

# *Consultation on the Smokefree Elements of the Health Improvement and Protection Bill*

This is a summary of the Government's consultation paper on workplace smoking restrictions, including guidance from your area's Smoke-Free Alliance (these partnerships are also sometimes known as tobacco control alliances). Each part of the consultation document summary is followed by a brief **analysis** in blue. **Recommendations** for action by potential respondents are then given in red bold. This is just a guide, and you are of course free to shape your response to the questions as you feel is appropriate.

**It is advisable that before responding you read the full guidance given here and access the complete text at [www.dh.gov.uk/consultations/liveconsultations](http://www.dh.gov.uk/consultations/liveconsultations) if possible.**

**You may also find it helpful to discuss likely local consequences with us at the Smoke-Free Alliance— contact details at the end of this guide.**

The consultation relates to the proposals in the Choosing Health white paper, to introduce a ban on smoking in workplaces with the exception of some residential environments, private clubs, and non-food-serving pubs. The consultation runs from 20 June to 5 September 2005 and applies only to England.

## **Analysis**

The consultation formally relates to the Choosing Health proposals for a partial ban, but our analysis is that the Government is willing to listen to responses that may encourage more comprehensive action. However, they will need to have substantial detailed evidence to support any public change of direction, and it is vital that all relevant organisations respond in detail. Many local authorities and PCTs will be members of smoke-free alliances or similar multi-agency groups that will submit joint responses, but it is important that statutory bodies respond individually too – both quality and quantity are necessary.

## **Recommendation**

**In drafting your response, please bear in mind that the key goal is to provide reasons for a strengthened approach. These need to be adequately evidenced, but preferably**

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**also readily quotable. Please don't miss the opportunity to respond to the Partial  
Regulatory Impact Assessment as well as the set 16 questions.**

## Proposed definition of smoke or smoking

“Smoke’ means smoke tobacco or any substance or mixture which includes it; and a person is taken to be smoking if the person is holding or otherwise in possession or control of lit tobacco or any lit substance or mixture which includes tobacco.”

***Question 1: Does this definition raise any concerns, in particular that non-tobacco cigarettes are not covered?***

Analysis
This is a largely helpful definition as it will include cigarettes, pipes, cigars, hookahs etc. There may, however, be the potential for confusion as regards ‘herbal’ cigarettes that may not contain tobacco.
Recommendation
<b>This proposal should be accepted, although it may be sensible to request the definition be broadened to any lit product that <i>reasonably appears</i> to be tobacco.</b>

## Proposed definition of enclosed

A place is to be regarded as ‘enclosed’ if it is fully enclosed (completely enclosed on all sides by solid floor-to-ceiling walls, windows, or solid floor-to-ceiling partitions with an exception for doors and passageways), or is substantially enclosed, that is at least partially covered by a roof and has walls such that the total area of the roof and wall surfaces exceeds 70 per cent of the total notional roof and wall area.

It is proposed that both “roof ” and “wall” will include any structure, whether fixed or movable, permanent or temporary. It is proposed that the “total notional roof and wall area” will be the sum of what would be the total area of the wall surfaces if the walls were continuous (any gap in the walls being filled by a surface of the minimum area required for the purpose) and the walls were of a uniform height equal to the lowest height of the roof.

***Question 2: Views are invited on this approach to defining “enclosed”. Does it give the owners of likely premises and enforcement authorities a sufficiently clear definition? If not, how might it be improved? Are there concerns that loopholes are being created?***

Analysis
A precise definition is likely to be helpful in avoiding some of the approaches attempted by some premises in order to avoid the ban in Ireland. However, responses as to whether the 70% rule is sufficiently clear would be helpful – if enforcement officers have to carry out complex calculations, this may not provide the clarity required.
Recommendation
<b>The proposal should be welcomed, if necessary with any additional suggestions as to whether the 70% rule is adequate.</b>

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## **Other public places and workplaces that might fall outside the definition of “enclosed” which might be smokefree**

It is proposed to create regulation-making powers to allow the legislation to apply in places which may not fall strictly within the definition of “enclosed” in the legislation but where there is risk of harm from secondhand smoke due to the inevitable close grouping together of people. Examples might be sports stadia and other outdoor areas such as bus shelters, entrances or exits to public buildings or workplaces.

### ***Question 3: Views are invited on this proposal***

#### **Analysis**

This goes substantially beyond the priority issues of indoor exposure to second-hand smoke and is therefore likely to be strongly challenged by tobacco industry lobbyists. However, it has merit in ensuring that possible additional exposure to a known hazard is minimised, and of course in assisting those attempting to quit smoking. This also supports work towards smoke-free workplaces already under way in many local authority and NHS settings

#### **Recommendation**

**It is worthwhile voicing support for this proposed additional protective measure, referencing the degree to which it would assist clients of Stop Smoking Services where there are examples of this.**

## **Exceptions – All licensed premises (receive a longer lead-in time)**

It is proposed that premises licensed for the sale and consumption of alcohol should be given longer to either become smokefree or to become smoking premises. To qualify for this extended period, a premises will need to be licensed for the sale and consumption of alcohol under the Licensing Act 2003 when the relevant section of the legislation comes into effect.

***Question 4: Views are invited on this proposal. Are there any potential difficulties with using the Licensing Act 2003 that consultees would want to raise? Comments on the principle of a longer lead-in time for all licensed premises are also welcome.***

#### **Analysis**

This is evidently a response to pressure from some in the hospitality industry (or those co-opted by the tobacco industry) to ‘go easy’ on pubs. Experience from abroad has shown that a significant lead-in period of up to a year is indeed important. However, there is no evidence that licensed premises need a longer lead-in time than other businesses in reality, and this proposal would simply delay the point at which workers in these premises are protected. As the implementation of the new Licensing Act has not been without difficulties itself, it would seem unwise to tie an unrelated measure to it.

#### **Recommendation**

**This proposal should be rejected, pointing out the unnecessary additional complexity of relying upon a second piece of legislation (i.e. other than the Health Improvement and Protection Bill/Act), the heightened administrative burden of enforcement (as**

**licences would have to be checked before identifying infractions after the end of the general lead-in period), and the unreasonable delay in protecting workers in the hospitality industry.**

### **Exceptions – All licensed premises that do not prepare and serve food – definition of “prepare and serve food”**

In *Choosing Health* an assessment was published of what proportion of pubs might fall into the category of “do not prepare food”. This was based on a survey of existing risk assessments for food safety carried out by Local Authorities. Pubs categorised as low risk, and therefore unlikely to do more than sell pre-packaged ambient shelf-stable snacks, are likely to be assessed as low risk following the Food Standards Agency Code of Practice.

This exception is a novel approach in terms of smokefree legislation internationally, and therefore this consultation puts forward two possible routes for legislation. At present the favoured route is to specify a list of permitted foods for smoking licensed premises. Consultation is under way with the hospitality industry on what might be included in such a list. The intention is that the list of snacks should be capable of being varied from time to time, in consultation with the hospitality industry, to accommodate legitimate variations where it can be demonstrated that there is no attempt to increase the proportion of pubs where smoking is allowed. The regulations would enable snacks to be defined by reference to their ingredients, weight, size or other characteristics.

An alternative route might be to have a broad definition of foods, approximating that in the Food Standards Agency Code of Practice, that are low risk, e.g. “fruit, vegetables and other ambient shelf-stable products”. However, this may leave significant room for uncertainty and different interpretations in different parts of the country.

***Question 5: Views are invited on the merits and practicability of this proposal. If a specific list is preferred, are there any things you would and would not want on such a list, recognising the current wish to, in essence, allow smoking only to continue in “drinking pubs”? Are there any major concerns about the impact on licensed businesses that will have to choose between food and smoking? Is the Choosing Health estimate of 10–30 per cent of pubs choosing smoking likely to be borne out?***

#### **Analysis**

This is, in effect, an open invitation to highlight the illogical nature of diminishing a health and safety measure on the basis of whether or not food is served. Terms such as ‘pre-packaged ambient shelf-stable snacks’ are very obviously *not* clear or easily understood by publicans and customers alike, and reliance upon yet more detailed regulations would inevitably make enforcement highly impractical, probably by errors of ignorance as much as deliberate evasion.

#### **Recommendation**

**These proposals should be rejected in detail, highlighting the impractical nature of the concepts and the obvious foreseeable difficulties in implementation. It is also worth including information as to the impact upon those pubs which will feel under**

**pressure to choose between food and smoking in your area, as this appears likely to be particularly onerous for smaller or independent establishments but real case studies would be usefully quotable. 'Wet-pub' mapping exercises have in most case shown that the 10-30% estimate of pubs likely to choose smoking (as opposed to choosing health) is optimistically low, particularly in the most deprived or lowest-income areas, and it is also sensible to include such data for your area where available.**

## **Exceptions – Residential premises**

It is proposed that regulations may exempt the following premises from the smokefree legislation, since they act as an individual's dwelling or are clearly private space:

- any place occupied as residential premises or as living accommodation – this includes a house, apartment, flat or a bedroom or living area let or being used as a person's principal place of residence (for example, bedrooms in a hotel, bed and breakfast or hostel which are designated for the use of a particular person or group of persons by the proprietor)
- halls of residence (only in bedrooms)
- adult hospices
- long-stay adult residential care homes
- psychiatric hospitals and units
- prisons or other places of detention
- detention rooms in police premises designated by, or on behalf of, a chief constable
- private vehicles (which may be defined by the regulations to include vehicles which are privately owned or hired for specified or minimum periods)
- a place where only a single self-employed person is working
- a vehicle that is used for work purposes by only ever one person
- oil and gas platforms
- the separate living area of a seafarer.

For some of these exemptions, for instance psychiatric hospitals and units, exploratory work will be needed to see how these can move to become smokefree in the longer term. Work by the HDA in conjunction with NHS Trusts has shown how progress can be made to minimise exposure to secondhand smoke in psychiatric settings.

***Question 6: Views are invited on the above list of exceptions, especially in respect of human rights aspects.***

### **Analysis**

This is a step in the right direction, attempting to enshrine the basic idea that smoking should only be permitted in private places. However, as presented it does not prevent all workers from involuntary exposure – staff in care homes, mental health facilities and prisons may not be adequately protected, and there is a loophole as regards domestic staff or workers providing home care services. The unqualified inclusion of oil and gas platforms is extraordinary given the obvious fire risks. The inclusion of vehicles may be contrary to the development of comprehensive workplace smoke-free policies already in development by local authorities and

the NHS if it is seen to apply to private vehicles being used for business purposes. Some hall of residence bedrooms may still be shared, in which involuntary exposure is still a possibility.

Recommendation

**The principle of the proposal should be welcomed, but suggestions for improved and clearer wording be offered. In order to protect domestic staff and other workers whose workplace may be another person's home – such as home helps, social services staff and visiting nurses – it may also be appropriate to suggest exempting only parts of private living areas not generally used or worked in by any other person.**



## Exceptions – Membership clubs

It is proposed to exempt membership clubs, where the members will be free to choose whether to allow smoking or not. These clubs, such as the Royal British Legion, working men's clubs, cricket and rugby clubs, will be those defined as Registered Clubs or Qualifying Clubs under the Licensing Act 2003.

It is proposed, subject to consultation, to require Qualifying Clubs to undertake an annual ballot, in the course of their normal processes, on whether or not to permit smoking. This reflects the proposal in the White Paper that the members should be free to choose the smoking status of the club.

### *Question 7: Views are invited on the proposal.*

#### Analysis

This is apparently aimed at working men's clubs in order to reduce the political impact of resistance in some high-smoking prevalence areas. As with the suggested food/non-food division, the constitutional nature of the workplace is irrelevant in considering a health and safety measure. The requirement for an annual ballot seems unwieldy, and unlikely to provide a fair route for staff requiring protection as they may not have a vote. Perhaps most importantly, experience overseas has shown that comprehensive bans become ever more popular following implementation, establishing the normality of smoke-free workplaces and public places.

#### Recommendation

**This proposal should be rejected, highlighting the impractical nature of the annual ballot requirement, the failure to protect staff in membership clubs, and the good grounds for confidence that resistance will be limited and transitory (New York City and Ireland being examples of where fears of a public backlash were not realised).**

## Exceptions – Practical implications

We would be interested in your views on how this legislation is likely to impact on your place of work.

### *Question 8: Will the introduction of this legislation present any practical difficulties in your workplace?*

#### Analysis

This question appears aimed primarily at garnering public responses, and is again an open opportunity to point out how the inconsistencies and loopholes inherent in the current proposals will make implementation expensive and unreliable. Quotable examples of the difficulties likely to result in any workplace are worth highlighting.

#### Recommendation

**It is advisable for all respondent to detail the practical difficulties in their own workplace, but also encouraging members of the public (for instance bar staff) to respond to this questions specifically where possible.**

## Signage

It is proposed that smokefree areas should be designated by no-smoking signs, with powers in regulations to prescribe the size and content of the signs.

It is proposed, in line with the proposals being put forward in Scotland, to require a no-smoking notice that should measure at least 280mm by 200mm (A4), displaying the international no-smoking symbol and stating that it is illegal to smoke on the premises. It is also proposed to include information on the maximum fine for smoking in smokefree premises and a phone number for people to call if they have concerns that the smokefree law is being broken on the premises. It shall be the responsibility of the owner, manager or other person in charge to ensure that the no-smoking status of the premises is clearly highlighted by appropriate notices.

### *Question 9: Views are invited on the proposal.*

#### Analysis

This proposal has been influenced by the successful experiences in New York City and Ireland, where clear signage of just the nature described has proved helpful in making smoke-free status of all workplaces clear, and allowing workers such as bar staff to point out the notices rather than have to tackle anyone lighting-up inside in a 'personal' manner

#### Recommendation

**It is recommended that this proposal be welcomed.**

## Offences and penalties

It is proposed to have three types of offence:

- i) not displaying the prescribed no-smoking notice in a smokefree premises
- ii) failing to act to prevent smoking in a smokefree premises
- iii) knowingly smoking in a smokefree premises.

In detail, the proposed offences and proposed penalties are:

(a) A person found guilty of not displaying warning notices in and on no-smoking premises is to be guilty of an offence.

• It is intended that initially the regulations prescribe a fine of up to level 1 (at present £200) for an offence of not displaying warning notices in and on no-smoking premises.

(b) The manager, or any other person who is in charge of smokefree premises at the time at which tobacco is smoked in them, and the licensee in the case of premises which are licensed to sell alcohol, will be guilty of an offence if they fail to prevent smoking in the premises, except where the special defence set out below applies.

• It is intended that the regulations will prescribe a fine of up to level 1 (at present £200) for a first conviction of the offence of failing to prevent smoking in no-smoking premises.

(c) If a person smokes a tobacco product in a smokefree premises in contravention of a prescribed no-smoking sign, he or she is to be guilty of an offence.

- It is intended that initially the regulations will prescribe a fine of £50 (fixed penalty notice) for an offence of smoking in no-smoking premises, but the Bill should contain the power to prescribe fines up to level 1. It is also intended that there will be an opportunity to have the case tried by a Court if there is a dispute.

***Question 10: Views are invited on the level of penalties and the general approach on the three types of offence (this section should be read in conjunction with the next section on defences), and whether there should be higher penalties for repeat offences.***

**Analysis**

These fine levels appear remarkably modest, given the seriousness of the hazard that involuntary exposure to second-hand smoke represents. A £50 fine puts polluting the workplace on a par with minor misdemeanours such as dropping litter; in Ireland, a €3000 fine applies, which provides a higher level of deterrent. In New York City an ascending scale of fines for employers that fail to prevent smoking enables the level of penalty to escalate for repeat offenders – the possibility that this may be considered in England is implicit in the suggestion of a level 1 fine for a 'first offence'.

**Recommendation**

**Where respondents have experience of existing fines regimes that may inform this area of policy development it would be helpful to include relevant insights in responses. The lack of a clear sliding scale for penalties, and the low level of fines for offenders, could both usefully be challenged – - for instance, by suggesting a clearly expressed ascending scale of penalties, with fines at a similar level to Ireland for repeat offenders and possibly licence suspension or revocation for serious repeat infringements by licensed premises operators.**

## Defences

It is proposed that there are specific defences which are to apply only to the offence of failing to prevent smoking and displaying no-smoking signage. These may provide a defence to the offence of failing to prevent smoking in no-smoking premises where a defendant produces evidence that:

- (a) he or she was not aware, and could not reasonably be expected to have been aware, that the contravention was occurring; or
- (b) he or she requested the person smoking to stop smoking and informed the person that the person was committing an offence.

It is intended that the defence in (a) above will also apply to the offence of failing to display a no-smoking sign.

*Question 11: Views are invited on defences set out here.*

### Analysis

These are standard defences, and largely unremarkable as proposals. They could, however, be improved upon; if a reporting line for infractions were established (advertised on the compulsory notices) defence B could be modified to apply only if the defendant had told the smoker to stop, informed them that they were committing an offence AND reported this to the proper authorities.

### Recommendation

**These defences should be accepted in principle, but pressure for a requirement to report offences (via the telephone number on no-smoking notices as proposed above) would be worthwhile.**

## Enforcement

Enforcement will be a matter for the appropriate local authority enforcement officers. Exactly how this responsibility is split between the different groups (for example, food safety officers, trading standards officers, technical officers and environmental health officers) will depend on how the local enforcement authorities are structured at the time the proposed legislation comes into effect.

It is proposed that the legislation should give a general power to the appropriate enforcement officer. The proposal is that the appropriate officers will have the power to:

- (a) inspect premises (see paragraph below); and
- (b) bring prosecutions for any offence under the legislation, including repeat offences.

It is intended that enforcement officers (in many cases this will be environmental health officers who have similar powers/responsibilities in sections 29 to 32 of the Food Safety Act 1990)<sup>6</sup> should have the power to enter premises for the purposes of enforcing the Act and, when on premises for that purpose, to take samples for analysis. Such samples may be needed, for example, to establish that a substance smoked is or includes tobacco, or to determine whether snacks are of a kind which is permitted in a smoking area.

*Choosing Health* confirms the Government's commitment to the New Burdens Doctrine, and states that it will reimburse local authorities for any extra costs they face as a result of the policies in the White Paper. Discussions have already commenced with the Local Government Association (LGA) on questions around enforcement and likely costs.

***Question 12: Views are invited on the approach outlined above. Comments are particularly welcome on how resource-intensive enforcement authorities might expect the enforcement work to be.***

### Analysis

This proposal is open as to the likely practical burdens upon local authority officers, particularly EHOs. There is an implicit rejection of a need for a national body, such as the Office of Tobacco Control in Ireland, to oversee efforts. Enforcement will clearly be more time-consuming and difficult at a local level if the exemptions proposed at present apply, and the unnecessary additional cost to the state of implementing a partial ban rather than a comprehensive one is a key argument.

### Recommendation

**It would be helpful for local authorities to respond in detail as to the likely cost of enforcing a partial ban, how this compares to the possible cost of enforcing a comprehensive (and thus more easily understood) ban, and the levels of reimbursement that may be sought from central government in either circumstances.**

## Smoking at the bar

It is proposed that, in exempted licensed premises, smoking at the bar would not be allowed, although there is no evidence that this would provide any health benefit for those in the premises. A possible route might be to define bar areas and stipulate the distance (1 metre) from the bar where smoking would not be allowed, or to allow the industry to continue to promote this policy without legislation.

***Question 13: Views are invited on how best to regulate a no-smoking at the bar policy in exempted licensed premises.***

### Analysis

This idea comes at the suggestion of the tobacco industry, its main function being to delay meaningful action to make pubs and bars smoke-free by such visible token measures. As the consultation points out, such a measure would not furnish any proven health benefit. It has no scientific merit – if people are smoking in the room, bar staff will be exposed to higher than necessary levels of tobacco smoke pollutants whether the source is one metre from the bar, two metres or five. However, should a partial ban continue to be proposed, the scientific case may provide a means to improve matters, as the only way to genuinely protect staff will be to define the bar area as the contained space that bar staff work in – i.e. smoking should only take place in a separate room with a self-closing door and no re-circulation of air to the bar area.

### Recommendation

**Respondents could usefully highlight the considerable evidence that second-hand smoke pollutants are present at a higher level throughout a room in which people are smoking, the obvious fact that smoke drifts, and the reality that such a token gesture would not actually protect the health of workers. Pressure to make worker protection meaningful in a partial ban environment, detailing the specific measures necessary as above, would be useful in maximising health gains for bar workers and encouraging publicans to take the lower-cost route of voluntarily introducing a smoke-free environment if a comprehensive ban is not required by legislation. Practical issues as to the enforcement practicalities for environmental health officers could usefully be included here.**

## Timetable

A timetable is proposed for this legislation as follows:

- By the end of 2007, all enclosed public places and workplaces, other than licensed premises (and those specifically exempted), will, subject to legislation, be smokefree.
- By the end of 2008 arrangements for licensed premises will be in place.

*Choosing Health* therefore sets out an absolute end point, but does not rule out that these policies will be in place before this point. Indeed, practice from other northern European countries has been that the middle of winter is not necessarily the best time to begin asking smokers to go outside.

***Question 14: Views are invited on the best time for the law to come into effect. Does the end of December provide any particular challenges or opportunities? Enforcement authorities, employers and the hospitality industry may want especially to respond on this point.***

### Analysis

Experience from abroad certainly has shown that winter is not the best time to introduce an indoor smoking ban – but it has also shown that there is not necessarily a need to give licensed premises (i.e. drinking venues) a significantly later implementation point than any other workplace. There is good reason to plan a lead-in period of up to a year before implementation, but delaying the start date further may achieve little more, whilst prolonging exposure to the hazards of second-hand smoke. The tobacco industry – possibly lobbying via ostensibly hospitality industry proxies – will press for delays, as every additional month of additional time will represent a postponement of an expected decrease in tobacco sales once restrictions are in force. An earlier start, however, would give more time for the public to adjust to – and, if international experience is a precedent, grow to like – smoking restrictions before the next General Election.

### Recommendation

**Respondents could usefully suggest a one-year lead-in period, ending in spring, summer or early autumn. Bringing the implementation date forward to mid-2008 is the very least that should be asked for – if the legislation can be carried through Parliamentary process and Assent by mid-2006 it may even be reasonable to suggest bringing the start date forward further to mid 2007 for all workplaces. It is worthwhile pointing out that delay beyond the year that may be required to prepare the public for the change may achieve nothing positive, whilst prolonging health hazards and causing confusion and uncertainty for the hospitality industry, who are increasingly aware that a 'level playing field' is the most stable basis upon which pub trade can flourish and fairly compete.**

## **Unintended consequences for binge-drinking**

*Choosing Health* stated: “Some have pointed to a risk inherent in this proposal that pubs may decide to stop serving food instead of imposing a smoking ban; and that this may have an adverse impact on our drive to tackle binge-drinking. We believe that the profitability of providing food will be sufficient to outweigh any perverse incentive for pub owners to choose to switch. However, we will consult widely with all those engaged in combating irresponsible drinking to ensure the risk is mitigated, and will monitor outcomes.”

***Question 15: Views are invited on the level of risk this policy may present to the drive to tackle binge-drinking and on how any such risk can be mitigated.***

### **Analysis**

This is one of the Achilles' heels of the partial ban proposals – it would indeed be 'perverse' for legislation to effectively discourage the provision of food in pubs whilst the intention to tackle binge-drinking naturally favours the spread of the type of pubs where people can sit down and eat and drink in moderation. The profitability of food – or the profitability of smoke-free environments – are already encouraging some publicans to provide some non-smoking premises in more affluent areas, but they are very few at present, and generally not present in areas of low incomes. There is thus a link to health inequalities – if binge-drinking and anti-social behaviour is occurring at high levels in populations experiencing higher health inequalities, which are also populations experiencing higher smoking prevalence where the pressure to switch from food to smoking will be the greatest, the effect could be serious and the optimistic assessment in *Choosing Health* unreasonable.

### **Recommendation**

**Local authorities and law enforcement bodies can usefully respond to this with detailed examples of the likely impact in their area, possibly by raising the issue with the relevant Crime and Disorder Reduction Partnership. Where 'wet-pub' mapping exercises are carried out, it would be useful to compare the results with mapping of drink-related disorder.**



## General points

*Question 16: It has been suggested that the proposals in the White Paper detailed here will result in smoking pubs and clubs being concentrated in poorer communities. The consequence of this is that the health benefits, in reduced exposure to secondhand smoke and in reduced smoking prevalence, will be less in these communities than in better-off communities, thereby exacerbating health inequalities. Views and evidence on this issue are invited.*

### Analysis

This is an open invitation to make the case for a comprehensive ban on the basis of meaningfully addressing health inequalities.

### Recommendation

**If your area includes communities known to experience health inequalities (for instance, if a regeneration area or Spearhead PCT patch, although this is not exclusive) it is well worth conducting a 'wet-pub' mapping exercise to plot potential exempted licensed premises – you are likely to see figures well above 10-30% in these areas, which will be valuable evidence to submit in its own right, and even stronger if you have resources to map in non-deprived areas for comparison. Northamptonshire smoke-free alliances have experience of this approach, and ASH also have a model available – both are willing to advise local respondents.**

**In presenting local data, it is worth considering actual maps or visual presentations, rather than numerical reports alone – these have been found to have additional impact in consultation responses in the past.**

## Partial Regulatory Impact Assessment

The partial RIA was originally published alongside the White Paper in November 2004. Responses on the key questions in this partial RIA are welcomed.

### Analysis

The PRIA was available on the DH website from November 2004, but not actively publicised or promoted – this is therefore the first that many potential respondents will have seen of it. The PRIA sets out the reasons for the proposed legislation – and why the proposals are not comprehensive.

### Recommendation

**Unlike the questions above, responding to the PRIA is an opportunity to emphasise the inadequacy of the partial ban proposals in principle as well as practice. It is important that this material is not overlooked in consultation responses.**

### Objective

The Government's objective is to:

- reduce the risk to health from exposure to secondhand smoke
- recognise a person's right to be protected from harm and to enjoy smokefree air
- increase the benefits of smokefree enclosed public places and workplaces for people trying to give up smoking, so that they can succeed in an environment where social pressures to smoke are reduced
- save thousands of lives over the next decade by reducing overall smoking rates.

Smokefree enclosed public places and workplaces would include those to which members of the public have access in the course of their daily business and leisure. They would include trains, buses, taxis, shops, schools, healthcare facilities, sports centres, offices, factories, cinemas, pubs, restaurants and clubs. Where a public place is also a workplace, action taken would not replace the existing duty of care under the Health and Safety at Work etc Act 1974.

The health risks of secondhand smoke have been reported by SCOTH in 1998 and 2003. Secondhand smoke in indoor places not only harms non-smokers, but also harms smokers and makes it difficult for the 7 out of 10 smokers who want to quit to succeed.

*Smoking Kills* (1998) led to the Public Places Charter – this set targets for voluntary smoking restrictions, which by 2003 had not been met, to the disappointment of Ministers.

### Option 1 – Continue with a voluntary approach

Likely to result in only limited progress. If we assume that indoor workplaces without bans are those least willing to apply them, we could estimate that only half will voluntarily choose a ban. A hospitality industry has launched an initiative for further voluntary action, but this does not cover the majority of the industry. Even if completely successful, there would still be significant exposure to secondhand smoke for people in the premises and no guarantee of anyone being able to find a smokefree pub or bar. The costs to Government are considered to be zero.

### **Option 2 – National legislation to make all indoor public places and workplaces completely smokefree (without exemptions)**

No exemptions would be made for the hospitality industry or others. Of the four options, this option offers the highest levels of benefits, including the highest reductions in prevalence, deaths from secondhand smoke, cleaning and fire risk, and increases in productivity. The main risk is that a total national ban may not reflect public opinion completely, and may therefore be more controversial and more difficult to enforce. However, experience from Ireland and other jurisdictions has not identified a significant enforcement problem. There would be a cost to Government to enforce the legislation, estimated at around £20m a year initially, although expected to fall to a minimal level subsequently. The available evidence does not support speculation that hospitality trade profits would suffer.

### **Option 3 – Legislation giving local authorities new powers to control secondhand smoke in indoor places**

This would be a longer term and more unpredictable route. Costs and benefits would not be known until the response from all local authorities was known. This may result in a confused system across the country, and there is every possibility that some local authorities may not make use of the legislation at all. This option is also the route that the hospitality industry favour least.

### **Option 4 – National legislation to make all indoor public places and workplaces completely smokefree (with exemptions)**

All enclosed public places and workplaces will be smokefree. This is likely to provide benefits set at a level below that of Option 2, but at a much greater level than Option 1. The loss of benefit in comparison with Option 2 is likely to be in non-workplace enclosed places (for example pubs). The benefits from reductions in deaths due to customers giving up are estimated, at this stage, to be between zero and the full benefits in Option 2. Overall there would be a reduction in secondhand smoke; an estimate for the purposes of the partial RIA is that more than half the deaths from secondhand smoke would be averted. A risk of this proposal is that food-led licensed premises, pubs in particular, may make a choice to give up serving food in favour of allowing smoking, thereby reversing the recent trend towards pubs being more than simply a place to drink alcohol. The different provisions for different businesses may be more complicated to enforce. Costs are estimated to be higher than for Option 2, as the enforcement decisions are likely to be more complicated (with more exemptions).

#### **Analysis**

Option 1 achieves nothing, Option 3 is confused and inconsistent, Option 2 would provide the highest level of health benefits at a modest cost, and Option 4 would achieve lower health benefits at a higher costs. The PRIA is correct on all points, including the reminder that other jurisdictions have not found a comprehensive ban difficult to enforce, which illustrates the illogicality of proceeding with a partial ban.

#### **Recommendation**

**When responding, you could helpfully point out how the greater health benefits of Option 2 will contribute to public health in your area, as well as highlighting again how the greater enforcement burden and complexity will disrupt businesses, as well as other fields of environmental health activity, in your area.**

## Net sum of all costs and benefits

Benefits	Option 1 Voluntary action	Option 2 Full ban in all enclosed public places and workplaces	Option 3 Local powers	Option 4 Ban with exceptions
<b>Annual benefits £m</b>				
a) Averted deaths from secondhand smoke Employees Customers	4 75	21 350	0-21 0-350	21 150-250
b) Averted deaths from smokers giving up Employees Customers	800 -	1600 180	0-1600 0-180	1600 0-180
c) Averted deaths from reduced uptake of smoking	275	550	0-550	550
d) NHS expenditure 20 saved through reduced smoking prevalence		100	0-100	40-100
e) Reduced sickness absence	14-28	70-140	0-140	28-140
f) Production gains (from reduced exposure to secondhand smoke)	68-136	340-680	0-680	306-612
g) Safety benefits (damage, fire, injuries, etc)	13	63	0-63	57-63
h) Reduced cleaning and maintenance costs	20	100	0-100	90-100
<b>Total benefits</b>	<b>1289-1371</b>	<b>3374-3784</b>	<b>0-3784</b>	<b>2842-3616</b>
<b>Annual costs £m</b>				
i) Implementation (changes to signage, alterations to premises, etc)	-	-(minimal)	unknown	-(minimal)
j) Enforcement	-	20	0-20+ Unknown - dependent on local decisions	20+
k) Education/ communication	-	1		1
l) Revenue losses to Exchequer from falling cigarette sales (employees) (customers)	570 -	1145 150	0-1145 0-150	1145 0-150
m) Losses to the tobacco industry	57	129	0-129	114-129
n) Unintended consequences (mess on streets, etc)	-	-	-	-
o) Production losses (smoking breaks)	215	430	430	430
p) Consumers' surplus losses to continuing smokers	80	155	155	155
<b>Total costs</b>	<b>922</b>	<b>2030</b>	<b>0-2029</b>	<b>1844-2030</b>
<b>Net benefit</b>	<b>367-449</b>	<b>1344-1754</b>	<b>0-1755</b>	<b>998-1586</b>

## Competition assessment

A competition assessment has been undertaken; outside the hospitality sector, no significant competition issues were identified. The biggest impact of action on secondhand smoke will be for the hospitality sector and, within the sector, for those businesses that have made least progress in becoming smokefree (for example, cinemas are almost universally smokefree, whereas smokefree pubs are very rare).

- Option 1 is a continuation of existing policy and does not give rise to any issues.
- Option 2 provides for a level playing field to business with no increased entry costs (indeed it will decrease entry costs to the pub sector, as expensive ventilation currently used will no longer need to be installed or maintained).
- Option 3 may result in impact on competition between businesses in different jurisdictions, which may result in smokers moving from a legally required smokefree public place in one local authority, to a smoking public place in the neighbouring local authority. There is potential for higher entry costs if an LA were to decide to require specified ventilation in local legislation.
- Option 4 will result in a decision for licensed public places whether to serve food or not. As with Option 2, and for similar reasons, this route may decrease rather than increase barriers to entry in premises that will be smokefree. Views are welcomed on competition aspects of this option.

### Analysis

Option 1 creates a competitive advantage for the small number of existing smoke-free pubs, but the effect in terms of creating smoke-free places is inadequate. Option 3 creates the least level playing field possible. Option 2 creates a completely level playing field and will evidently be the lowest-cost for businesses to enforce, but to make similar claims about Option 4 appears groundlessly optimistic.

### Recommendation

**Views are requested as to the competition weaknesses of Option 4, rather than hard economic data. It would be helpful to highlight your concerns about the deleterious effect of a partial ban upon hospitality businesses in your area, whether or not you have financial evidence to complement these views.**

## Rural proofing

We have considered the impact of these measures in relation to rural areas, and consider that they will not have a different or disproportionate impact on people living in rural areas. It has been suggested that rural pubs might be disproportionately affected; however we have no evidence at present to support this. We welcome further comments from stakeholders on this issue.

### Analysis

This has been pointed out because some smaller rural pubs have only one or two rooms and low turnover, so creating separate smoking rooms and installing expensive (although ineffective) ventilation systems would be architecturally and financially impossible – if rural pubs thus lost trade to larger-scale urban facilities as a result this could threaten their financial viability. Pubs are the only regularly available community facility in many small rural communities, so a partial ban should arguably not pass the 'rural proofing' test – however, the PRIA asks for evidence.

### Recommendation

**Where this affects pubs in your area, evidence (anecdotal or otherwise) could usefully be included in your response.**

### **Enforcement and sanctions**

Further consultation will be necessary on the full details of the licensing and enforcement arrangements. This may simply involve redirection of existing local enforcement work for some of the options, or it may be a much greater change involving action to enforce the proposed legislation. We welcome comments from stakeholders on this issue and on appropriate sanctions. Below are some hypothetical scenarios for each option and the estimated cost of enforcement. We would be grateful for stakeholder views on these and the cost to individual organisations. Views on the level of fines and the scale of enforcement this are also welcomed.

#### **Option 1**

Continue with current enforcement.

##### *Hypothetical scenario 1*

The market and business/employers will decide the level of protection and therefore there will be no enforcement costs.

**Total estimate  
£0m**

#### **Option 2**

Based on Ireland's experience, it might need 500 officers at a cost of £20m for a year, dropping substantially after the start.

##### *Hypothetical scenario 2*

Enforcement/Environmental Health Officers will be employed to enforce new legislation. Estimated total cost £20m. If there is a circumstance where the law has been broken then the EHOs will be contacted to take the appropriate action. This action will include the cost of prosecution. Evidence from Ireland is that the number of prosecutions remains very low. If EHOs cannot be contacted and the circumstance escalates to a public order issue then it is likely that the police will be called upon. We welcome comments on the cost of this.

**Total estimate  
£20m plus any  
courts/legal aid,  
plus possible police  
costs**

#### **Option 3**

Depending on what local authorities choose, the need for enforcement could be anything up to that identified for Option 2 or 4.

##### *Hypothetical scenario 3*

Extreme case scenarios would be if each local authority decided to ban smoking in public places (Option 2) or if they decided to do nothing and encourage voluntary action (Option 1). However, the costs will depend on the level of enforcement decided by each LA. We welcome comments on this. These costs would include EHO costs, any prosecution/appeal costs to courts and legal aid, plus possible police enforcement costs.

**Total estimate £0 –  
20m plus any  
courts/legal  
aid, plus possible  
police costs**

#### **Option 4**

At least that required for Option 2.

##### *Hypothetical scenario 4*

There are a number of scenarios for this option. It is envisaged that enforcement costs to cater for all the scenarios will include the following: Enforcement/Environmental Health Officer employment and training costs – £20m. Again, any prosecution/appeal costs to courts and legal aid, plus possible police enforcement costs. We welcome in particular views on prosecution and police costs. Total estimate

**£20m plus any  
courts/legal aid,  
plus possible police  
costs**

Due to the complexity and likelihood of misinterpretation, a partial ban is certain to be more expensive to enforce successfully.

Recommendation

**Estimates of differential local costs for Options 2 and 4 could usefully be included in responses.**



## Public opinion

Secondhand smoke was the single biggest issue raised in the *Choosing Health?* Public consultation. Over half of submissions were in favour of a national ban on smoking in public places or workplaces. There is increasing public support for smoking restrictions or smokefree legislation to cover indoor public places and workplaces, but polls indicate that the measure of support varies according to types of premises. For most workplaces and public places support for restrictions is generally 80 per cent or more. However, pubs stand apart from all other indoor places, and even other parts of the hospitality sector, as being a special case in the mind of the public.

### Analysis

Pubs are no different from any other workplaces in most aspects of health and safety, and here too the difference is one of perception rather than fact. Many public consultation exercises have been weakened by asking the public about preconceptions, rather than framing the question constructively; if asked simply about where smoking should be restricted – workplaces or pubs too? – this sets up a false dichotomy and fails to remind people that pubs are also workplaces. If and when a comprehensive approach is agreed, this misunderstanding can be tackled through targeted communications programmes, as carried out successfully in many other parts of the world.

### Recommendation

**It is worth reiterating in responses that uninformed opinion is of questionable value in considering technically validated health and safety measures, and that public acceptance can and will grow as a result of planned communications activity if the Government chooses to act – indeed, smoke-free measures internationally have tended to become more popular once implemented. Where resources allow it may be possible to carry out small-scale local opinion studies to ask members of the public whether bar staff should be protected from the health hazards of second-hand smoke as well as other workers, and if such work is carried during the consultation period the results could usefully be included in responses.**

## Summary and recommendation

Option 4 is the preferred option, as it offers the highest level of benefits possible, taking into account the need for appropriate exceptions from a ban on smoking in enclosed public places and workplaces that reflect public opinion (see table below for a summary of the four options). Taking forward Option 4 will be subject to consultation and the feedback received from a wide range of stakeholders.

<b>Option 1</b>	<b>Option 2</b>	<b>Option 3</b>	<b>Option 4</b>
Least restrictive and costly but may not make significant progress	Most effective but may be seen by the public as too restrictive, as no exemptions are identified	Potentially equally as effective as Option 2, but with no guarantee of action, no way of predicting what type of action would be taken, and no guarantee of a timescale for action	The preferred option – although likely to be less effective in reducing smoking and protecting from secondhand ban, exceptions a more complex and costly approach which tries to reflect public opinion
<b>£m net benefit</b> 367–449	<b>£m net benefit</b> 1344–1754	<b>£m net benefit</b> 0–1755	<b>£m net benefit</b> 977–1651

### Analysis

Option 4 was the option preferred by the previous Secretary of State for Health for reasons of expediency – it was considered unhelpful to let a potential ban become a General Election issue. Apart from the misapprehension about public opinion, the PRIA makes it clear that Option 4 is in no sense preferable to Option 2, which is superior in all respects; a comprehensive workplace restriction would be easier to understand, easier to enforce, lower cost to the Government, local authorities and employers, in the medium to long term more popular, and capable of delivering the greatest health benefits. Option 2 is the only logical avenue for national action – but the Government may not feel able to recognise this and change course without an overwhelming response to this consultation exercise in support of comprehensive restrictions.

### Recommendation

**Please take the time to respond to the consultation questions and PRIA in as much detail as possible, or at least identifying the 'killer facts' in your area. Every informed response that strengthens the case for comprehensive restrictions and illustrates the additional burdens and missed opportunities that a partial ban would represent is of real value.**

## Useful supporting information for drafting consultation responses

There is copious material freely available at [www.ash.org.uk](http://www.ash.org.uk), and a website specially established to inform consultees at [www.smokefreeaction.org.uk](http://www.smokefreeaction.org.uk)

### A summary of key arguments for reference:

#### **Second hand smoke**

- SCOTH (Scientific Committee on Tobacco and Health), Nov 2004, found that exposure to second hand smoke (SHS) in non-smokers increased the risk of lung cancer by 24% and heart disease by 25%. The report confirmed that SHS 'represents a substantial public health hazard' ([www.advisorybodies.doh.gov.uk/scoth/](http://www.advisorybodies.doh.gov.uk/scoth/))
- Prof. Jamrozik's report, 'Estimate of deaths attributable to passive smoking among UK adults', published in the BMJ in April 2005, found that 11,000 people die each year due to exposure to SHS. This breaks down to 30 people each day. Also found that one worker each week dies from SHS exposure in the hospitality industry.  
<http://bmj.bmjournals.com>
- The dangers of second hand smoke have been confirmed by the Government's Chief Medical Officer, Sir Liam Donaldson, as well as by the heads of all of Britain's thirteen Royal Colleges of Medicine.
- The US Environmental Protection Agency (EPA) has classified environmental tobacco smoke as a Class A (known human) carcinogen, alongside asbestos and benzene.
- Tobacco smoke contains 4,000 chemicals and 60 known carcinogens.
- In Ireland, post-ban, levels of carbon monoxide in non-smoking bar workers have decreased by 45%.

#### **The ventilation argument**

- Ventilation and similar systems cannot eliminate all the dangerous elements of cigarette smoke. They remove the visible smoke but not the cancer-causing particulates which are invisible to the human eye and too small to be caught by the filter.
- Tobacco industry giant Philip Morris has previously admitted on its company website that ventilation is 'not shown to address the health effects of second hand smoke'.
- The ventilation argument is also used to address the issue of the 'comfort' of non-smokers. This draws attention away from the health concerns: while it is true that non-smokers often avoid pubs because they dislike the smoke, the reason for smoke free legislation is to protect people's health.
- Ventilation systems are expensive for businesses and ineffective in removing the risks from SHS. Smoke free workplaces are the only safe option.

#### **The 'smoker's right to smoke' argument**

- Smokers should not be free to endanger the health of those around them. The right of non-smokers to breathe clean air must take priority over the perceived right of smokers to smoke.

- The issue isn't about *whether* smokers can smoke, but about *where* and *when* it is appropriate for them to smoke so that they do not harm the health of others.
- Smoking in enclosed public places causes direct harm to other people. A law which prevents this is reasonable and fair.
- The Americans coined the phrase 'your right to smoke ends at my nose'.

#### **Ease of enforcement**

- In Ireland, where a total ban has been in place for a year, compliance has been very high: 94% of hospitality workplaces inspected were smoke free.
- Smoking restrictions are already in place in many areas in this country, for example on the London Underground. These restrictions are routinely observed without heavy enforcement, because the great majority of people are law abiding.

#### **Popularity with the public**

- In Ireland, post-ban, 93% of people think the smoke free law is a good idea, including 80% of smokers.
- In \_\_\_\_\_shire, \_\_\_\_\_% of people who took part in the Big Smoke Debate wanted smoke free public places. \_\_\_\_\_% wanted legislation to this effect. \_\_\_\_\_% wanted totally smoke free pubs.

#### **Concerns that a smoking ban will move smoking to the home**

- There is no evidence to support this.
- Many smokers give up altogether when smoke free legislation is introduced.
- Smokers and non-smokers become more aware of the risks of smoking around others, and children in particular, when smoke free legislation is introduced.
- In California, the percentage of children living in smoke free homes rose from 38% in 1992 to 82% per cent in 1999. California went smoke free in 1995.

**Smoke-Free Alliance is available to assist you in responding if you would like practical assistance, opportunities to discuss the most persuasive approaches, or support in drafting a response. Please contact us as below:**

## **NUMBERS & CONTACT DETAILS**