

# Teeth or no teeth: exploring punitive measures for adults smoking in cars containing children in Aotearoa/New Zealand

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## ABSTRACT

This viewpoint welcomes the recent announcement of the Government of Aotearoa/New Zealand to ban smoking in cars with children. However, it notes that the thorny issue of enforcement and punishment remains. Internationally there is a deficit on research on this issue. The experiences of the UK and Ireland are examined, where there was little or no enforcement of such laws, as well as a comparison with the State of Victoria in Australia, where the law was more robustly enforced. This viewpoint argues that enforcement is an important element in safeguarding the health and wellbeing of children.

*One generation plants the trees; another gets the shade.* - Chinese proverb

Smoking remains the world's leading causes of preventable mortality and morbidity. Alongside the human cost are the significant economic costs of smoking.<sup>1</sup> Therefore, all actions to de-normalise and remove this threat are important. Hence the recent announcement that Aotearoa/New Zealand is to ban smoking in cars with a child present is welcome,<sup>2</sup> particularly as it will undoubtedly help protect the most disadvantaged children.<sup>3</sup> Although there is some resistance to such legislative approaches among libertarian/laissez-faire advocates,<sup>4</sup> the Government is to be commended for this move. It is a bold and mature step for any Government because, in line with the Chinese proverb above, although it will undoubtedly yield returns into the future, these will not become apparent for some time. Introducing this important legislation closes what has been termed "an enormous gap in the law" elsewhere.<sup>5</sup> In assessing the issue of parents'

smoking in cars with children, an obvious parallel is the infamous statement by RJR Tobacco Executive Charles Harper:

At the 1996 shareholders' meeting of cigarette and food manufacturer RJR Nabisco, a woman in the audience asked company chairman Charles Harper whether he would want people smoking around his children and grandchildren. Mr. Harper responded, "If the children don't like to be in a smoky room ... they'll leave." When the woman responded, "An infant cannot leave a room," Mr. Harper answered, "At some point they learn to crawl, okay? And then they begin to walk" (RJR Nabisco 1996).<sup>6-7</sup> Given that children are strapped in by seat belts and are, to all intents and purposes, almost incarcerated in cars while being driven by parents/guardians, the similarity with the quote above is obvious.<sup>8</sup> The issue of a smoking ban in cars containing children has been heavily researched in New Zealand, with most of the literature focusing on attitudes towards such a ban or estimates of youth exposure to tobacco smoke. However,

one notable lacuna in this extensive literature is the issue of the enforcement of and punishment resulting from such legislation. New Zealand is not alone in this deficit. In a review of legislative measures to improve health it is interesting to note Pawson et al's conclusion that "there is virtually no available data pertaining directly to the policing of smoking in cars".<sup>9</sup> However, on the basis of the precautionary principle, legislation and subsequent enforcement is required, albeit accompanied by ongoing evaluative research.

It is generally agreed in legal circles that there are five purposes of punishment: specific and general deterrence; incapacitation; rehabilitation; retribution; restitution.<sup>10</sup> In relation to fines for misdemeanours, the usual reason given is that of general deterrence/prevention.<sup>11</sup> In Ireland for example, the powers of the Police (An Garda Síochána) in relation to the fines for this offence are clearly outlined:

An Garda Síochána will issue a fixed charge notice. The amount of that fixed charge is €100. The person will have 28 days to pay that amount. If they do not pay within the 28 days, the amount payable will increase to €150 to be paid in a further 28-day period. If they do not pay any fine within the 56 days then a prosecution will be initiated.<sup>12</sup>

However, the philosophy of general deterrence presumably only works if sanctions are actually administered, or at least there is a perception of such a threat. Analysis of information from the UK and Ireland, however, reveals the almost total absence of such sanctions. Analysis after the law had been in existence for 12 months in Ireland revealed that nobody had been fined.<sup>13</sup> Reports after a similar period in the UK noted just one fine having been given alongside a minimal number of warnings:

Only Northumbria Police gave a figure other than zero for fines, reporting one case involving a driver. Three forces—the Met Police, Dyfed Powys and Devon and Cornwall—gave figures on warnings, with two, six and three respectively.<sup>14</sup>

It is notable that in other jurisdictions this offence has been much more rigorously enforced. In the State of Victoria (Australia) for example, where the fine for smoking in a car with children is \$289, it was noted

that "During the first 12 months, police reported 318 offences were recorded, rising to 350 in 2012–2013".<sup>15</sup> Commenting on these figures the author of that report acknowledged that "it is difficult to know if the increasing number of offences related to a rise in incidence or reflected more effective enforcement of the law".<sup>16</sup>

Discussion of the lack of fines metered out in Ireland revealed some interesting responses. For example, the National Director of Population Health indicated that the legislation was assumed to tap into habitual respect for and obedience to the law:

"it was not envisaged that this initiative would have to be driven by fear of prosecution. It is the law and we believe that the vast majority of smokers, and particularly parents, are responsible and comply with legislation".<sup>17</sup>

In a similar vein, the Irish Minister for Health has stated that the Irish police force will not have to enforce the law themselves, instead relying on public shaming: "peer pressure from other drivers who will look across and see a kid in a car and an adult smoking".<sup>18</sup> Given the widespread and well acknowledged problems relating to other traffic-related offences such as speeding, driving without insurance and/or tax, driving while using a mobile phone and illegal parking, this would appear to be an odd appraisal. Perhaps the most notable response to the lack of any fines having been issued in Ireland came from the former Senator and oncologist John Crown, who drew up the legislation. He stated that the fact that no fines for the offence had been issued was "wonderful news ... It's really fantastic. The purpose of the legislation was not to make money from prosecutions but to encourage education and create a bit of debate".<sup>32</sup> Senator Crown is undoubtedly correct in that the legislation was never meant to be a revenue stream for government. However, his description of the zero prosecutions outcome as "wonderful" and "fantastic" does appear to have an Orwellian Newspeak ring to it (where instead of such a finding being very bad it might for example be termed 'Doubleplusungood').<sup>19</sup> It must be acknowledged that enforcement of laws in Ireland, as well as professionalism and discipline within the Irish police force, are ongoing

issues.<sup>20-21</sup> Concerns have been raised in both the UK and Ireland about the willingness and ability of police to enforce this legislation.<sup>22-24</sup>

It is hard to pinpoint exactly why both the UK and Ireland have introduced laws outlawing smoking in cars with children, while almost steadfastly refusing to enforce them. However, some of the reasons may include the pervasiveness of smoking, alongside the perceived futility of enacting a law for vehicles, while it remains legal in other contexts, such as the family home. Another reason may include the general perceived inconsequentiality of the offense, particularly in relation to more acutely serious offences. This issue may be combined with police concerns over a public backlash, with offenders and bystanders potentially challenging police with statements or sentiments along the lines of “Have you not got anything better to do?”. The general workload and administrative burden of the police force should also not be underestimated as an impediment to enforcement. However, the reality may be that many of the broader coalition of politicians involved were simply more interested in appearing concerned about the issue and striving to score political kudos from the theatrics of dynamic action, rather than actually wishing to implement change.

It is very interesting to note that reports related to the proposed legislation in New Zealand appear to offer a wider spectrum of proposed police interventions than observed elsewhere:

Police will be able to require people to stop smoking in their cars if children (under 18) are present ... They will also be able to use their discretion to give warnings, refer people to stop-smoking support services or issue an infringement fee of \$50.<sup>2</sup>

Such interventions therefore would encompass, not just general and specific deterrence but also aspects of rehabilitation<sup>10</sup> such as “educational and vocational programs, treatment centre placement and counselling”.<sup>11</sup> As such, the legislation should meet less resistance from both the police and the public in Aotearoa/New Zealand.

It should be acknowledged that the New Zealand Police have worked hard to improve their professionalism in recent years.<sup>25</sup>

However, whatever the sensibilities about enforcement of such legislation, it is imperative to remember both the deadly impact of cigarettes, and the responsibilities of New Zealand as a signatory to the United Nation’s Convention on the Rights of the Child (UNCRC). Articles 3, 6, 19 and 24 of the UNCRC clearly have implications for the introduction and effective enforcement of legislation banning smoking around children.<sup>26</sup>

It is imperative that the impact of the proposed legislation is evaluated carefully. Such research should include ongoing observation-based analysis, as well as self-report data from both children and adults about exposure. Further research should also examine both support for the legislation and the level of support for penalties for those that break this law. Longer-term research will undoubtedly examine the possible impact of such legislation on smoking rates among young people and cancer epidemiology into the future. However, the difficulties in trying to disentangle the impact of various initiatives probably render such research as hopelessly optimistic.

Although the proposed legislation banning smoking in cars with children is certainly welcome, thought must also be given to how it is going to be implemented and enforced. The evidence is clear from other driving related behaviours that legislation without enforcement is meaningless. Evidence from Ireland and the UK points to police inaction, a scenario that appears in stark contrast to States within Australia. The ethical arguments supporting robust intervention are clear,<sup>27</sup> and there is wide public support for this measure. A range of possible penalties for breaking the law have already been suggested for New Zealand, that go well beyond those currently in place in either the UK or Ireland. However, whatever the proposed penalties or interventions finally adopted, enforcement is essential. Finally, this process should be accompanied by in-depth and ongoing research examining the impact of this important legislation.

**Competing interests:**

Nil.

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<http://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2020/vol-133-no-1508-17-january-2020/8097>

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