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FRANCIS ROCK
Chief Executive

CK/JMcG

26 April 2006

Investing for Health Team (Tobacco Control)
Department of Health Social Services & Public Safety
Room 4C.22
Castle Buildings
Belfast
BT4 3SQ

Dear Sir

Draft Smoking (NI) Order 2006

The above draft Order was brought before the Environmental Services Committee of Craigavon Borough Council at their meeting on 12 April 2006.

The matter was considered by the Committee and I enclose the following comments in relation to Questions 1 – 7.

The comments were ratified by the Council at their mid-monthly meeting on 24 April 2006.

Yours faithfully,


C Kerr
Head of Environmental Health

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.

For Paragraph 2(a) we would prefer the definition of a place of work for one or more persons.

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.

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.

Q4. *Articles 7, 8 and 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.

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 owner of the business. It is our opinion 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 our view 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) we feel the level of the penalty should increase to level 5 so as to be consistent with other legislation for example health and safety.

Defences

Burden of proof. In respect of Articles 7(7), 8(4), 9(5) it is our 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) we believe that this would create enforcement difficulties in relation to prosecution of owners who are not present while the person is smoking or managers who are unable physically to observe all parts of the premises all the time. The defence relates to a lack of knowledge of this specific person smoking. We feel that this defence is not necessary given the defence available in 9(4)(a).

It is important that defences are not so readily available that prosecutions will be dismissed in many cases.

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 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). We do 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 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-boarder areas. We also believe that persistent breaches of this legislation should be relevant for consideration by the Licensing Authority when applications for liquor licence renewals are made. Development. DHSSPS-NI should liaise with the Department of Social Development to ensure that this link is included in the new licensing system.

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. 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 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.

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.