver, knowing they would be driving to work the next morning and couldn't be confident they would pass a breathalyser if pulled over on their way to work.

When the drink-drive limit was 80mg per 100ml people were confident about going out at night and sleeping

off the effects of the alcohol they had drunk the night before. Once the limit was reduced to 50mg per 100ml – effectively very little alcohol in the bloodstream – people were unsure about drinking in the evening and driving the next morning with residual levels of alcohol that might still show up. It naturally followed that alcohol consumption would therefore shift towards drinking at home or on days when there was no work (or the need to drive) the following day.

This second factor – pushing alcohol consumption away from licensed premises – aggravated what had already been started by the smoking ban. The police had warned drivers that ‘having no alcohol at all’ was the only way to ensure they wouldn’t fail a test and drivers were warned to avoid planning car journeys the morning after a night drinking. Paul Waterson reported that in 2014, before the drink-drive legislation, closures were running at five or six pubs a week with the corresponding loss of thirty to forty jobs (1,500-2,000 a year), but he now expected this to rise.

While Scottish politicians have always taken the view that the licensed trade’s views were commercially motivated and could therefore be dismissed, the justification for such a measure was that the outcome would be better than what had come before, that accidents and fatalities caused by alcohol consumption decreased beyond any existing trends. As with the smoking ban, the first set of figures were declared a success and used to justify the stricter policy. Compared to 2014, before the change in the law, casualties from road accidents were said to have fallen by three per cent from 11,307 to 10,968, serious injuries by six per cent to 1,596, and deaths from 203 to 168.<sup>71</sup> The Scottish Government claimed that, as there had been no spike immediately after the introduction of the new law, drivers had changed their behaviour. The police had advised ministers to expect an increase in convictions by a third if the public continued to drink-

drive at previous levels. However, these were the figures for all accidents. When the statistics for accidents related to alcohol consumption became available it was possible to see that the number had actually increased, reversing the previously falling trend.

It was crucial to the case for stricter drink-driving laws that the existing trend of falling road traffic accidents and deaths related to alcohol above the legal limit should be bettered – but the evidence thus far shows this has not happened. The falling trend has reversed and plateaued. The 2004-08 average for fatal accidents and resulting fatalities) was thirty and thirty respectively. By 2010 it had fallen to 20/20; by 2012 it was 10/10 and by 2014 it had climbed again to 20/20. After the drink-drive limit was reduced in 2015 it remained at 20/20. Even the number of all accidents and all casualties (serious and slight) attributable to drink driving in Scotland had been falling and but has now stalled.

### **Estimated number of reported drink drive accidents and casualties 2005-2015**

<b>Year</b>	<b>Fatal accidents</b>	<b>All accidents</b>	<b>Fatalities</b>	<b>All casualties</b>
2004-08	30	690	30	990
2009	20	660	30	920
2010	20	530	20	750
2011	20	490	20	680
2012	10	440	10	580
2013	10	330	20	450
2014	20	340	20	460
2015	20	340	20	470

Source: Transport Scotland, Reported Road Casualties Scotland 2016

Police figures tell a similar story. The recorded crime figures in Scotland show that driving under the influence of alcohol usually accounts for three to four per cent of motor vehicle offences. There was a consistent decline from 2006-07 to 2014-15, crossing into the period in which the lower drink drive limit was introduced. Overall the fall was an impressive 55.5 per cent but over the next two years offences rose by five and eight per cent annually. While it is possible that the new lower 50mg level has resulted in marginally more drivers breaking the law, the impact is nothing like the 33 per cent the police predicted. Unless the police take details of the levels of alcohol for those who fail the test and can show how many would have passed the current 50mg limit but failed the previously 80mg limit, it is impossible to know whether the law has made much difference or not.

### **Driving while under the influence of alcohol in Scotland**

<b>Year</b>	<b>Offences</b>	<b>Rise/Fall</b>	<b>%</b>
2006-07	11,704	+447	+ 4%
2007-08	10,697	- 1,007	- 8%
2008-09	9,800	- 897	- 8%
2009-10	8,504	- 1,296	- 13%
2010-11	7,563	- 941	- 11%
2011-12	7,445	- 118	- 1%
2012-13	6,433	- 1,012	- 15%
2013-14	6,079	- 354	- 6%
2014-15	5,218	- 861	- 14%
2015-16	5,458	+ 240	+ 5%
2016-17	5,917	+ 459	+ 8%

Source: Scottish Government Recorded Crime in Scotland 2012-2017.  
Below the line is after the change from 80mg/100ml to 50mg/100ml.



The accident and criminal statistics also need to be seen in a context where road traffic and the number of drivers increase year-on-year. In Scotland, in the ten years between 2006 and 2016, the number of households with vehicles available for private use rose from sixty-eight to seventy-one per cent and the number of adults licensed to drive a vehicle rose from sixty-six to sixty-nine per cent of a growing population.

Within those numbers the number of private and light goods vehicles (including cars) rose by 13.8 per cent – all while drink drive prosecutions fell by 49.5 per cent. Death-related accidents caused while driving under the influence of alcohol fell by a third (33.3 per cent) and all casualties dropped by more than half (52.5 per cent). What we have therefore is a continuing proportionate decline in drink-drive accidents, casualties and deaths, that cannot be attributed to any new drink-drive laws and run counter to the growing number of vehicle journeys. In such a context the case for introducing tighter restrictions was weak.

The Scottish Parliament has not yet taken significant action on the issue of obesity – or what is more usually called being ‘obese and overweight’ – as that description ensures the group being targeted is forever of significant size – other than to issue guidance to local authorities on the nutritional quality of school meals. That is about to change, however, as the first minister Nicola Sturgeon recently met Jamie Oliver and announced that after his lobbying she was advocating a ban on two-for-one pizza offers, together with other ‘junk food’ restrictions.<sup>72</sup> The intention is to halve child obesity by 2030. Proposals are expected in the summer of 2018, especially if Westminster fails to take action where Holyrood politicians feel they can. It wasn’t possible for the Scottish Government to introduce a sugar tax but a sugar levy, similar to the minimum unit price of alcohol, could be devised.

There is an urban legend, originally based on fact, that Scotland is the only country where Coca-Cola is not the number one selling soft drinks brand. This honour goes to Irn Bru, the orange-coloured drink reputed to be a hangover cure and famous for its provocative and witty advertising. It's a matter of pride for many in Scotland when this factoid is quoted, but whether it remains true is disputed. What is certain is that the UK's new tax on sugary drinks, introduced at Westminster, has led soft drinks' manufacturers to change their recipes so they have less sugar content and are liable to less or no tax. AG Barr, owners of Irn Bru, have changed their recipe and it's currently getting mixed reviews. Coca-Cola, in contrast, offers a wide range of drinks with different sugar levels and as a matter of policy has declined to reduce the sugar in its classic brand. The lesson is that changes to popular brands should be dictated by consumer choice and market forces, not politicians and campaigners.

Other restrictive laws that have been considered at Holyrood include changes to the laws governing prostitution, a constant favourite of feminists in the parliament. Fortunately they were up against the former SNP MP Margo Macdonald who had been elected as an independent MSP for the Lothians. Margo, who sadly died in 2014 from Parkinson's disease, was a very popular figure publicly and had campaigned for justice and welfare rights for prostitutes over many years and knew the issue better than anyone. On many occasions she was able to point out to her opponents that the various restrictions being proposed would only make life harder for the women, make them less safe and simply drive the practice underground where violence was more likely to take place.

Nevertheless the introduction of the unified single police force, Police Scotland, from the eight locally accountable constabularies had the unintended consequence of ensuring that the chief constable of Strathclyde police,

who took charge of the new unified body, presided over the whole of Scotland and introduced Strathclyde's far more authoritarian approach to prostitution whereby prostitutes were forced to work the streets. Between 1991 and 1998 six prostitutes were murdered in Glasgow and there was one suspicious death. In contrast Lothian & Borders and Grampian police took a more liberal approach that allowed prostitutes to initially work in zones and then in saunas as masseuses, with fewer assaults and only one (possibly-related) murder.<sup>73</sup>

The prostitution (Public Places) (Scotland) Act 2007 had come into force in October 2007, creating a new offence for clients' kerb crawling and ensuring tolerance zones were no longer legal; thus saunas became more popular. In 2013 the new more hardline approach by Police Scotland saw Edinburgh saunas raided in broad daylight with men and women thrown out on to the streets. Many arrests were made but after a great deal of protest (no doubt much of it behind the scenes from some upset elite clients) the saunas were tolerated again. Attempts to criminalise clients were made by various Labour politicians in 2010, 2011 and 2013 but all failed to gain enough support. They, the saunas and the prostitutes remain, however, a target of feminist activists and a number of MSPs are waiting for their moment when they believe they can change the law, irrespective of how it will impact on the working women.<sup>74</sup>

Every one of these interventions is part of the creeping prohibition we see in Scotland's McNanny state. There will always be the big-ticket issues, the bans that grab the headlines, but behind the scenes Scottish politicians continue to chip away on ordinary freedoms that disappear incrementally.

**Scottish  
Conservative  
& Unionist**



## 8. Where is the opposition?

*"It is hard for anyone to be an honest politician who is not born and bred a Dissenter."* William Hazlitt, 1819

WHEN it comes to public debate on the extension of the nanny state into the everyday lives of ordinary Scots, those that want more laws and more restrictions are pushing on an open door. It is very rare indeed for the current SNP government, or the Greens (who usually ensure the SNP has a majority), or their Labour and Liberal Democrat opponents, to oppose further state intervention. Indeed they can usually be expected to try and outbid each other in creating new interventionist schemes. If Labour or the SNP has come up with an idea first it is quite usual that one or the other will oppose it purely on partisan grounds but accept the principle and look to introduce the idea themselves later.

The official opposition, the Scottish Conservative and Unionist Party, finds itself in a quandary and sadly can't be relied upon to oppose further intervention. Indeed it too may try on occasion attempt to lecture the SNP government for not going far enough, or failing to meet interventionist targets. And yet the Scottish Conservatives remain the best hope of challenging Holyrood's mission creep because, very occasionally, they discover a backbone and speak out. Unfortunately it seems to depend on which Tory MSPs hold a particular brief and whether they are able to resist the pressure from taxpayer-funded NGOs and charities.

From day one in the parliament, in areas of public health, the Scottish Conservatives have been minded to adopt the current consensus and accept further intervention. The inevitability of NHS rationing feeds that syndrome because healthcare treatment costs taxpayers' money so if a case can be made for an intervention that will save the public

money further down the line it can be a winning argument with fiscal conservatives. This may explain why, in April 2018, a Scottish Conservative spokesman attacked the fall in Scottish Government spending on smoking cessation. “Complacency is creeping in,” he complained, arguing that the decline in smoking needed to be “accelerated”.<sup>75</sup>

‘Quit attempts’ (in other words those assisted by the state) have indeed fallen in Scotland (from 121,386 in 2011/12 to 59,767 in 2016/17) while funding for smoking cessation services has also been cut (from £510,000 to £134,000 in the same period). However, it was a particularly odd argument coming from a Conservative politician because the fall in the uptake of NHS cessation schemes is widely accepted to be due to people switching to e-cigarettes at their own expense and volition, negating the need for the state to fund smoking cessation services as generously as before.<sup>76</sup>

Yet in areas affecting education or civil liberties there is the prospect of a more robust line, one that might even find a parliamentary majority if a cross-party approach was skilfully played. A good example is the cross-party alliance that together with the intervention of the courts has helped stall the SNP Government’s ‘state guardians’ legislation. By comparison the Scottish Conservatives opposed minimum pricing of alcohol, but when the spokesman changed from Murdo Fraser to Jackson Carlaw they decided to accept the political reality that they would lose the vote and in return for supporting the bill a ‘sunset clause’ would be introduced to review its effectiveness after five years. Thus we find that when it comes to health issues such as smoking, alcohol and diet the Scottish Conservatives offer an unpredictable voice at best.

Some observers, including many Conservative supporters, may find this disappointing but I have news for them – it’s nothing new. The Conservatives have traditionally been

a patrician party and only rarely has it adopted a more libertarian approach. The more recent classical liberal tendency in the party is partly a result of that ideological position being abandoned by the old Liberal Party under the leadership of David Steel, who merged it with the Social Democrat party to form the Liberal Democrats, and partly because it coincided with the premiership of Margaret Thatcher who was atypical of Conservative leaders, although even she could be interventionist when internal party horse-trading left her with little option.

Many Conservatives – most often those in charge of the party – have form on ceding ground to the nanny state. It was the Scot Iain McLeod who, when editor of the *Spectator* in 1965, coined the phrase with the words “what I like to call the nanny state”.<sup>77</sup> By reclassifying what constituted public health, expanding the role of government had even by then become a nostrum adopted by every mainstream party. Indeed it was Edward Heath’s Conservative government that introduced the compulsory wearing of helmets by motorcyclists despite widespread protests in 1973. This was followed by Margaret Thatcher’s government introducing compulsory seat belts, first with a three year trial in 1983, and then permanently in 1986.

In 2009, towards the end of the Tories’ wilderness years in opposition, David Cameron and George Osborne then hit upon a seemingly great idea. It was called ‘nudge theory’ and they adopted it with all the enthusiasm of religious converts because it simultaneously presented them as more liberal and open-minded than their Tory predecessors or the nannying Labour government that had held power in Westminster since 1997, whilst allowing them to show that they ‘cared’ about the public’s wellbeing.

Nudge theory was conceived by Richard Thaler and Cass Sunstein in their 2008 book, *Nudge: Improving Decisions about Health, Wealth, and Happiness*. It mixed psychology



with behavioural economics to offer up the oxymoron of libertarian paternalism. Very simply, nudge theory argued that in the design of choices that the state must provide, it is possible, even desirable, to nudge people to make the 'right' choice that will be in their best interests. It was 'libertarian' because it didn't force people to act in a certain way (such as smoking or drinking less) but instead left them to make up their own minds. But it was also paternalist because it allowed others to decide what the preferred 'choice' was.

This seemingly answered the contradiction that paternalist Conservatives find difficult to square: how, in the economic sphere, do believers in small government, limited regulation and minimal intervention shape society to behave in the manner that they believe best, especially in matters of health and safety? The correct answer is found through the writing of John Stuart Mill, namely that modern day Conservatives and any remaining Liberals shouldn't be so patronising as to make choices for other people other than providing laws that protect against the denial of freedom by others abusing their own.

Once elected in June 2010 Cameron and Osborne, firmly of the old Tory patrician school, soon found nudge theory wanting and it was quickly dropped. The Conservative party's initial opposition to Labour's tobacco display ban was the first casualty. Within a couple of years supermarkets were forced to introduce screens and drawers to hide tobacco products from view. Smaller shops were given a stay of execution but the result was the same – the display of tobacco products was prohibited in case it encouraged children to start smoking. Next came proposals for the introduction of standardised (or 'plain') packaging on all tobacco products. Thus, several of the ideas that were first mooted by Nicola Sturgeon when she was Scotland's health secretary from 2007 to 2012 found favour with Cameron's Conservatives while the Scottish



Conservatives eventually dropped their opposition to Sturgeon's campaign for minimum pricing of alcohol.<sup>78</sup>

It's in this patrician context that the Scottish Conservatives should be seen. Scots were always aware that some aspects of their life – the church, the legal process, education – operated under entirely different arrangements that reflected past custom and practice. These variations existed throughout the time of the Scottish Office (1885-1999) when UK parties would usually determine national laws but bring forward separate Scottish bills when necessary to take account of legal or institutional differences. The establishment of the new Scottish Parliament in 1999, with 129 members and its own executive with the power to introduce primary legislation, created a significant capacity for processing new laws. This was not an opportunity any of the mainstream parties were likely to resist and it meant there was a real need to consider what laws to offer or contest at election time.

Ironically no party proposed a smoking ban in either the 1999 or 2003 Scottish Parliament elections but following the global political 'success' of the Irish government's workplace smoking ban in 2004, Scotland's first minister, Labour's Jack McConnell, was persuaded he could do the same in Scotland. A bill was brought forward and passed in 2005 by 97 votes to 17 with one abstention, and was introduced on 26th March the following year. Political opposition to the bill was led by the Scottish Conservatives but apart from the party leader, David McLetchie, and myself, many of my colleagues were reluctant to oppose the bill and a three-line whip was imposed to ensure sixteen of the seventeen elected Tories voted against it at its final stage. Murray Tosh, a Conservative MSP sympathetic to the bill, voted with the Scottish Executive against three of my reasoned amendments that sought to moderate the bill at the final stage. Tosh abstained on the final vote on the grounds

that he was deputy presiding officer and had handled the proceedings of the bill that day. Only John Farquhar Munro, a Liberal Democrat and a pipe smoker, joined the sixteen other Conservatives who voted against the bill.

Subsequent tests of the Scottish Conservatives' attitude to more state interference have drawn a mixed response. The problem they have is that without any philosophy that defines where the limits of the state should lie they become intellectually incoherent when faced with proposals for further state encroachment into our daily lives. In the end it comes down to who is the spokesman on a particular topic of health, education or civil rights, and to what extent the leader of the day will agree with that person's view. The role of the leader is important because he or she can usually overrule or outmanoeuvre the relevant spokesman and can also use the backing of the whole group to determine if and how the members will vote in concert.

State intervention, then, is driven by vote seeking politics and rent seeking of single interest groups. Political parties seek to second guess what the McChattering classes will support in saving the hoi polloi from themselves, while the professionals, especially but not exclusively from the massive public sector, feed off the teat of public subsidy and the work of administering the regulations.

With the Scottish Conservatives lacking a clear public health philosophy that recognises the limits of state intervention, and with private sector trade associations demonised for being self-interested (when they are no more or less self-interested than the publicly-funded NGOs and at least don't call upon the taxpayer to finance their lobbying) the result is that there is now very little consistent mainstream opposition to proposals for further state intervention in private and commercial life in Scotland.

While most political parties are pushing on a door that is already ajar, they themselves are being pushed by the plethora of charities, ad hoc or permanent campaign groups, working groups, conventions, standing councils, quangos and joint working parties – many of whom are funded by government agencies or departments who then find themselves being lobbied by the very same bodies they have been funding. If there is to be a political rebellion to arrest or even reverse some of Holyrood's worst interventions it requires not just a reform of laws or a trimming of budgets but the scything down of this publicly funded lobbying organism.

Take ASH Scotland, which formally separated from its parent body Action on Smoking and Health, based in London, in 1993. ASH Scotland is now the larger of the two organisations even though it serves a nation of only 5.3 million while England's population is more than ten times that number. In 2017 ASH Scotland had an income of £786,202 while employing nineteen staff headquartered in Frederick Street, Edinburgh. Income from taxpayers via the ultra generous Scottish Government totalled £604,798 of which £218,449 (thirty-six per cent) was core funding and £386,349 (sixty-four per cent) was for projects. In contrast, the London-based Action on Smoking and Health had an income of £675,564 in 2016 of which £160,000 was from the taxpayer.

### ASH Scotland and ASH (England) – a comparison<sup>79</sup>

Year	Scotland staff costs	Employees	England staff costs	Employees
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2013	£907,884	27	£351,294	8
2014	£788,630	25	£415,881	9
2015	£782,849	23	£390,679	9
2016	£612,304	19	£403,798	9

ASH Scotland fights on many fronts, at every point seeking to demonise tobacco, but it remains oblivious to irony or hypocrisy. Take its campaign on tackling inequalities allegedly caused by smoking. ASH Scotland's own literature states that 'A low-income family earning £18,400 a year, where both parents smoke 20 cigarettes a day, will spend a quarter of their entire income on tobacco or around £4,600 a year.' The facts are not in dispute but the reason for the financial pressure is that groups such as ASH Scotland have been campaigning year-on-year for higher taxes on tobacco. Every budget that brings a substantial increase in tobacco duty gets a cheer from ASH Scotland and their fellow travellers even though the people hardest hit are the poorest in society. Like it or not, many people enjoy smoking – it can even be one of their few pleasures – but the financial pressures caused by tax hikes on tobacco make their lives harder and less pleasurable. ASH Scotland does not tackle inequalities caused by smoking, it seeks to aggravate them.

Needless to say the tentacles of the prohibitionists interlink and spread, resurfacing with different heads but a common purpose. For example, it's no surprise to find, via the ASH Scotland website, that the chair of ASH Scotland, Mary Cuthbert OBE, is also the chair of Alcohol Focus Scotland, while Sheila Duffy, CEO of ASH Scotland, has been working with Alison Douglas, CEO of Alcohol Focus Scotland, 'to set up a new Cross Party Group in the Scottish Parliament with a focus on Non-Communicable

Disease prevention, and joining up knowledge around tackling tobacco, alcohol and diet/obesity.'

### **Alcohol Focus Scotland**

<b>Year</b>	<b>Staff costs</b>	<b>Employees</b>
2013	£582,295	20
2014	£529,748	18
2015	£512,100	17
2016	£460,160	13
2017	£465,816	15

The reason for this partnership is obvious. The preferred template for greater intervention in Scottish public health is the one developed to tackle smoking and it is increasingly being used in other areas, notably alcohol and obesity.

One only has to look at the media releases, reports, websites and campaign materials to see how organisations like ASH Scotland and Alcohol Focus Scotland work. They and others like them are all part of a top down approach, funded by government to speak unto government. There is no comparable system or structure for ordinary consumers to influence public health policy. The lack of balance should be a priority and the only way to achieve that is for the Scottish Government to stop funding these professional lobbyists and demand that they support their activities through voluntary contributions from individuals, charities or the private sector. If there is genuine support for their neo-prohibitionist, nanny state campaigns they will have no problem finding sources of income. What we should not allow is for the taxpayer to continue to pick up the tab so that public money is being used to lobby government.



## 9. Enough is enough

*“It cannot be said too often – at any rate; it is not being said nearly often enough – that collectivism is not inherently democratic, but, on the contrary, gives to a tyrannical minority such powers as the Spanish inquisition never dreamed of.”*

George Orwell, 1944

DEVOLUTION, or so we were told, was going to create a new nirvana, a world in which we would be healthier and happier. When that didn't happen we were blamed for not listening to those who know best and further laws were proposed to bully us into submission.

The smoking ban may have improved air quality in the nation's pubs by forcing smokers out onto the streets, but the same improvement to our local howfs could have been achieved by introducing separate, well-ventilated smoking rooms or imposing clean air standards, in the same way that publicans must meet building control, food hygiene or fire safety standards. Some pubs would have chosen to meet new standards while others would have opted to ban smoking – and we would have had a choice. Fewer pubs would have closed, there would arguably have been fewer deaths from home fires, and the government would still have achieved a slow but steady fall in smoking rates.

The opportunity for a successful, liberal approach to public health – something that Scotland really could have been proud of – has so far been missed. But does a new development offer us a second chance?

The anti-smoking zealots were thrown a curve ball they are still trying to catch when electronic cigarettes began to gain popularity with smokers wanting to quit. A technological innovation that was in its infancy when the smoking ban was introduced meant that vaping wasn't included in the legislation and this has created

a problem for regulators. The immediate instinct of the prohibitionists was to ban the use of e-cigarettes everywhere smoking was prohibited, chiefly on the grounds that vaping made it harder to police smoking. But once evidence suggested that e-cigarettes were significantly safer than smoking (“at least 95 per cent less harmful” according to Public Health England) the public health community was divided. Some wanted to encourage e-cigarettes as a way to reduce smoking rates, while others zealously sought out any research that might demonise vaping, no matter how tenuous.

Initially at least, it was noticeable that ASH Scotland adopted a rather different attitude to vaping compared to its sister organisation in London. Indicative of a cautious, nanny state approach, the Edinburgh-based group was far more reluctant to embrace e-cigarettes as a new and even pleasurable route to smoking cessation. A European Union directive soon arrived that gave some guidance that Scotland gold-plated by limiting the purchase age of e-cigarettes to eighteen and over, on the grounds that vaping might act as a pathway for adolescents to take up smoking. What e-cigarettes have done is expose how some public health zealots won't stop at controlling smoking but will campaign against any product that involves inhaling nicotine for pleasure – which ultimately means further controls on e-cigarettes.

Other new products that heat tobacco without burning it and therefore create no tar have been developed by tobacco manufacturers and are proving popular in several markets, notably Japan. The fact, however, that heat not burn (HNB) devices heat tobacco rather than an e-liquid mean they will probably face many of the restrictions that other tobacco products face in Scotland, the one possible exemption being on stage since the law applies to the combustion of tobacco, which doesn't occur with HnB devices.



Another issue for e-cigarettes and heated tobacco products is that some of their development, marketing and distribution is now in the hands of tobacco companies who understandably see them as a way to diversify away from traditional cigarettes in the longer term. Realistically, because of their resources, the tobacco industry will probably end up dominating the e-cigarette market as well as the heated tobacco market. It makes sense therefore for governments to work with the industry not against it. But the tobacco control lobby is doctrinally averse to working with Big Tobacco and fights vehemently for tobacco companies to be kept out of any official consultations or meetings at almost every level of government – from the United Nations and the European Commission to Westminster, Holyrood and even local councils.

This attitude betrays the reality that anti-smoking campaigners have moved away from reasonable approaches that could develop a consensus around limitations of use and that the sloganeering of a ‘smoke-free Scotland’ will in time evolve to become a ‘nicotine-free Scotland’ – just as those advocating restrictions on alcohol will in time reach a point where they advocate an ‘alcohol-free Scotland’.

Denormalising smokers should itself be denormalised. Promoting tolerance should be the new norm. This isn’t impossible and it doesn’t require public health professionals to lay down and surrender, or to advocate smoking tobacco. There remains a major role for public health professionals to educate and inform people of the risks of smoking, or drinking and eating to excess, and what the alternatives are, but it’s essential that adults are treated as sentient human beings capable of making their own choices even if it means risking a shorter life as a trade-off for it being more a pleasurable one.

Having achieved great advances in life expectancy I hear more and more people talking about quality of life and enjoying our time on our planet rather than stretching it out through medications and life support. Being free to enjoy the occasional dram, the odd puff and a bacon butty – without being hectorred or shoved out on to a street – does not seem too much to ask.

It remains to be seen how a new tobacco control strategy can meet the target of a smoke-free Scotland by 2034 without adopting draconian policies that further shame and stigmatise smokers or destroy small shops that rely on the sale of tobacco products to remain in business. Discussion documents already in the public domain talk about not stigmatising smokers but this is nothing more than empty rhetoric. As long as any strategy seeks to openly denormalise smoking it must ipso facto denormalise smokers and in doing so it stigmatises them in a variety of ways that would be unacceptable if applied to other minority groups.

In March 2016 a Populus poll of 1,011 Scottish adults commissioned by the smokers' group Forest found that twenty-five per cent of respondents said they smoked cigarettes, sixteen per cent regularly and eight per cent occasionally. Of the seventy-five per cent who said they didn't smoke, forty-five per cent said they had never smoked while twenty-nine per cent said they were ex-smokers. As a baseline that demonstrated there is already a majority group that might believe they have an inherent advantage in favour of smoking bans. Yet the same poll revealed a far more liberal approach to smoking than might have been expected, especially in today's climate where smokers are routinely demonised for their habit.

For example, when asked if adults should be allowed to smoke when alone in their own vehicle sixty-seven per cent said they should be allowed and only twenty-seven

per cent said they shouldn't. Even amongst non-smokers sixty-three per cent thought smokers should have the freedom to smoke in their own vehicle when alone.

When asked if pubs and private members clubs, including working men's clubs, should be allowed to provide a well-ventilated designated smoking room to accommodate smokers, over half the respondents agreed, compared to forty per cent who disagreed. Among non-smokers almost half (forty-nine per cent) believed clubs should be allowed to provide a smoking room compared to forty-five per cent who disagreed with the proposition. Incredibly this was ten years to the month after the introduction of the smoking ban in Scotland, a ban we are repeatedly told has been a great popular success. The truth is, most people may not want the smoking ban rescinded, but there is still considerable sympathy for smokers forced outside and a majority that believes the option of a separate, well-ventilated smoking room in pubs and clubs would be a reasonable compromise.

Asked about government policies to tackle smoking, sixty-one per cent of respondents said anti-tobacco regulations had gone too far or far enough. Given that seventy-five per cent of those surveyed said they didn't smoke then clearly a significant number of those who have quit or have never smoked also thought that enough was enough.

If there is a message the Scottish Government should take heed of it's that the public has no appetite for further interventions and is actually in favour of amending the existing laws to be more accommodating and tolerant of those who choose to smoke, as long as designated smoking areas are separate and well-ventilated. Such an outcome would leave non-smokers – the 4:1 majority – retaining a similar proportion of space in licensed establishments plus all the other enclosed public spaces, whilst granting smokers accommodation in places where

only adults could congregate, out of sight of children who could be forbidden from entering such spaces. This would lead to a far more liberal, tolerant and harmonious society at ease with itself and a balanced compromise that respected every individual and every point of view.

Proportional voting systems can have perverse outcomes by giving a minority party great leverage. So it was that the Austrian parliament voted to rescind a 2015 smoking ban in bars and restaurants that was to come in during May 2018. Passed by the previous coalition government, the scrapping of the ban was a key pledge in the manifesto of the Austrian Freedom Party (FPÖ). When it helped form a new coalition government in early 2018 that became one of the agreed policies. As a trade-off, smoking would be banned in vehicles where a minor was present and the minimum age of smoking was raised to eighteen.<sup>80</sup> Sensible compromise is possible when political opportunity knocks.

As members of the Scottish Parliament are elected by proportional voting and most of the administrations are formed by coalitions, it isn't implausible that a similar turn of events could happen in Scotland. But it would need a political party to include a commitment to amending the smoking ban in their manifesto, something that is not currently on the horizon.

The SNP, Labour and Greens have a record for intervention, while the Liberal Democrats have been consistently inconsistent. If there is to be any change and relaxation of Holyrood's intolerance then it will have to come from the Scottish Conservatives. To do this means they will need to develop a far more coherent approach to what public health is meant to achieve and the limits for the state in its relationship with individuals and families. Simply asking if the policies being applied make people's lives more miserable or more happy would be a start.

As an example, and with some irony, after all the attempts by the McNanny state to drive people away from pubs, there are now justifiable concerns that one of the great problems facing the public is one of loneliness. Thought to be a serious problem, especially in later life, it can only get worse as the elderly become the dominant age group due to changing demographics.

For many people Scotland's pubs and bars were the one casual meeting place where older people could go, keep warm, have a chat with bar staff or other regulars, play dominoes, read the papers or watch the sport on the telly – all in the company of like-minded people. Thanks to the raft of regulations described here, from the smoking ban to the prohibition of discount offers for pensioners, many older customers now buy their booze at the off licence and stay at home. Meanwhile there are fewer pubs to go to and fewer customers to speak to.

You might have thought that an enlightened approach to saving pubs could combine tolerance with genuine concern for the lonely. But I don't hold out much hope. It seems that in Scotland nothing is allowed to stop the neo-prohibitionists forcing people to live a certain way in order to meet their targets for reducing our consumption of alcohol and tobacco.

If there's one addiction Scotland must break, it's our addiction to big government as the cure-all for matters that, in a more liberal society, could be settled without the constant intervention of politicians and rent-seeking professionals whose determination to dictate how others live their lives deserves a far more robust response than meek subservience to our McNanny state.



## Appendix 1

### **A judgementally free list of interventionist legislation (22) passed by the Scottish Parliament since its reincarnation in 1999**

- 2002 Marriage (Scotland) Act 2002
- 2003 Protection of Children (Scotland) Act 2003  
Education (School Meals) (Scotland) Act 2003
- 2005 Breastfeeding etc. (Scotland) Act 2005  
Smoking, Health and Social Care (Scotland) Act 2005  
Licensing (Scotland) Act 2005
- 2007 Schools (Health Promotion and Nutrition) (Scotland) Act 2007  
Adoption and Children (Scotland) Act 2007  
Prostitution (Public Places) (Scotland) Act 2007
- 2008 Public Health etc. (Scotland) Act 2008
- 2010 Tobacco and Primary Medical Services (Scotland) Act 2010  
Criminal Justice and Licensing (Scotland) Act 2010  
Alcohol etc. (Scotland) Act 2010
- 2012 Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012  
Alcohol (Minimum Pricing) (Scotland) Act 2012
- 2014 Children and Young People (Scotland) Act 2014
- 2015 Air Weapons and Licensing (Scotland) Act 2015  
Scottish Elections (Reduction of Voting Age) Act 2015
- 2016 Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016  
Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016
- 2017 Limitation (Childhood Abuse) (Scotland) Act 2017  
Seat Belts on School Transport (Scotland) Act 2017

## Appendix 2

### Timeline of significant changes in UK smoking laws with Scottish Parliament laws and announcements shown in bold

2003	UK-wide ban on tobacco advertising in print, billboard, direct mail, internet and new promotions
July 2005	UK-wide ban on tobacco sponsorship of sports events, including global events such as Formula 1
March 2006	<b>Smoking banned in all enclosed public places in Scotland</b>
April 2007	Smoking banned in all enclosed public places in Wales (2 April) and Northern Ireland (30 April)
July 2007	Smoking banned in all enclosed public places in England (1 July)
October 2007	Minimum age of buying tobacco products raised from 16 to 18 in Scotland and rest of UK through separate laws
February 2009	<b>Announcement that cigarette vending machines are to be banned in Scotland</b>
April 2010	<b>Register of tobacco retailers introduced in Scotland alongside new offences of proxy purchasing and under-age purchasing</b>
April 2012	Ban on the display of tobacco and smoking-related products in large shops in England
March 2013	<b>Scottish Government tobacco control strategy introduced aiming to make Scotland 'smoke-free' (fewer than five per cent of adults smoking) by 2034</b>
October 2011	Cigarette vending machines banned in England
February 2012	Cigarette vending machines banned in Wales
April 2013	<b>Cigarette vending machines banned in Scotland</b>
April 2013	<b>Ban on the display of tobacco and smoking-related products in large shops in Scotland</b>
October 2015	Smoking in cars carrying children banned in England and Wales



April 2015	<b>Tobacco products display ban extended to smaller retailers in Scotland and the rest of the UK</b>
April 2015	<b>Use of e-cigarettes banned in hospital grounds across Scotland</b>
December 2016	<b>Smoking in cars carrying children banned in Scotland</b>
May 2017	Ban on packs of fewer than twenty cigarettes and pouches of hand-rolled tobacco less than 30g (EU Tobacco Products Directive)  Large graphic health warnings covering 65 per cent of front and back of tobacco packs (EU Tobacco Products Directive)  Full implementation of standardised packaging on all tobacco packs (UK)
2017	<b>Ban on sale of tobacco and nicotine vapour products (NVPs) to under 18s in Scotland</b>
2017	<b>Ban on sale of tobacco and nicotine vapour products (NVPs) by under 18s without authorisation in Scotland</b>
2017	<b>Ban on proxy purchasing of tobacco and nicotine vapour products (NVPs) by adults for under 18s in Scotland</b>
January 2018	<b>Blanket ban on smoking in mental health hospitals in Scotland declared 'lawful'</b>
2018	<b>Ban on smoking within 15 metres of a hospital building with on-the-spot fines of £50 for those who do</b>
Planned	<b>News laws around the sale and promotion of nicotine vapour products (NVPs)</b>
Planned	<b>Action to make prisons in Scotland smoke-free</b>
2019	Ban on smoking on all hospital grounds (Wales)
2020	Ban on sale of menthol flavoured tobacco (EU)

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