

Tax Working Group Public Submissions Information Release

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Submission to

The Future of Tax Tax Working Group Te Awheawhe Tāke

Dr Jonathan Barrett, 30 April 2018

1. This submission is made in a personal capacity and does not represent the views of my employer, Victoria University of Wellington.
2. I wish to comment briefly on the questions: “Should there be a greater role in the tax system for taxes that intentionally modify behaviour? If so, which behaviours and/or what type of taxes?”
3. A focus of my research lies with the application of human rights to taxation. I have a particular interest in the ethical and rights implications of behaviour modifying taxes (“BMTs”).¹
4. BMTs are not new² but we can observe “increasing use internationally of economic market-based instruments for the purpose of influencing the achievement of desired behavioural change and objectives, be they social, economic or environmental”.³
5. The plastic bag environment levy introduced by Ireland in 2002 is commonly cited as an example of a successful BMT.⁴ Very high rates of excise have also contributed to curbing tobacco use,⁵ although tobacco taxes were traditionally designed to raise

¹ See, in particular, Jonathan Barrett “Behaviour Modifying Taxes: Some Ethical Considerations” in Adrian Sawyer and Andrew Maples (eds) *Taxation Issues: Existing and Emerging* (Centre for Commercial and Corporate Law, University of Canterbury, Christchurch, 2011); Jonathan Barrett “‘Fat Taxes’: A Proportionality Approach” (2012) 18(3) *New Zealand Journal of Taxation Law and Policy* 242; Jonathan Barrett “The Human Right to Adequate Housing and Vacant Property Taxes” (forthcoming).

² See, for example, the gin tax introduced by the Sale of Spirits Act 1750 (UK).

³ Department of Housing, Planning and Local Government, *Circular PL 7/2016 - Implementation of the Vacant Site Levy as provided for in the Urban Regeneration and Housing Act 2015* (2016) <www.housing.gov.ie>.

⁴ See Sheila Killian “Environmental Taxes and the Double Dividend Hypothesis: A Case Study from Ireland” (2003) 18 *Australian Tax Forum* 407.

⁵ See, for example, Joy Townsend “Price and Consumption of Tobacco” (1996)v52(1) *British Medical Bulletin* 132.

revenue, rather than modify behaviour. BMTs are commonly proposed as contributory solutions to other health issues, such as obesity.⁶

6. A BMT, such as the plastic bag levy, interferes trivially with autonomy, whereas taxes which seek to alter people's choices about their health and bodies, raise significant human rights concerns.
7. Respect for human dignity is the root of all human rights.⁷ According to the human rights jurist and commentator Aharon Barak, human dignity is 'the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is freedom of choice.'⁸ It is also a cornerstone of liberal democracy, expressed most persuasively by John Stuart Mill,⁹ that individuals are 'sovereign' over their own bodies and are best placed to make decisions about their own health.
8. The findings of behavioural psychology show that people often make decisions which, from the perspective of an outsider, are not in their best interests.¹⁰
9. Furthermore, behavioural economics has shown that people do not behave in the economically rational way of the presumed *homo oeconomicus*. This insight has led to so-called libertarian paternalism or nudging, as popularised by Cass Sunstein.¹¹ Acceptance of the insights of behavioural economics does not mean that government should not use economic measures, such as BMTs, but implies a more nuanced understanding of how they may modify people's behaviour.
10. Nevertheless, we should not lose sight of the presumption of autonomy and self-responsibility in liberal democracies. In other words, before government uses BMTs to

⁶ For an overview of proposed taxes, see March Suhreke "Fiscal Policy Instruments to Improve Diet" (2010) National Institute for Health and Clinical Excellence <www.nice.org.uk>.

⁷ See the preamble to the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948).

⁸ Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton (NJ), 2006) at 86.

⁹ See J S Mill *On Liberty* (1859).

¹⁰ See, for example, Dan Ariely *Predictably Irrational: The Hidden Forces that Shape Our Decisions* (HarperCollins, New York, 2010).

¹¹ Cass R Sunstein *Why Nudge?: The Politics of Libertarian Paternalism* (Yale University Press, New Haven, 2014).

direct or nudge its citizens in particular ways, it should give proper consideration to human dignity, including autonomous decision-making.

11. Proportionality testing is the most appropriate way of ensuring that rights are taken into account when a BMT is proposed.
12. While it is trite that Acts of Parliament are not subject to judicial review in New Zealand, proportionality testing of administrative decisions provides useful guidance on respecting fundamental rights. According to the United Kingdom’s Supreme Court, proportionality “depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine
 - i. whether its objective is sufficiently important to justify the limitation of a fundamental right;
 - ii. whether it is rationally connected to the objective;
 - iii. whether a less intrusive measure could have been used; and
 - iv. whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.”¹²
13. Proportionality also underpins sound policy making. The Organization of Economic Cooperation Development Council on Regulatory Policy and Governance provides extensive guidance for policymakers on proportionality analysis.¹³ The OECD guidelines are substantially similar to the judicial review process outline in 12.
14. Proportionality testing should be employed by policymakers before a BMT is introduced (ex ante analysis), and by administrators after a reasonable period of time following the introduction of the BMT (ex post facto analysis).
15. In the light of this sketch of proportionality: “Should there be a greater role in the tax system for taxes that intentionally modify behaviour?”
 - a. BMTs should be considered as a component of a suite of measures designed to remedy social mischiefs.
 - b. However, such taxes must be transparent. The risk is run of a plethora of ‘invisible’ taxes.

¹² *Bank Mellat v Her Majesty’s Treasury (No. 2)* [2013] 4 All ER 533, [2013] UKSC 39, [20] (Lord Sumption).

¹³ *Recommendation of the Council on Regulatory Policy and Governance* (2012) <www.oecd.org>.

- c. A BMT, whose revenue is ringfenced to contribute to solving an identified social mischief, may be preferable to one whose revenue goes to the general account.¹⁴
- 16. “If so, which behaviours and/or what type of taxes?”
 - a. BMTs that are likely to have only trivial effects on autonomy but lead to positive social or environment outcomes, such as a plastic bag levy, are the best candidates.
 - b. BMTs that seek to alter people’s bodies and health, may be considered but must be subject to rigorous proportionality testing.

¹⁴ For example, the British Columbian Empty Home Tax, revenue from which will be reinvested in affordable housing initiatives. See *Will your home be taxed?* (2018) <www.vancouver.ca>.