



5 May 2006

Investing for Health Team (Tobacco Control)  
Department of Health Social Services and Public Safety  
Room C4.22  
Castle Buildings  
BELFAST BT4 3SQ

**DRAFT SMOKING (NORTHERN IRELAND) ORDER 2006**

Dear Sir/Madam

The Chief Environmental Health Officers' Group (CEHOG) comprises chief officers or their representatives from all 26 councils in Northern Ireland, the 4 Group Committees, the Chief EHO for the DHSSPS, and the Director of the Chartered Institute of Environmental Health (NI).

The group welcomes the opportunity to comment on the Draft Smoking (NI) Order 2006 and believes that successful implementation could have a significant positive impact on the health of the population of Northern Ireland. However, to achieve this objective the law should be clear, unambiguous and framed to allow successful enforcement.

The group believes that there are considerable deficiencies in the proposed legislation and the Southern Group Environmental Health Committee, on behalf of CEHOG, has sought legal opinion on these, the detail of that opinion is appended to this document for your information.

The Northern Ireland Chief Environmental Health Officers' Group urges the Department to give full and careful consideration to the issues raised in this response and looks forward to future consultations on proposed Regulations.

Yours faithfully

BGS HEYWOOD

Enc

05.05.2006

# **CONSULTATIVE DOCUMENT**

## **THE DRAFT SMOKING (NORTHERN IRELAND) ORDER 2006**

### **QUESTIONNAIRE**

## 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](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”. We agree 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?**

<b>Hotel Bedrooms</b>	<b>No</b>	<input checked="" type="checkbox"/>
<b>Care Homes</b>	<b>No</b>	<input checked="" type="checkbox"/>
<b>Psychiatric Units</b>	<b>No</b>	<input checked="" type="checkbox"/>
<b>Prisons</b>	<b>No</b>	<input checked="" type="checkbox"/>

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

We believe the smoke-free legislation should be as comprehensive as possible and that all workers should be afforded the same level of protection. We do acknowledge that this will create some practical difficulties and expect that others will have views on these matters. An important balance needs to be achieved in considering exemptions. In order that the balance is correct we feel it is important that the exemptions do not apply to premises as a whole but that the exemption is restricted to an area of premises that does not expose workers unduly to second hand smoke and that any exemption does not apply to employees or visitors to the premises. The department may also consider exemptions as temporary for some premises to enable the premises to work towards becoming smokefree.

**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.**

Our detailed concerns regarding both the offences and the defences available are set out in the legal opinion appended to the questionnaire but a summary is set out below.

We are broadly content with the four offences as set out in the Draft Order. However we have some reservations concerning the meaning of Article 9(1) in relation to the proprietor of the business. It is our opinion that the offence needs to extend to cover the proprietor 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 for example such as having a smoking policy in place, training staff, removing ash trays erecting no smoking signage and ensuring that the smoking policy is implemented. It is our view that the proprietor 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. In addition the Draft Order should create the possibility of contemporaneous offences by both the proprietor and manager where there is a breach of the Draft Order.

**Penalties.** In relation to the offence of failing to prevent smoking in smoke-free places (Article 9) we feel the level of the penalty should be increased to level 5 so as to be consistent with other legislation for example health and safety regulations. We also believe that the offence of obstructing an authorised officer should attract a penalty equivalent to the one set for permitting someone to smoke in smokefree premises.

**Defences.** We are concerned both about the breadth of the defences available and their vague nature, these factors may undermine the effective operation and enforcement of the duties imposed by the Draft Order. We believe that the defences are not conducive to a culture where managers of smoke free premises become fully informed of their obligations and take a proactive approach to ensuring compliance with the legislation.

Given the wide nature of the defences available we are concerned by the evidential regime created by articles 7(7), 8(4), and 9(5). The burden of proof on the prosecution to disprove a defence where “an issue” is raised is to the criminal standard of proof rather than on the balance of probabilities. This approach is more generous to the defendant than is the case in either Scotland or the Republic of Ireland.

cont'd .....

#### Q4 .... cont'd

In relation to the defence available for breach of Article 9(1) set out in 9(4)(b) we believe 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 a specific person smoking. We feel that this defence is not necessary given the defence available in 9(4)(a). However we favour the defence available in Scotland i.e. that of taking all reasonable precautions and exercising all due diligence. If the above defence was available no other is needed.

We believe 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). The Department of Health, Social Services & Public Safety should liaise with the Department of Social Development to ensure that this is included in the new licensing system as it would strengthen the proposed objective (promotion of public health).

**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.**

We believe that fixed penalty notices are not appropriate however, if a fixed penalty regime is to be introduced then it is our view that it should only be used for breaches of Article 7. Fixed penalty notices were not available 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 Health Bill in England has been amended to remove the fixed penalty offence for permitting someone to smoke in smokefree premises. We believe 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 use of fixed penalties may not prove to be a strong deterrent as a person may feel they will take a chance knowing that if they get caught they will only get a fixed penalty notice. It is imperative to ensure high levels of compliance that there is both a penalty that acts as a deterrent and sufficient enforcement activity to make people believe that offences will be detected. It is our experience of enforcing other legislation where fixed penalties are used that where a district council chooses to prosecute that the magistrates court apply a penalty equivalent to the fixed penalty level. 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. Environmental health departments of district councils are experienced in both dealing with business and the public in ensuring compliance with legislative requirements. This experience will ensure a sensible approach to enforcement that will not burden the courts. The use of fixed penalty notices would also create different regimes in cross-border areas.

**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.**

We believe 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. Other council departments also have contact with many businesses and business organisations for example economic development, building control and waste management. District councils currently enforce other tobacco control functions and the addition of this responsibility would help to provide a focus for public health issues within district councils. District councils will also be given powers in relation to community planning and the promotion of well being, this legislation would sit well with those functions. District councils are currently working with other partners such as Investing for Health Partnerships, Health Promotion Commissioners, Smoking Cessation Co-ordinators, Health Promotion Officers, Health Promotion Agency, representatives of the business community and charities to ensure the objectives set in the Tobacco Action Plan are met. Environmental Health Officers in district councils have begun preparing to help sign posting smokers who wish to avail of smoking cessation services on the back of the introduction of smokefree legislation. Councils also have a very strong role in providing civic leadership on this issue and many have been instrumental in setting the smokefree agenda by making their own premises smokefree well ahead of any legislation and by promoting smoke free awards. Elected members have many links with the business community that will enable district councils to work to build compliance at an early stage.

**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.**

We believe 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 our opinion 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***

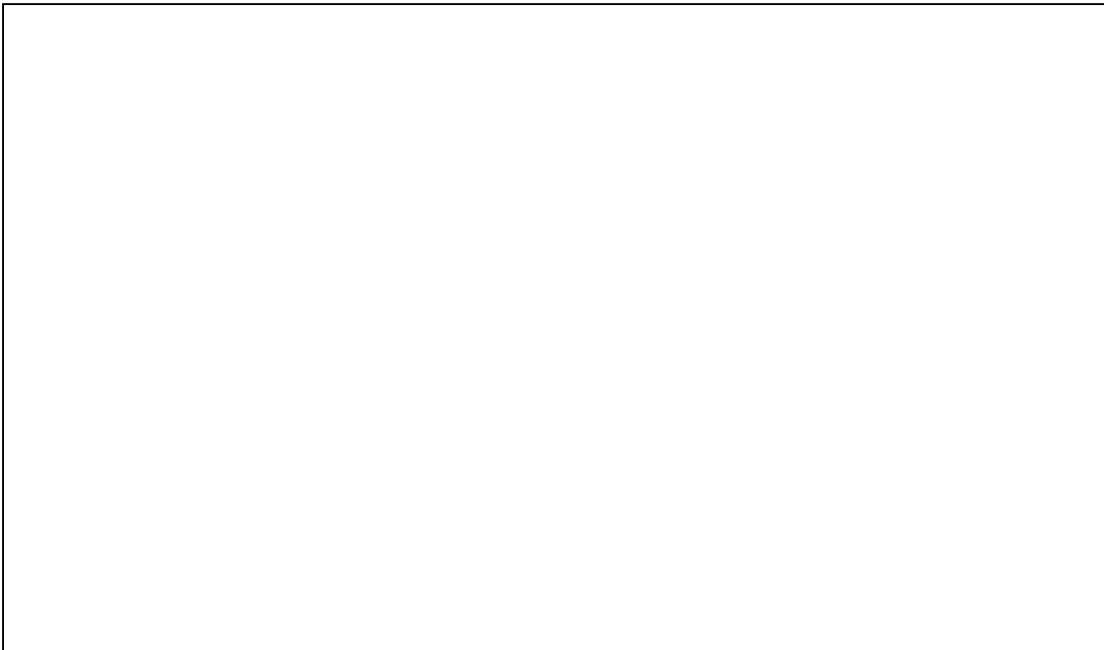
**Q16. Do you have any general comments on the overall approach that was taken in completing the RIA?**



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

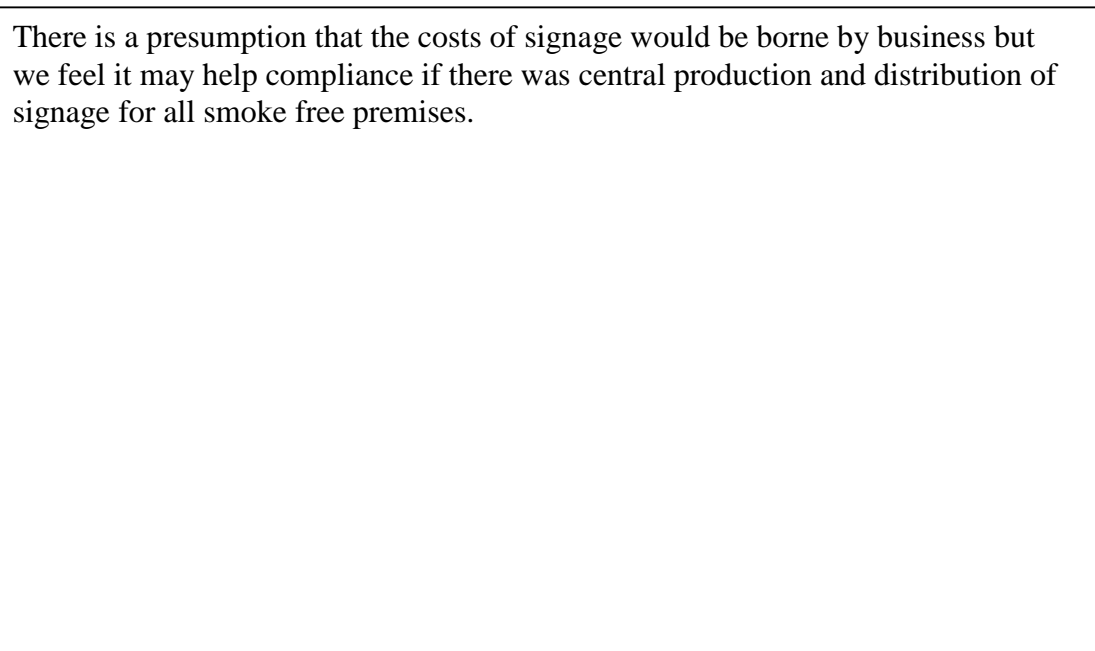


**Q18. Do you agree with the analysis of the sectors and business/organisations which might be particularly affected by the introduction of this policy?**



**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 we feel 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?**

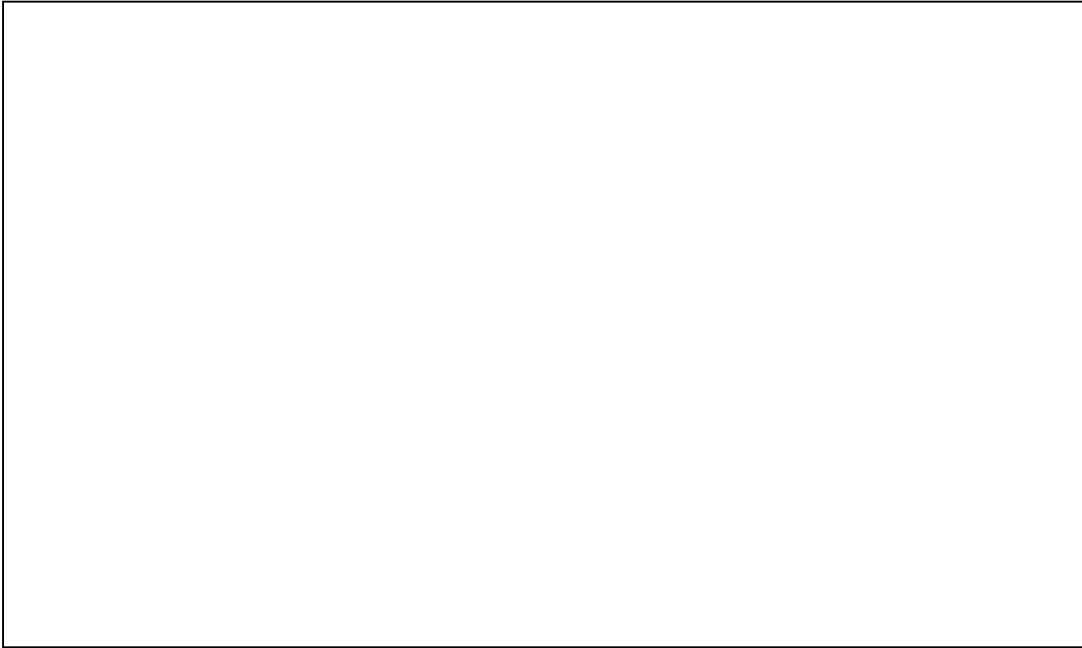


**Rural Proofing**

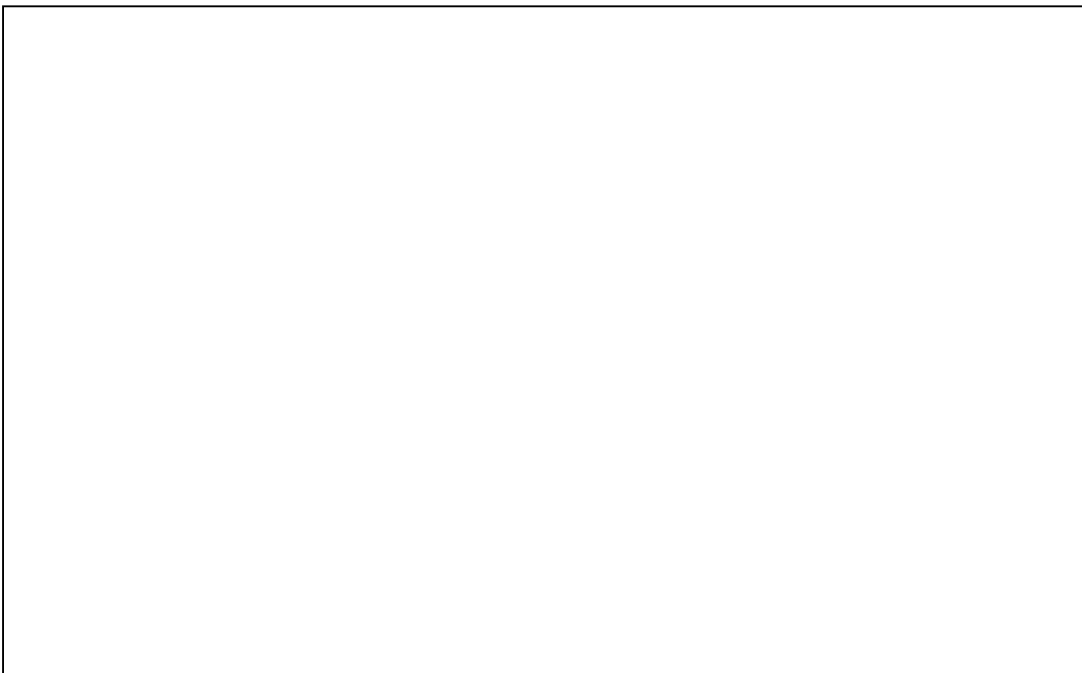
**Q21. Do you agree that the draft Order will not have a disproportionate adverse impact on rural business?**



**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.**

**BRIEF TO ADVISE**

**THE SOUTHERN ENVIRONMENTAL HEALTH GROUP**

**IN THE MATTER OF  
THE DRAFT SMOKING (NORTHERN IRELAND) ORDER 2006**

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**COUNSEL'S ADVICES**

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**I. Introduction**

1. I have been instructed by Belfast City Council Legal Services Department, on behalf of the Southern Environmental Health Group (SEHG), to give an opinion on certain aspects of the Draft Smoking (Northern Ireland) Order 2006 ('the Draft Order'), which is currently out for consultation.
2. I have been provided with a helpful memorandum from the Legal Services Department identifying a number of issues of concern to the SEHG (and a number of local authorities in the jurisdiction) and a number of issues on which advices are sought. I seek to deal with each of those issues below.
3. These advices have been provided within a very limited timescale at relatively short notice. Ideally, counsel would have been provided with more time within which to research the issues dealt with herein and set out my views in more detail.

**II. Background**

4. The Minister for Health, Social Services and Public Safety has launched a consultation on the Draft Order, which is designed to give effect to the Minister's announcement on 17 October 2005 that comprehensive controls on smoking in enclosed workplaces and public places would be introduced by April 2007 to protect the public from exposure to second hand smoke. The explanatory note to the Draft Order states that:

'This Order makes provision for the prohibition of smoking in certain premises, places and vehicles and for amending the minimum age of persons to whom tobacco may be sold.'

5. The general scheme of the Draft Order is to define what will be 'smoke-free premises' (articles 3 and 4), with 'smoke-free places' and 'smoke-free vehicles' to be set out at a later stage by regulations (articles 5 and 6). There is then an obligation to display no-smoking signs in smoke-free places (article 7). Certain offences are also created by the legislation such as failing to make sure that no-smoking signs are displayed (article 7); smoking in a smoke-free place (article 8) and failing to prevent smoking in a smoke-free place (article 9).

6. The SEHG's interest arises primarily because (by virtue of article 11 of the Draft Order) it is district councils who will be required to enforce the legislation. Article 11(1) provides:

'It is the duty of a district council to enforce, as respects premises, places and vehicles within its district, the provisions of this Order and regulations made under it.'

7. In practice, such enforcement is likely to be through the respective councils' environmental health departments, a number of which are represented by the SEHG; and 'authorised officers' pursuant to article 11(2) are likely to be environmental health officers.

8. I understand the SEHG's principal aim at this stage is to ensure that the legislation has teeth – that is to say that it is effective and easily enforced against the relevant person where smoking has occurred in smoke-free premises and/or sufficient steps have not been taken to prevent this.

9. I am instructed that, in the SEHG's view, the draft Northern Irish legislation follows more closely the scheme of the Health Bill in England, rather than the equivalent legislation in either Scotland or the Republic of Ireland. This is thought to pose difficulties as the English Bill was drafted (I am instructed) at a time when it was thought that there would be a partial ban in that jurisdiction and has not yet been subject to significant amendment since the House of Commons voted for a complete ban.

### **III. The statutory defences – substance**

10. The SEHG's primary concerns appear to relate to the provision of the statutory defences in each of articles 7-9 of the Draft Order. Its concerns relate to the substance of those defences and the burden of proof provided for in relation to the defences.
  
11. In each of articles 7-9 of the Draft Order, there is a statutory defence provided to a person charged with an offence: see article 7(6), article 8(3) and article 9(4). One can summarise the effect of these articles as follows:
  - (i) **Ignorance of smoke-free nature of premises:** It will be a defence to a charge under article 7(5) or 8(2) for the accused to show that he 'did not know, and could not reasonably have been expected to know' that the relevant place was, or premises were, smoke-free.
  
  - (ii) **Ignorance that a requirement was being breached:** Additionally, it will be a defence to a charge under article 7(5) for the accused to show that he 'did not know, and could not reasonably have been expected to know' of the requirements of the article; or, in the case of a charge under article 9(3), that he 'did not know, and could not reasonably have been expected to know' that the person in question was smoking.
  
  - (iii) **Reasonable steps to end the violation:** It will also be a defence to a charge under article 9(3) for the accused to show that he took 'reasonable steps' to cause the person in question to stop smoking.
  
  - (iv) **Reasonable not to comply:** Finally, it will also be a defence to a charge under article 7(5) or 9(3) for the accused to show that 'on other grounds it was reasonable for him not to comply with the duty'.
  
12. I understand that the SEHG would be critical of the breadth of the defences provided. Those provided for at articles 7(6)(a), 7(6)(b), 8(3) and 9(4)(b) appear to fly in the face of the general maxim that 'ignorance of the law is no excuse'. If the legislation is designed to promote a culture where employers, proprietors and the public are aware of smoke-free premises and of the obligations imposed by the Order, there is a strong argument that providing a statutory defence where persons are simply ignorant of what the law requires is counter-productive.

13. This argument appears to me to be all the stronger in relation to the defence provided at article 8(3) of the Draft Order which exonerates an accused if he can show that they did not know and could not reasonably have been expected to know that the premises were smoke-free premises. One can see that there may be a legitimate interest in not punishing a member of the public who lacks detailed knowledge of the legislation. It is quite another thing, however, to provide the public with protection for failing to ascertain the nature of the premises before smoking there.
14. The defences provided in articles 7(6)(a), 7(6)(b) and 9(4)(b) of the Draft Order may be said to be yet more objectionable in that they essentially permit managers of premises to plead ignorance of their relevant legislative obligations and/or of what is occurring in the premises for which they are responsible. This approach could properly be said not to be conducive to a culture where managers must be fully informed of their obligations and take a pro-active approach in enforcing the legislation in their own premises.
15. Much will depend, of course, on how these statutory defences are applied by the courts and, in particular, when the courts will determine that an accused 'could reasonably be expected to know' the relevant fact. This caveat is welcome as it provides an element of objectivity to the establishment of the relevant defence and means that the accused who has wilfully shut his eyes to his obligations is unlikely to benefit from the statutory defence. However, the statutory defence is still very generous to those who can plead ignorance and who can do so, for instance, out of genuine disinterest.
16. The SEHG is also critical of the defences provided at articles 7(6)(c) and 9(4)(c) where an accused can escape criminal sanction because 'on other grounds it was reasonable for him not to comply with the duty'. This is an exceptionally vague provision which gives no guidance to the court or enforcing authority as to what type of grounds may be relied upon in order to establish the defence. It is therefore open to the prosecution being ambushed by the defence. Moreover, the subjective nature of the inquiry into what constitutes a ground on which it was reasonable not to comply is likely to result in inconsistent approaches being taken between districts and between magistrates.
17. Several equally fundamental objections to the defences that it was 'reasonable not to comply' are as follows:

- (i) Many accused who feel that they have any point to make in their favour are likely to take their chances trying to persuade the court that it was 'reasonable' for them not to comply. This is likely to significantly increase the number of cases under the Order which must be fully fought through the criminal justice process.
- (ii) The type of excuses which may be raised by defendants in support of a plea that it was reasonable for them not to comply with the Order are, in a great number of cases, likely to be matters which are, in truth, matters in mitigation rather than defence. Where a defendant feels that he had a reasonable excuse for a breach of the obligations imposed by the Order, this can be reflected in the sentence imposed (which could, in an appropriate case, be an absolute discharge). Given the variety of issues which may be raised ("I'm trying to quit but am addicted"; "The new legislation has only come into force and I didn't know about it") against the background of a clear breach of the Order, judicial discretion is better exercised at the sentencing stage rather than in the course of a trial.
- (iii) The provision of these defences also fails to recognise the prosecutorial discretion exercised by the enforcing authority. If there is a case where a person has a genuine reason for non-compliance such that it is not in the public interest for a prosecution to be brought, this can be dealt with by the council – which might choose to give a caution or simply a verbal warning.
- (iv) Finally, the provision of these defences fails to recognise the well-established criminal defences at common law of necessity and duress, which are likely to apply to the small number of cases in which it is genuinely reasonable for a person not to comply with their obligations under the criminal law. To provide a further such defence may be otiose.

18. For the above reasons, there is a strong argument that the statutory defences provided in the Draft Order at present are too wide and likely to undermine the effective operation and enforcement of the duties imposed by the Order.

#### **IV. The statutory defences – procedure**

19. In addition to the breadth of the defences provided by the statute, the SEHG have a real concern about the evidential regime which is to apply to the statutory defences. Articles 7(7), 8(4) and 9(5) of the Draft Order are each in similar terms to the effect that:

‘If a person charged with an offence... relies on a [statutory] defence... and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.’

20. The purpose of this provision is clearly that, where the defendant wishes to rely on the statutory defence, he need only put it in issue, following which it is for the prosecution to prove (to the criminal standard) that the defence is not made out. This, in itself, is unexceptional in criminal law (although the legislature is not obliged to follow this approach). Indeed, it is common in criminal law for the prosecution to have to **disprove** a defence relied upon by the defendant. Perhaps the most well known example is the defence of self-defence.
21. The first difficulty with this regime, however, is that the prosecution may be taken by surprise by a defence raised by the defendant, unless there is some requirement for advance disclosure by the defendant of a defence which he intends to put in issue. In some cases it will be obvious to the prosecution what defence (if any) a defendant is likely to put in issue. As noted at paragraph 16-17 above, however, the statutory defences provided to an accused (and, consequently, the matters on which he may rely to put the defence in issue) are very wide.
22. It would be possible, therefore, in many cases, for the accused to raise a matter – of which the prosecution had, and could have had, no advance notice – which the accused contends was a ground on which it was reasonable for him not to comply with the duties imposed by the Order. Since the number of matters on which an accused may rely for this purpose are so wide and because the accused generally gives his evidence after the prosecution has closed its case, the prosecution is likely to be taken unawares in many cases and is unlikely to be in a position to present effective rebuttal evidence. The reversion of the persuasive burden onto the prosecution, therefore, may be open to abuse by defendants.
23. I understand that the SEHG would prefer the burden of establishing a defence to remain on the defendant (albeit the standard of proof required of the defendant would only be on the balance of probabilities). The burden of proof provided for in

the Draft Order is different from the type of regime with which environmental health officers are used to dealing in this jurisdiction in certain aspects of their work where, often, a defendant will have to prove that he acted with due diligence or reasonable caution in order to avoid criminal sanction. Indeed, there would appear to be some merit in adopting such an approach to the proposed statutory defences for the following further reasons:

- (i) Where an accused alleges that he had reasonable grounds for not complying with his duties (where a breach of duty has been established) it would appear to make sense that he should convince the court of this. He will be in a better position to give evidence of why he should not have been expected to comply. The prosecution, having proved the offence, should not, in general, be expected to show why the duties imposed by the legislation should be observed.
- (ii) Similarly, where the defendant relies on the defence that he took reasonable steps to put an end to a violation of the Order, he will be best placed to explain those steps to the court and say why he felt they were reasonable in the circumstances. It is much harder for the prosecution to prove a negative (that the steps taken were not reasonable) than for the defendant to prove a positive (that they were reasonable).

24. The SEHG is concerned that this approach imposes a greater burden on the prosecution in this jurisdiction than that imposed on enforcement authorities in Scotland or in the Republic of Ireland. Indeed, in the Irish legislation – the Public Health (Tobacco) Act 2002, as amended by the Public Health (Tobacco) (Amendment) Act 2004 – the onus appears to fall on the defendant to establish the reasonable efforts defence. Section 47(4) provides:

‘In proceedings for an offence under this section, it shall be a defence for a person against whom such proceedings are brought to show that he or she made all reasonable efforts to ensure compliance with this section.’

25. Similarly, in Scotland, section 1(3) of the Smoking, Health and Social Care (Scotland) Act 2005 provides (in relation to the offence of knowingly permitting another to smoke in no-smoking premises) that:

‘It is a defence for an accused charged with an offence under this section to prove –

- (a) that the accused took all reasonable precautions and exercised all due diligence not to commit the offence, or
- (b) that there were no lawful or reasonably practicable means by which the accused could prevent the other person from smoking in the no-smoking premises.'

26. Section 2(2) of the 2005 Act provides a defence to the charge of smoking in no-smoking premises in the following terms:

'It is a defence for an accused charged with an offence under this section to prove that the accused did not know, and could not reasonably have been expected to have known, that the place in which it is alleged that the accused was smoking was no-smoking premises.'

27. Section 3(2) of the 2005 Act provides a defence to the charge of failing to display warning signs in the following terms:

'It is a defence for an accused charged with an offence under this section to prove that the accused (or any employee or agent of the accused) took all reasonable precautions and exercised all due diligence not to commit the offence.'

28. Not only is there a heavier emphasis on the precautions which must be taken before the defence is established in the Scottish legislation (cf. 'took **all** reasonable precautions **and** exercised **all** due diligence') but, again, the burden of proving the exculpatory defence remains on the defendant. This is very different to the approach set out in the Draft Order where the burden shifts onto the prosecution to disprove the defence to the high standard of beyond reasonable doubt.

29. **There is also precedent for this type of approach in the area of tobacco regulation in this jurisdiction. Article 3 of the Health and Personal Social Services (Northern Ireland) Order 1978 provides for an offence of selling tobacco to persons under the age of 16. Article 3(1A) of the 1978 Order (inserted by article 3(2)(b) of the The Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991) provides that:**

‘It shall be a defence for a person charged with an offence under paragraph (1) to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.’

30. The SEHG is concerned about the burden of proof to be imposed on the prosecution to disprove a defence was ‘an issue’ is raised and that it must do so to the criminal standard of proof rather than on the balance of probabilities. This approach appears to be much more generous to defendants than the approach adopted in the equivalent legislation in the Republic of Ireland and Scotland.

#### **V. The article 9 offence**

31. The SEHG is also concerned about the offence created by article 9 of failing to stop persons smoking in a smoke free place. This offence can be committed by ‘any person who controls or manages a smoke free premises’. The SEHG’s concern is, firstly, whether this offence applies to absent proprietors; and, secondly, even if the article does so apply, whether article 9(4)(b) may provide a defence in that such a proprietor could argue when he was not on the premises that he would not know or could not reasonably have known that any person was smoking.
32. The SEHG feel there should be a specific duty on the proprietor to ensure that he or she enforces the legislation. This would ensure that policing of the premises is conducted primarily by the proprietor, rather than it being left to environmental health officers from the relevant local authority.
33. Under the equivalent legislation in the Republic of Ireland it appears that a proprietor is guilty of an offence if someone smokes on their premises whether he or she (the proprietor) was there or not (see section 47(3)). Further, there is a dual approach in the Irish legislation which means that, on certain occasions, there can be contemporaneous offences committed on the part of both the proprietor and the manager of the premises where there is a breach.
34. The SEHG instructs that a district council would not wish to prosecute a proprietor who had done everything possible to ensure that his staff enforced the ban; but that where people continued to smoke through the inaction of a manager, the council would wish to prosecute the manager. In short, they would prefer a strict liability offence but with a statutory defence that the defendant had taken all reasonable precautions. A non-exhaustive list of the type of precautions which might be expected could also be set out in the legislation, such as staff training and

instruction, provision of 'no smoking' signs, removal of ashtrays, the existence of a smoking policy, adequate risk assessments, etc..

35. This is similar to the regime which applies in relation to the offence of selling cigarettes to children. In these cases, enforcement action would be taken against the proprietor if he could not demonstrate that he took reasonable precautions. I am instructed that, if no precautions were in place, it is unlikely that a council would take enforcement action against the employee serving. Rather, it would proceed against the manager or proprietor.
36. The SEHG feels that article 9 of the legislation is, at present, very poorly drafted and does not adequately explain the duties and responsibilities of proprietors. It feels that it would be difficult for councils to advise proprietors on their duties on the basis of the current Draft Order.
37. My initial view is that the article 9(3) would apply to proprietors of premises who were not present at the time the offence was committed. The offence is committed where 'any person...fails to comply with the duty mentioned in paragraph (1)'. Article 9(1) provides that:

'It is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking.'
38. On the present drafting, a question of interpretation for the courts is likely to arise as to whether a person must have been present at the premises at the time in order to be guilty of an offence under this article. That such presence is necessary might be inferred from the words 'to cause a person smoking **there** to stop smoking'.
39. However, the preferable view seems to me to be that a person who is in control of premises or concerned in their management need **not** be present at the time in order to be guilty of an offence under this article. This may be one reason why the offence is restricted to those in control of or concerned in the management of premises – as these persons exercise control over the premises (and responsibility for the premises) through staff, even when they are not present. Indeed, if the article did require the owner or manager to be present in order to be guilty of an offence under this article, premises might seek to avoid prosecution under the article by permitting people to smoke but ensuring that only low-grade staff were present at the time. Furthermore, the defences provided in article 9(4) are apt to apply to a manager or proprietor who

was not present at the time – pointing to the fact that the offence can be committed by someone who is absent. However, the above issue is an issue which could usefully be clarified by the legislation in its final form in order to avoid controversy.

40. Assuming a person who controls or is concerned in the management of smoke-free premises can be guilty of an offence under article 9(3) even though not present at the premises at the time someone was smoking, it will then fall to him to rely on a defence under article 9(4). The difficulties with the defences provided by this sub-article, in common with the burden of proof resting on the prosecution to disprove any such defence, have been discussed at length above.

## **VI. The use of fixed penalties**

41. Finally, the SEHG is concerned about the use of fixed penalty notices. It is concerned that proprietors may be prepared to risk being caught if they will only be subject to a fixed penalty notice which may, in turn, cause enforcement difficulties.

42. Article 10(1) of the Draft Order provides that:

‘An authorised officer of a district council who has reason to believe that a person has committed an offence under Article 7(5), 8(2) or 9(3) on premises, or in a place or vehicle, within the district of the council may give him a fixed penalty notice in respect of the offence.’

43. A fixed penalty notice is defined by article 10(2) as ‘a notice offering a person the opportunity to discharge any liability to conviction for the offence to which the notice relates by paying a penalty’. Further provision about fixed penalties is made in Schedule 1 to the Draft Order.

44. It is difficult at present to ascertain whether the SEHG’s fears about the use of fixed penalties are justified when the amount of the penalty is yet to be fixed (see paragraph 5 of Schedule 1 to the Draft Order). Obviously, the higher the penalty, the more seriously fixed penalty notices will be taken by members of the public and proprietors or managers of premises.

45. It appears to me that the use of fixed penalties for persons smoking in smoke-free premises may well be a quick and effective way of enforcing the legislation and that the use of such notices is a useful tool in the enforcement agency’s armoury. My understanding is that the SEHG is more concerned with the use of fixed penalties in

relation to managers or proprietors of premises who fail to discharge their duties (as the cost of fixed penalties could, in effect, be built into the running costs of the business). This problem could be solved by permitting the use of fixed penalties only for offences under article 8(2) but **not** for offences under article 7(5) or 9(3).

46. Even if the present drafting is maintained, however, and fixed penalties are available for the range of offences created by articles 7-9 of the Draft Order, it is important for the SEHG to note that authorised officers are not required to issue fixed penalty notices but are given a discretion to do so (note the use of the word 'may' in article 10(1)). Although the fear may be legitimate that managers and proprietors of premises may not take the offences as seriously if fixed penalties are available, it would be open to district councils, as a matter of policy, not to issue fixed penalties when a failing has been identified with the way in which premises are run but, rather, to prosecute in the normal way. Any such policy would need to be carefully considered and would need to allow for proper consideration of each case on its own merits.

## **VII. Conclusion**

47. The explanatory memorandum to the Draft Order, published by the Department of Health, states that:

*'In December 2004 the Department published its regional strategy 'A Healthier Future – A Twenty Year Vision for Health and Wellbeing in Northern Ireland 2005-2025'. The Strategy document sought views on three options for strengthening controls on the use of tobacco. In summary these were:-*

- i. to build on the existing policy of encouraging and supporting those who choose to give up smoking;
- ii. to follow the English proposals which were to prohibit smoking in most public places and workplaces while still allowing smoking in some pubs and bars (those that did not serve food)...
- iii. to adopt the approach taken in the Republic of Ireland and Scotland to ban smoking in all enclosed public places and workplaces.

*There was overwhelming support for option iii.'*

48. The Draft Order does follow the approach taken in the Republic of Ireland and Scotland to the extent that a ban is being imposed in respect of all enclosed public places and workplaces. The detail of the legislation does not, however, 'adopt the approach taken in the Republic of Ireland and Scotland' more generally – in that the defences provided to offences created in the Order appear to be broader than those provided in the Irish and Scottish legislation and, perhaps more importantly, the burden rests on the prosecution to disprove such defences if the defendant raises an issue in relation to them. The combined effect is that the Draft Order's approach is significantly different to the approach adopted in the Irish and Scottish legislation. I am compelled to agree with the SEHG that this will make it more difficult for district councils to effectively enforce the legislation by making it more difficult to successfully secure convictions.
49. Unfortunately, although the Consultation Questionnaire issued by the Department seeks views on the offences created by the Draft Order and the level of penalties in the Order (see question 4), comment has not been sought on the defences provided by the Draft Order. These issues are unlikely, therefore, to feature significantly in the responses received by way of the Consultation Questionnaire. They are issues, however, which will have a significant effect on the efficacy of the legislation.
50. I trust the foregoing is of some assistance to SEHG as it considers its response to the Draft Order. As I noted above, I would have preferred more time to give detailed consideration to the issues addressed above. However, if I can be of any further assistance, my instructing solicitor should not hesitate to contact me.

**David A Scoffield BL**  
**Bar Library, Belfast**  
**4 May 2005**