

**Extract of the minutes of the
Health and Environmental Service Committee
10th April 2006**

**Response to Consultation on Smoking
(Northern Ireland) Order 2006**

The Committee considered a report which had been prepared by the Head of Environmental Health in relation to a response to a consultation document which had been issued by the Department for Health, Social Services and Public Safety in respect of the Draft Smoking (Northern Ireland) Order 2006. The report, with the exception of the appendices referred to therein, is set out hereunder:

“1. Purpose of Report

To present for the Committee’s consideration a response to the consultation document from the Department of Health, Social Services and Public Safety (DHSS&PS) on The Draft Smoking (Northern Ireland) Order 2006.

2. Background

The Committee will be aware that the DHSS&PS published a consultation document on The Draft Smoking (Northern Ireland) Order 2006 on 6th March 2006. Responses to the document are required by 5.00 pm on Friday 5th May 2006.

Between December 2004 and March 2005 the DHSSPS consulted on proposals to strengthen existing controls on tobacco use in Northern Ireland. The consultation exercise elicited in excess of 70,000 responses with 91% of respondents expressing support for comprehensive controls. At its meeting of 1st December 2004 the Council adopted the following Notice of Motion:

‘Belfast City Council notes that smoking in public places is a cause of concern for many residents of the City. It has become a major issue within countries in the European Union and, indeed, some have taken a positive approach by introducing smoking bans.

Belfast City Council believes that similar action should be taken immediately to protect the citizens of our City. The Council calls upon the Secretary of State for Northern Ireland and the Minister for Health, Social Services and Public Safety to introduce immediately legislation which would ban smoking in all public places within Belfast and across Northern Ireland.’

On 17th October 2005 Health Minister Shaun Woodward announced that he would bring forward legislation that would

control smoking in most enclosed public places and workplaces by April 2007.

Legislation to control smoking in enclosed public places and workplaces was introduced in the Republic of Ireland in 2004. Legislation was also introduced in Scotland on 26th March 2006. Similar comprehensive legislation is due to be introduced in England and Wales in the summer of 2007.

Summary of legislative proposals

The Draft Order provides a definition of smoke free premises, which includes buildings open to the public, and workplaces where more than one person works or where the public might attend.

The Draft Order contains regulation-making powers to enable the controls on smoking to be extended to premises not included in the current definition and to vehicles. The Draft Order also provides for regulation making powers in relation to exemptions and for designating additional smoke free places.

The Draft Order requires that no smoking signs be displayed in smoke-free premises.

Currently district councils are named as the sole enforcing authority.

There are four offences:

- (1) To smoke in smoke free premises
- (2) To fail to display no smoking signs
- (3) Failing to prevent smoking in smoke-free places
- (4) Obstruction of an authorised officer.

Fixed penalties are available for offences (1), (2) and (3) above. The level of these penalties will be established in regulations. The district council will have the power to withdraw any fixed penalty that it feels ought not to have been issued. In addition the district council must consider representations made by, or on behalf of, the recipient of a fixed penalty notice and decide in all the circumstances whether to withdraw the notice.

District councils will be permitted to retain the receipts of fixed penalty notices. The use of fixed penalty receipts is restricted to stated purposes and district councils may have to make returns on the use of fixed penalty receipts to the DHSSPS.

Prosecution to a court of summary jurisdiction is also available instead of a fixed penalty or where a penalty has not been paid or where the person who receives the fixed penalty

requests it. The level of fines available are Level 3 (£1,000) for offences (1), (2) and (4) and level 4 (£2,500) for offence (3).

There are statutory defences created for offences (1), (2) and (3). Where a person charged with an offence raises a statutory defence it will be for the prosecution to prove beyond reasonable doubt that it cannot successfully be used.

The Draft order contains regulation-making powers to enable an increase in the age for the sale of tobacco products.

The Draft Order makes provision to allow DHSSPS to provide financial resources to district councils. The money available is on the basis of the submission made by CEHOG to DHSSPS in June 2005.

DHSSPS will put in place a mechanism for auditing how the money has been used.

Much of the detail in relation to how the ban will work and what premises will be exempt will be contained in regulations, for which a separate consultation exercise will be carried out in either June or July 2006. The regulations will be debated in Parliament in November and December 2006 and will be made in January 2007 for commencement with the Order in April 2007. Guidance on the Order and Regulations will be issued in January 2007.

Exemptions are not mentioned in the Draft Order. However DHSSPS are seeking views on which premises may be exempt from controls. (The power to exempt premises does not enable the minister to exempt pubs or registered clubs.)

3. Proposal

A proposed response to the consultation document is attached to this report.

4. Environmental Implications

The proposed legislation would have a clear environmental impact in terms of improvement of indoor air quality since enclosed workplaces and public places will be smokefree. It would lead to a reduction in the exposure of people to the pollutants in Environmental Tobacco Smoke.

5. Equality Implications

Article 4 of the draft Order provides for the DHSS&PS to make regulations to specify premises or parts of premises not to be smoke-free. The consultation questionnaire gives examples of premises which may be exempt. In the event that the exemptions suggested are incorporated into the legislation,

workers in those exempted areas will not be afforded the same level of protection from environmental tobacco smoke as workers in other non exempted premises. The exemptions may also exacerbate existing health inequalities as some of the workers in exempted premises will be from lower socio economic groups.

6. Resources

The Draft Order makes provision to allow DHSS&PS to provide financial resources to district councils. The finance which will be available is on the basis of a submission made to DHSS&PS by the Chief Environmental Health Officers Group (CEHOG) in June 2005. DHSS&PS will put in place a mechanism for auditing how the money has been used.

7. Decision Required/Recommendation

Members are asked to consider the consultation document and are recommended to agree to the submission of the Council's response as proposed in Appendix A."

The Head of Environmental Health drew the Committee's attention to the Council's proposed response in respect of the definition of smoke free premises, the offences and level of penalties as set out in the Draft Order, designation of smoking rooms in hotels and other such establishments and the fixed-term penalty procedures as set out within the Draft Order.

After discussion, the Committee adopted the recommendations contained within the report and agreed that the Response Document be submitted to the Department of Health, Social Services and Public Safety, as the Council's response to the consultation exercise and noted that a copy of the response was available for inspection in the Members' Library.

CONSULTATIVE DOCUMENT

THE DRAFT SMOKING (NORTHERN IRELAND) ORDER 2006

QUESTIONNAIRE

March 2006

INTRODUCTION

Purpose

This Questionnaire seeks views on the **Draft Smoking (Northern Ireland) Order 2006** (the draft Order) which will introduce comprehensive controls to protect employees and the public from exposure to second-hand smoke. Comments would be particularly welcomed on a number of key areas:

- the definition of smoking;
- the definition of smoke-free premises;
- the extent of any proposed exemptions;
- offences and level of penalties;
- requirement for fixed penalties; and
- the power to raise the age limit for sale of tobacco to young people.

The Department of Health, Social Services and Public Safety (the Department) carried out an Integrated Impact Assessment (IIA) screening exercise on the proposed legislation. The results, which include equality considerations and a partial Regulatory Impact Assessment, are set out in the IIA Overview.

Background

On 17 October 2005, Shaun Woodward, Minister for Health, Social Services & Public Safety, announced his intention to introduce legislation by April 2007 to protect employees and the public from exposure to second-hand smoke. He also indicated that he would seek views on specific issues such as exemptions and penalties. This followed a public consultation exercise carried out by the Department between December 2004 and March 2005, on options to strengthen existing controls on tobacco use. The consultation elicited over 70,000 responses with 91% of respondents expressing support for comprehensive controls. In framing the draft Order, account was taken of similar legislation and proposals in Scotland and England.

Responses to this Questionnaire must be received by not later than 5.00pm on Friday 5 May 2006.

In order to facilitate analysis it is important that respondents use the Questionnaire.

Responses to this consultation may be made online at:

http://www.dhsspsni.gov.uk/index/consultations/current_consultations.htm

QUESTIONNAIRE

Q1. *Article 2 (a) and (b)* of the draft Order defines “smoking” as covering all lit tobacco or any other lit substance in a form which could be smoked, for example, herbal cigarettes. This is to avoid enforcement difficulties in cases where smokers claim their cigarettes do not contain tobacco.

Do you agree with the definition of smoking as set out in the draft Order?

Yes ✓

If you wish to comment, please do so here.

The broad definition of smoking should remain in order to prevent enforcement difficulties.

Q2. *Article 3* of the draft Order defines “smoke-free premises”.

Do you agree with the definition of smoke-free premises as set out in the draft Order?

Yes ✓

If you wish to comment, please do so here.

The definition of smoke-free premises hinges upon the understanding of what constitutes “the public”. The Council agrees with the definition provided that members of a club whether licensed or not are members of the public or a section of the public; if this is not the case the definition needs to be more explicit.

Q3. *Article 4* of the draft Order provides for the Department to make regulations to specify premises or parts of premises not to be smoke-free. In accordance with the Minister’s announcement, the intention is that these exemptions will be limited and *Article 4(3)* specifically precludes exemptions in respect of licensed premises. **The regulations will be the subject of a separate consultation later in the year.** However, the Department is taking this opportunity to seek views. There are premises which act as a person’s home, either on a permanent or temporary basis, but which are also another person’s workplace, for example, residential accommodation, hotel bedrooms,

prisons and psychiatric facilities. Different approaches to this issue have been adopted by other jurisdictions. In the Republic of Ireland psychiatric hospitals are exempt. In Scotland designated rooms in psychiatric hospitals are exempt while in New York it is necessary to apply for a waiver.

Set out below are examples of premises that serve as a person's home, either on a temporary or permanent basis.

Do you think that hotel bedrooms, designated rooms, or areas within the following premises should be exempt?

Hotel Bedrooms	No	✓
Care Homes	No	✓
Psychiatric Units	No	✓
Prisons	No	✓

Do you wish to suggest any other exemptions? If yes, please specify below.

The Council believes the smoke-free legislation should be as comprehensive as possible. No worker in any situation should be exposed to Environmental Tobacco Smoke. All workers should be afforded the same level of protection. However, the Council acknowledges that in some circumstances eg: in care homes and prisons pragmatic engagement will have to be made for people who are essentially in their 'home' situation.

Q4. *Articles 7, 8, 9 and 12* of the draft Order sets out the following four offences and penalties:

- (i) a person failing to display the prescribed no-smoking signs in smoke-free premises commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale (£1,000);
- (ii) a person who knowingly smokes in smoke-free premises commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale (£1,000);
- (iii) a person who controls or is concerned in the management of smoke-free premises and fails to prevent a person smoking in a smoke-free place commits an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale (£2,500); and
- (iv) a person who intentionally obstructs an authorised officer of a district council acting in exercise of his duties under the Order commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale (£1,000).

Do you agree with the offences and level of penalties set out in the draft Order?

No ✓

If you wish to comment, please do so here.

The Council is broadly content with the four offences as set out in the Draft Order. However it has some reservations regarding the meaning of Article 9(1) in relation to the owner of the business. It is the opinion of the Council that the offence should extend to cover the owner of the business whether present or not. Furthermore it is essential that the phrase “cause a person smoking there to stop smoking” must include actions such as having a smoking policy in place, training staff and ensuring that the policy is implemented. It is the view of the Council that the owner of a business must be held responsible for the inaction of his staff if they fail to cause a person smoking there to stop smoking.

Penalties

In relation to the offence of failing to prevent smoking in smoke-free places (Article 9) the level of the penalty should increase to level 5 so as to be consistent with other legislation for example health and safety at work.

Defences

Burden of proof. In respect of Articles 7(7), 8(4), 9(5) it is the Council’s view that these subsections of the articles are not necessary and it should be for the defendant to establish the defence and not for the prosecution to disprove it if an issue is raised.

In relation to the defence available for breach of Article 9(1) set out in 9(4)(b) the Council believes that this would create enforcement difficulties in relation to prosecution of owners who are not present while the person is smoking; the defence relates to a lack of knowledge of this specific person smoking. The Council feels that this defence is not necessary given the defence available in 9(4)(a).

Q5. *Article 10* of the draft Order provides for an authorised officer of a district council to issue a fixed penalty notice where he believes an offence has been committed under Articles 7, 8 or 9. Schedule 1 makes further provision about fixed penalties. The levels of fixed penalties will be specified in regulations which will be the subject of consultation this year.

Do you agree with the fixed penalty notice procedures as set out in the draft Order?

No ✓

If you wish to comment, please do so here.

The Council believes that fixed penalty notices are only appropriate for Article 7 offences. Fixed penalty notices have not been used in the Republic of Ireland where controls have been introduced successfully. There is evidence from British Columbia that fixed penalty notices for this type of offence are not effective. (Ref: Tobacco Control 2003:12:264-268). The Council believes that breach of this legislation is a serious matter and the use of fixed penalties does not create the correct image in terms of being a deterrent and ensuring compliance. The issuing of fixed penalty notices may also create enforcement difficulties. Experience from the Republic of Ireland indicates that sensible enforcement will not result in large numbers of cases going to court; to date there have been 36 prosecutions. The use of fixed penalty notices would also create different regimes in cross-border areas. The Council believes that compliance with this legislation should be one of the conditions attached to all liquor licences so that persistent breaches could lead to sanctions as outlined in the consultation document "Liquor Licensing – the way forward". DHSS&PS should liaise with the DSD to ensure that this is included in the new licensing system as it would strengthen the proposed objective of "Promotion of Public Health".

Q6. Tobacco control measures are currently enforced by Environmental Health Officers of district councils.

Do you agree that smoke-free legislation should also be enforced by district councils?

Yes ✓

If not, please state your reasons below.

The Council believes that district councils should be the sole enforcing authority. District councils currently enforce legislation in large numbers of premises through functions in relation to health and safety at work, food hygiene, environmental protection, entertainment and petroleum licensing, consumer protection, public health and noise control. District councils also enforce other tobacco control functions and the addition of this responsibility would help to provide a focus for public health issues in relation to tobacco control within district councils. District councils are currently working with other partners such as Investing for Health Partnerships, Health Promotion Commissioners, Smoking Cessation Co-ordinators, Health Promotion Officers, the Health Promotion Agency, and representatives of the business community and charities to ensure the objectives set out in the Tobacco Action Plan are met.

Q7. At present *Articles 3 and 4* of the Health & Personal Social Services (Northern Ireland) Order 1978 make it an offence to sell tobacco products to young people under 16. In the Republic of Ireland, the Health (Miscellaneous Provisions) Act 2001 increased the age limit from 16 to 18 and in Scotland the Smoking, Health & Social Care (Scotland) Act 2005 provides the power to raise the age limit there. The draft Order provides the power (*Article 14*) for the Department to raise the age limit from 16. Any proposal to raise the age limit would be the subject of further consultation.

Do you agree that the Department should take this power?

Yes ✓

If you wish to comment, please do so here.

The Council believes that it is prudent for the Department to take this power and perhaps through regulations consult on increasing the age limit to 18.

INTEGRATED IMPACT ASSESSMENT OVERVIEW

General

Q8. Do you have any views on the conclusions reached by the Department to screen out from further assessment the implications of the draft Order in respect of:

- (a) Social Impact Assessment (New TSN, Homelessness etc);
- (b) Rural (see Q21 –Q23);
- (c) Environmental;
- (d) Human Rights;
- (e) Victims;
- (f) Community Safety & Other Areas?

Is there any other evidence which you consider should have been taken into account in these assessments?

Equality

Comments are welcome on any aspect of the draft equality conclusions contained in Annex 2 of the Integrated Impact Assessment Overview (IIA). The Department would particularly welcome comments on the following:

Q9. Do you agree with the decision that the draft Order does not require a full equality assessment? (see Annex 1 and Annex 2 of the IIA Overview). If not, please explain why?

Yes

Q10. Is there any other qualitative or quantitative information which you consider should have been taken into account in performing this exercise?

Q11. Are you aware of any evidence – qualitative or quantitative that the draft Order may have an adverse impact on equality of opportunity or on good relations? If so, please provide details. Can you suggest any ways of avoiding or minimising such adverse impact?

Q12. Are you aware of any other equality implications likely to arise from the draft Order?

It is the opinion of the Council that all workers should be afforded equal protection by this legislation. In the event that the exemptions suggested are incorporated into the legislation workers in those exempted areas will not be afforded the same level of protection. The exemptions may also exacerbate health inequalities as some of the workers will be from lower socio economic groups.

Partial Regulatory Impact Assessment (RIA)

(see Annex 3 of IIA Overview)

Health

Q13. Do you have any views on the assessment of health impacts?

Q14. Are there any other potential health impacts that you consider should have been addressed?

Q15. Is there any other material evidence which you consider should have been taken into account in this assessment of health impacts?

Economic

Q16. Do you have any general comments on the overall approach that was taken in completing the RIA?

Q17. Do you consider that there are other issues which need to be taken into account in the assessment of the impact on business?

Q18. Do you agree with the analysis of the sectors and business/organisations which might be particularly affected by the introduction of this policy?

Q19. What are your views on the identification and assessment of the costs and benefits?

There is a presumption that the costs of signage would be borne by business but the Council feels it may help compliance if there was central production and distribution of signage for all smoke free premises.

Public Expenditure and Public Service

Q20. Do you agree with the Department's view that a separate Economic Appraisal is not required?

Rural Proofing

Q21. Do you agree that the draft Order will not have a disproportionate adverse impact on rural business?

Q22. Are there any rural impacts that you consider should have been addressed?

Q23. Is there any other material evidence which you consider should have been taken into account in this assessment of rural impacts?

Additional Comments

Q24. Do you have any other comments or suggestions on the draft Order and/or the Integrated Impact Assessment Overview?

Thank you for taking time to complete this Questionnaire.