

# **CONSULTATIVE DOCUMENT**

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

### **QUESTIONNAIRE**

**March 2006**

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## 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:**

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[http://www.dhsspsni.gov.uk/index/consultations/current\\_consultations.htm](http://www.dhsspsni.gov.uk/index/consultations/current_consultations.htm)

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# 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

No

**If you wish to comment, please do so here.**

**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

No

**If you wish to comment, please do so here.**

There should be a specific exemption for premises where worker exposure to airborne contaminants complies with all the environmental standards as set out in the HSE's document EH40/2005. This would bring this measure into line with the control regime for potentially hazardous substances. This is to avoid confusion with any exempt premises (see below).

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**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>Yes</b> <input type="checkbox"/>	<b>No</b> <input type="checkbox"/>	<b>Don’t know</b> ✓
<b>Care Homes</b>	<b>Yes</b> <input type="checkbox"/>	<b>No</b> <input type="checkbox"/>	<b>Don’t know</b> ✓
<b>Psychiatric Units</b>	<b>Yes</b> <input type="checkbox"/>	<b>No</b> <input type="checkbox"/>	<b>Don’t know</b> ✓
<b>Prisons</b>	<b>Yes</b> <input type="checkbox"/>	<b>No</b> <input type="checkbox"/>	<b>Don’t Know</b> ✓

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

To avoid discrimination between workers, the same yardstick should be used for all premises in which workers could be exposed to harmful airborne contaminants. The stated premises should be exempt from the measure **only** if they meet the relevant environmental standards. There is an established framework for this in the HSE's EH40/2005 and this should be applied.

It is unclear why licensed premises should be singled out specifically to be precluded from exemptions - why not include unlicensed coffee shops, retail stores, offices etc also? What is the purpose of that inclusion?

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**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?**

- |       |   |  |   |
|-------|---|--|---|
| (i)   | <b>SIGNAGE -</b>                        | <b>Yes</b> <input type="checkbox"/>            | <b>No</b> <input checked="" type="checkbox"/> |
| (ii)  | <b>SMOKER NON COMPLIANCE</b>            | <b>Yes</b> <input checked="" type="checkbox"/> | <b>No</b> <input type="checkbox"/>            |
| (iii) | <b>BUILDING OPERATOR NON-COMPLIANCE</b> | <b>Yes</b> <input type="checkbox"/>            | <b>No</b> <input checked="" type="checkbox"/> |
| (iv)  | <b>OBSTRUCTION OF AN OFFICER</b>        | <b>Yes</b> <input checked="" type="checkbox"/> | <b>No</b> <input type="checkbox"/>            |

**If you wish to comment, please do so here.**

**(i) SIGNAGE -**

The legislation assumes that all premises that are open to the public, and almost all workplaces, should be non-smoking. The onus should therefore be upon premises that **can** allow smoking to state that fact, as they will be the (very rare) exception rather than the norm. This is in line with accepted practice in other areas; for example, vehicles that carry hazardous materials state the fact but vehicles which do not carry such material do not routinely state "no hazardous materials". We firmly believe, therefore, that the proposed scale of the fine is out of all proportion to the offence, given that practically everywhere will be no-smoking. Why impose such a large fine for stating the obvious? *(continued on next page)*

**(SIGNAGE continued) –**

Notwithstanding that, signage will be useful in demonstrating due diligence, but why has the cost of signage for operators other than licensed premises not been built into the Integrated Impact Assessment? It states specifically that signage costs have not been included, yet there is to be potentially a fine of up to £1,000 if signs are not displayed! This means that everywhere must have signs, and should be costed accordingly (see below).

**(ii) SMOKER NON-COMPLIANCE –**

This level is appropriate as it puts the onus on the smoker not to smoke in premises where smoking is not permitted.

**(iii) BUILDING OPERATOR NON-COMPLIANCE –**

The proposed level of fine is excessive, especially for operators of licensed premises where enforcement of the law may put individuals at risk. We fully expect that all licensed premises will enforce the law as required; however, there may be situations where for a member of staff to “enforce” the law may be unreasonable (think, for example, of a young female member of staff and a large, well-built man who has had several drinks). This situation has been recognised in Scotland, as the enforcement guidelines issued by the Scottish Executive state that enforcement officers should not “*compromise their personal safety*”, should “*avoid confrontation*” and that they should target management of a premises rather than the person actually smoking! The legislation appears to make staff into enforcers, so the same provisions and guidance should apply to them. [Reference – *Guidance for Officers involved in the Enforcement of the Provisions of the Smoking (Health & Social Care) (Scotland) Act 2005*; Scottish Executive 2006]

**At a maximum**, the level of fine should be at the same level as that for the person who smokes in the premises. It is simply unfair for it to be otherwise.

**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?**

Yes

No

Don't know

**If you wish to comment, please do so here.**

Yes, provided that the individual who is subject to the fixed penalty notice is not penalised with an escalating charge if he / she refuses to accept the fixed penalty notice.

We fully agree that it is more satisfactory to deal with offences for both smokers and premises operators by way of fixed penalty notice, rather than by costly and time-consuming court proceedings in the first instance.

**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

No

Don't know

**If not, please state your reasons below.**

Yes, provided that sensible and timely guidance is issued to all EHOs and Councils to ensure that the legislation and regulations are applied and enforced in a **consistent** manner across the whole of Northern Ireland.

**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  \_\_\_\_\_ No

Don't know

√

**If you wish to comment, please do so here.**

Whilst this is an important issue, and one which we support, we believe that this is a separate issue that should be subject to specific debate and consultation.

## 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?**

- (a) We believe that a full Social Impact Assessment should be carried out.
- (c) The Environmental Impact Assessment needs to include an assessment of the impact on noise and nuisance of people standing outside licensed premises smoking. This has been a problem in the Republic of Ireland and Scotland, and is recognised by EHOs as an issue. It needs therefore to be recognised.
- (f) A Community Safety Assessment is needed – there will be implications for community safety having crowds of individuals standing outside licensed premises smoking, particularly in certain flashpoint areas of Northern Ireland.

Much detail on the above areas was included in the Federation's two responses to the consultation in 2005 and does not need to be repeated here.

## 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?**

No.

The smoking ban will have a different impact on people in different economic circumstances. Table 3 of Annex 2 of the Integrated Impact Assessment shows this clearly:

- 12% of professional males smoke and would be affected by the measure
- 34/35% of semi- or un-skilled males smoke by contrast.

The changes would be borne most heavily by the more disadvantaged groups. Equally, there is a clear difference between the levels of smoking between Catholics (31% men; 30% women) compared with Protestants (24% men; 22% women). This is likely to have a major impact on their access to community facilities such as pubs and clubs, especially if these cannot provide any smoking facilities inside or outside due to legislative or planning controls, or lack of any outside space at all.

This impact is also likely to impact the less mobile members of society (the elderly and infirm) who will be unable to stand outside in bad weather or easily reach another venue with appropriate facilities. There is a further impact on social cohesion and access to sporting and recreational opportunities, as many of these are pub and club based (football, darts, pool etc). If pubs and clubs close, as in the Republic of Ireland where, according to the Vintners Federation of Ireland, 600 pubs have shut as a result of the ban, this negative impact will be substantial.

The negative effect on pubs re: loss of business and possible closure of the business will be borne in substantial part by the Catholic community, as we estimate that well over 80% of licensees are Catholic.

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

Yes.

An analysis of the Republic of Ireland's Central Statistics Office data on sales and employment in the hospitality trade. This shows a negative impact of around 10% on the hospitality sector vs the rest of the private sector following the ban. This provides a benchmark for the likely effects in Northern Ireland. In the Republic this appears to have translated to a loss of about 10% of (VFI) pubs outside the Dublin area. An assessment of the economic vulnerability of community outlets in Northern Ireland would give an indication of where losses of community facilities will be most concentrated and their "knock-on" effect.

**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?**

Yes.

Operators of pubs and bars that primarily serve Catholic customers are likely to be hit harder than those serving primarily Protestant communities, due to the higher incidence of smoking amongst their customers (see Table 3 of Annex 2).

The lack of internal smoking facilities, and lack of outside areas that could be turned into smoking shelters, in many instances (especially near town centres) is likely to lead to an increase in on-street smoking and drinking with accompanying public order issues. We believe strongly that consideration should be given as to how these smokers could be accommodated indoors in areas where staff have no access in order to prevent community problems.

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

None, other than the areas outlined in previous questions.

## **Partial Regulatory Impact Assessment (RIA)**

(see Annex 3 of IIA Overview)

### ***Health***

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

Yes.

Paragraph 53 indicates a likely “additional fall of 2% per annum in smoking prevalence” as the result of a ban based on a single academic report.

This is not borne out by the facts. According to the Irish Office of Tobacco Control, smoking incidence was –

- 25.28% in November 2003 before the ban (the ban was introduced in March 2004),
- 23.98% in November 2004, and
- 23.1% in November 2005.

The maximum effect of the ban was to cut incidence by 1.4% in the first year, with no impact afterwards (0.08% in year 2). In reality, the effect would have been less as this includes any effect from the large rise in duty of 25 cents that took effect on 4 December 2003. On this basis, there may be slight health benefits in Year 1 and none thereafter.

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

No

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

Yes.

Office of Tobacco Control statistics as outlined above – various charts as displayed on

[http://www.otc.ie/research\\_reports.asp](http://www.otc.ie/research_reports.asp)

It is worth noting that after declining to around 23% by January 2005, smoking incidence was actually increasing throughout 2005 in the Republic of Ireland. This practical experience calls into question the single academic study used as evidence for a “likely 2% fall”, on which the assessment is predicated.

***Economic***

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

Yes.

The analysis appears to be worded in such a way as to promote the measure than to give an objective assessment. The decision to introduce a smoking ban has been made, and the Federation does not wish to fight that decision further, rather to get on with planning for as smooth an implementation as possible; however, at the very least, we would wish to see an objective RIA and Integrated Impact Assessment.

For example, at paragraph 15 – “...around half of the non-smoking workforce could potentially be exposed to second-hand smoke”. An alternative reading would say that 19% of the 79% of businesses with smoking policies (15% of the total) permit unenclosed areas, plus 21% with no smoking policy creates a total of 36%. It also should be noted that these are likely to be at the smaller employers, so the overall exposure rate is likely to be much less than even this.

This unbalanced approach is continued throughout the assessment itself, and especially with the extensive use of the Health Economics Research Unit study. This study was commissioned by NHS Scotland, which was heavily in favour of a complete ban – no data appear to have been included from other sources that did not share this objective in order to provide much needed balance.

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

No.

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

Yes.

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

These are poorly constructed and rely almost entirely on the HERU study when there is considerable available data from other sources, including “real-life” data on the effects of the ban in the Republic of Ireland (ROI).

The “central estimate” may project a 0.2% decrease in turnover in the hospitality sector (paragraph 62), but this is not borne out by the experience in ROI. According to the Central Statistics Office, employment in the hospitality sector (“hotels and restaurants”) grew on a year-on-year seasonally-adjusted basis in every one of the nine quarters from Q1 (Jan/Mch) 2002 to Q1 2004. The ban was then introduced at the end of that Quarter. Again, allowing for seasonality, employment in the sector dropped for every one of the next four Quarters.

This was a trend unique to the industry – the rest of the private sector economy continued to increase employment in every one of those Quarters. So, whilst the hospitality sector slumped by an average of 3.8%, the rest of the private sector grew by 3.4% - a difference of 7.2%.

Only at the end of 2005 – nearly two years after the ban was introduced – did employment in the sector reach the same level as before the ban (115,400 jobs in Q4 2003 vs 115,500 jobs Q4 2005). By contrast, the rest of the private sector had grown from 1,223,700 in Q4 2003 to 1,323,000 two years later – a growth of 8.1%. *(continued on next page)*

The direct loss to the industry in employment in Northern Ireland is therefore likely to be in the region of 3.8% in Year 1 (1,700 jobs), and the lost opportunity to the industry around 8% (3,600 jobs). The knock-on effect into other supply sectors would increase this further. The effects on turnover would be similar. Assuming a total sector turnover (2003) of £1.154 billion, this would represent a direct Year 1 loss of £43.9 million and an opportunity loss of £92.4 million per annum.

The losses to our industry are all too real, as compared to the far-fetched productivity and “other” gains (a worker leaving the premises to smoke must surely take longer than smoking inside). Equally, the public health benefits are not yet proven, especially when we look at the failure of the ban in the Republic of Ireland to have a long-term meaningful impact on smoking prevalence.

Our assessment of the cost/benefit analysis is that it is far from an accurate reflection of the real likely impacts.

Additionally, in the draft Regulatory Impact Assessment, the assumptions in relation to costs of signage etc are woefully lacking and underestimated. The legislation will require **all** premises to display standard no-smoking signage, and there is a significant penalty for non-compliance (see question 4 above). However, the RIA has included an estimate **only** for licensed premises, so this section must too be amended to reflect the true costs, whether to the business or ultimately to the government. The Federation would support the stance taken by the Scottish Executive in relation to the amount of help and assistance it gave to all businesses in the run-up to the smoking ban. For example, in relation to the hospitality sector, it made available posters, tent cards, staff badges, stickers, bins for attaching to walls at entrances, signage etc, all of which has helped to ensure a relatively smooth introduction.

## ***Public Expenditure and Public Service***

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

No.

A proper Economic Appraisal is required using the publicly available data from the CSO and the Office of Tobacco Control in the Republic of Ireland.

## **Rural Proofing**

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

Yes.

In some ways, rural businesses may even be at an advantage, as licensed premises are more likely to have space to build facilities for smokers and avoid complaints from neighbours than in urban centres.

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

Yes.

In some areas the viability of smaller rural pubs that serve as social centres and do not have the resources to provide smoking areas outside.

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

Yes.

Viability of rural pubs (see above).

### **Additional Comments**

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

No.

**Thank you for taking time to complete this Questionnaire.**

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