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Target Audience:  
All Frontline Staff in HSE

## **SECOND HAND SMOKING GUIDANCE FOR INSPECTORS, HSAOS, COMPLAINT OFFICERS, ETC**

This OC updates inspectors and others on HSE's position on smoking at work. Scotland has introduced new legislation but the situation in England and Wales is unchanged. However, England and Wales will be introducing similar legislation and HSE staff may receive enquiries about HSE's position.

### BACKGROUND

1 The prohibition of smoking in certain places is being taken forward as a public health issue across Great Britain. The Scottish Executive, the Department of Health (DH) and the Welsh Assembly Government lead on this topic in Scotland, England and Wales respectively.

#### THE NEW LEGISLATION IN SCOTLAND

2 The Smoking, Health and Social Care (Scotland) Act 2005 came into force on 26 March 2006 and introduced a ban on smoking in almost all enclosed public places in Scotland. As a result, the vast majority of workplaces are now smoke free. However there are a small number of exempted premises, where the duty holder may allow smoking. They include:

- Residential accommodation;
- Designated rooms in adult care homes; psychiatric hospitals and units; and offshore installations;
- Adult hospices
- Designated detention or interview rooms; and
- Private vehicles

3 The Act creates four main offences:

- Permitting others to smoke in no smoking premises;
- Smoking in no smoking premises;

- Failing to display warning notices in no smoking premises; and
- Failing without reasonable cause, to give one's name, and address on request by an enforcement officer.

4 The law to ban smoking in certain places is being made under Public Health provisions and not the Health and Safety at Work etc. Act 1974 and will be enforced by the Local Authorities in all premises.

5 The Scottish Executive has drawn up an enforcement protocol agreed by the Royal Environmental Health Institute of Scotland, the Society of Chief Officers of Environmental Health, the Convention of Scottish Local Authorities (COSLA), the Crown Office and Procurator Fiscal Service, the Association of Chief Police Officers in Scotland (ACPOS) and the Scottish Executive Health Department. Please see Annex 1.

6 HSE wishes to cooperate with and support LAs charged with enforcing the law on smoking in HSE-enforced premises. HSE inspectors and HSAOs should therefore bring matters of evident concern to the attention of the employer; such matters will include evidence that smoking is continuing in premises subject to the ban, particularly if it involves a number of smokers, and failure to display warning notices (para 4 and annex 1 give further information on the LA approach). If the employer resists acting on this advice, then inspectors/HSAOs should bring this to the attention of the appropriate local authority. However, we expect, based on experience in Eire and experience so far in Scotland, that the ban will be largely self-enforcing and that after an initial "settling down" period, there should be very few breaches. Any complaints received by HSE about the smoking ban should be referred to the appropriate local authority. It is unlikely that staff will have to spend significant time on this topic, but if it necessary to do so, then they should use the COIN activity "Advice, Education and Promotion".

7 HSE policy in exempted premises will remain the as it is at present and as summarised in IND(G)63(L)Rev "Passive smoking at work". This concentrates on the welfare aspects of smoking, and what can be achieved through the use of section 2 of the HSW Act in relation to welfare. OC 255/7 "Passive smoking" remains current and although much of its guidance has been overtaken by this circular, it gives useful background information. It will be replaced in due course. In exempted premises, HSE will continue to promote sensible, proportionate management of SHS to as low a level as is reasonably practicable, and to encourage employers to adopt smoking policies in the workplace, which give precedence to the wishes of non-smokers not to be exposed to SHS. It will not be possible to require exposure to SHS to be eliminated at source in exempted premises, although employers may choose to do so in premises under their control.

8 There is no completely effective way of protecting employees from the effects of SHS, short of a total smoking ban. However, employers may take some relatively simple measures to mitigate the effects of SHS. Examples of such measures include the following:

- Asking occupiers of domestic premises not to smoke during visits.

- Arranging meetings at exempted premises to take place in the open air or a non-enclosed shelter.
- The Scottish Executive guidance suggests that, where care homes have two lounges, one could be designated as a smoking area, while the other remains smoke free.
- Providing suitable ventilation in exempted premises, consistent with maintaining the comfort and functionality of the premises.
- Minimising the time spent by individual non-smokers in designated smoking rooms.
- Health promotion campaigns on smoking cessation.

9 The evidential link between individual circumstances of exposure to risk in exempted premises will be hard to establish. In essence, HSE cannot produce epidemiological evidence to link levels of exposure to SHS to the raised risk of contracting specific diseases and it is therefore difficult to prove health-related breaches of the Health and Safety at Work Act. **Inspectors are therefore urged to exercise caution in considering any formal enforcement action in relation to SHS (with one exception – see below). However, the full impact of the smoking ban is difficult to foresee completely, and if serious circumstances emerge where inspectors believe they must consider enforcement, then they should consult Health Unit and the Policy Team (see Annex 2 for contacts) before taking action.** The exception to this guidance relates to pre-existing health conditions of employees which can be made worse by exposure to second hand smoke e.g. respiratory or cardiovascular disease, or to pregnancy. In such circumstances, specialist and medical advice may be necessary to secure support for enforcement action.

## ENGLAND AND WALES

10 The position in England and Wales is unchanged for the moment. In England, the Health Bill has received its third reading in the House of Lords and the Department of Health is consulting on draft regulations (from 17 July – 9 October 2006). The consultation document includes proposals for compliance and enforcement by local authorities. The Government is already committed to banning smoking in central government departments and the NHS by the end of 2006. New legislation is expected to come into force by summer 2007.

11 The Health Bill devolves regulation-making powers on this issue to the Welsh Assembly. The Assembly Government will consult on draft regulations once the Health Bill has received Royal Assent. The policy set out by Assembly Ministers last year is similar to that in Scotland and proposed for England.

12 In England and Wales Inspectors should follow HSE's current policy, set out in our guidance, "Passive smoking at work – IND (G) 63 (L)", and actively encourage employers to have smoking policies in place which give priority to

the needs of non-smokers who do not wish to breathe tobacco smoke. They may also wish to suggest that employers prepare for the forthcoming legislation.

13 Revised guidance will be issued to advise on the new legislation in England and Wales in due course.

#### CONTACTS AND OTHER INFORMATION

14 If Inspectors encounter any issues, problems, solutions, etc. then they are encouraged to inform the contacts in annex 2.

Date first issued: 28 July 2006

## ANNEX 1

### ENFORCEMENT PROTOCOL IN SCOTLAND

This document outlines the key principles of the enforcement of the smoking provisions of the Smoking, Health and Social Care (Scotland) Act 2005 as agreed by the Royal Environmental Health Institute of Scotland, the Society of Chief Officers of Environmental Health, the Convention of Scottish Local Authorities (COSLA), the Crown Office and Procurator Fiscal Services, the Association of Chief Police Officers in Scotland (ACPOS) and the Scottish Executive Health Department.

#### **Legislation**

The Smoking, Health and Social Care (Scotland) Act 2005 provides for 4 main offences: permitting others to smoke in no smoking premises; smoking in no smoking premises; failing to display warning notices in no smoking premises; and failing without reasonable cause, to give one's name, and address on request by an enforcement officer.

The Act allows for an individual to discharge any liability to conviction by payment of a fixed penalty. It also provides for an authorised local authority officer to enforce the legislation and issue fixed penalty notices. These "enforcement officers" encompass all local authority officers who may be engaged in enforcement work associated with the smoking controls including Environmental Health Officers, Technical Officers and Licensing Officers.

#### **Enforcement**

Enforcement officers will assess whether premises comply with the legislation. Enforcement officers will do so by determining whether owners, occupiers, managers, or persons in control of premises have taken all reasonable precautions to avoid people smoking. Annex A sets out more detail.

Enforcement officers will work closely with businesses, building compliance with legislation through education advice and presentation. Enforcement action is taken forward only when the seriousness of the situation warrants it. The approach to enforcement is non-confrontational focused on raising awareness and understanding to ensure compliance. Any enforcement action undertaken must be fair, proportional and consistent. Enforcement action should be considered against individuals smoking in no-smoking premises where the owner, occupier, manager or any other person in charge can demonstrate that they have taken all reasonable precautions against these individuals smoking on their premises.

#### **Inspection**

Inspection will either be proactive ie to confirm compliance; or reactive in response to a complaint. The initial focus of inspections should be on premises:

- Which are open to substantive numbers of people.
- Where there is an absence of pre-existing self imposed smoking controls.
- Where enforcement officers do not usually visit as part of their routine inspections under other legislation.

A risk based inspection programme for premises is likely to evolve as officers become more familiar with the new requirements. The development of such a programme could include factors such as:

- Confidence in management.
- History of compliance with the requirements.
- Number of complaints received from the Compliance Phone Line.

Enforcement officers may carry out a number of different types of inspections in relation to smoking controls – examples are listed below. These options are not mutually exclusive. Officers should choose the most appropriate course of action once all factors have been taken into account.

- Official inspection** – officers announce themselves and show appropriate identification to person in charge of premises, prior to assessing compliance with the provisions.
- Covert** – officers will assess compliance by observation within the premises, and subsequently announce themselves and show appropriate identification to person in charge of premises, at the end of the period of surveillance.
- Covert and leave** – As above, but the officers wait until the following day to discuss their findings with the manager of the premises.

Any covert inspection should comply fully with each local authority's policy in relation to the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA).

The personal safety of officers should not be compromised by enforcement action.

### **Complaints Protocol**

All complaints should be assessed by an enforcement officer and action taken appropriate to the nature of the complaint.

### **Assessment of Compliance**

Enforcement officers will require to carry out an assessment to determine whether or not owners, occupiers, managers or any person in control of no-

smoking premises have taken “all reasonable precautions” to avoid people smoking. These precautions will include a combination of compliance with **specific legal requirements (in bold text)** and activities which would be considered good practice by organisations in demonstrating that they are taking all reasonable precautions.

All businesses and organisations should have received guidance from the Scottish Executive on the implications of the new legislation and how to comply. Sample signs were included. Further copies of the guidance and signage can be obtained from [www.clearingtheairscotland.com](http://www.clearingtheairscotland.com)

**Issues for officers to assess are:**

### **Signage for premises**

**“No smoking” signs must be conspicuously and permanently displayed to be visible to and legible by persons in and persons approaching no-smoking premises.**

**The minimum signage requirement for premises is a no-smoking notice which:**

- **is at least 230mm by 160 mm in size;**
- **states that the premises are no-smoking premises and that it is an offence to smoke there or knowingly to permit smoking there;**
- **displays the international “No Smoking” symbol (at least 85mm in diameter);**
- **displays the name of the person to whom a complaint should be made in the event of non-compliance; and**
- **is displayed in such a manner that it is protected from tampering, damage, removal or concealment.**

**Any additional notices required to make sure everybody on the premises is made aware that smoking is not allowed are required to:**

- **state that the premises are no-smoking premises and that it is an offence to smoke there or knowingly to permit smoking there; and**
- **display the international ‘no smoking’ symbol, at least 85 mm in diameter;**

### **Signage for Vehicles**

**No-smoking signs should be displayed in or on any vehicles that are affected by the ban in such a way that the signs can be seen and read by persons who are in the vehicle, as well as persons approaching the vehicle in question. The reference to vehicles includes trains, buses,**

**taxis, private hire cars and any vessel, boat or hovercraft. There's no legal requirement on the size of these signs but they must:**

- **state that the vehicle is no-smoking and that it is an offence to smoke there or knowingly to permit smoking there;**
- **display the international no-smoking symbol; and**
- **display the holder of a particular post (e.g. the manager) to whom a complaint may be made by anyone who observes someone smoking.**

## ACTIVITIES

### Ashtrays

Ashtrays and other such receptacles should not be present in a no-smoking premises.

### Management Controls

It is recommended that those in control of no-smoking premises:

1. Develop a smoke-free policy, (preferably written).
2. Develop a procedure for dealing with any people who smoke (preferably written).
3. Communicate to staff in both the policy and written procedure.
4. Keep a written record of any incident (and outcome) where responsible member of staff confronts an individual for smoking on the premises.

### Smoke-free policy and procedures

It is strongly recommended that owners and managers establish and implement a written policy and procedures to demonstrate their compliance with the law. A sample smoke-free policy was provided as part of the Scottish Executive's guidance to businesses. This can be adapted by individual businesses and organisations for their use, if they wish.

The procedures should contain items similar to the following:

- Draw the person's attention to the "No Smoking" signs in the area and inform them that he/she is committing an offence by smoking. Politely ask them to stop smoking.
- Direct them to the nearest place where they are able to smoke legally.
- Advise the person smoking that their actions could result in the person in control of the premises receiving a Fixed Penalty Notice of £200 or being prosecuted and receiving a fine of £2,500.

- Refuse the person service.
- If the person continues to smoke, ask them to leave the premises.
- If he/she refuses, implement normal procedures for anti-social/illegal behaviour on the premises.
- Maintain a written record of all such incidents and outcomes.
- If physical violence is threatened by the person smoking, notify and/or seek assistance from the Police.

The policy should identify members of management and/or staff who have responsibility for its implementation and review.

### Staff

Employers and managers of no-smoking premises should ensure that all staff, including new members of staff, are aware of the no-smoking policy. All staff working in no-smoking premises should be aware of which member of staff or management present is the responsible person for dealing with any persons smoking.

### Record of incidents

In order to assist any future defence of “due diligence”, each premises should keep a documented record of any incidents.

Businesses should be encouraged to contact their local Environmental Health section after any incident.

Owners, occupiers, managers or other persons in charge should only be reported to the Procurator Fiscal after repeated failure to comply with the legislation. Again, this should be reserved for serious or persistent contraventions, and an educational and non-confrontational approach should be used whenever possible.

### QUESTIONS

If you have any questions about the legislation in Scotland contact:

The Scottish Executive Health Department  
Tobacco Control Division  
St Andrew's House  
Edinburgh  
EH1 3DG

Tel: 0131 244 5660

e-mail: [info@clearingtheairscotland.com](mailto:info@clearingtheairscotland.com)

or visit their dedicated web site [www.clearingtheairscotland.com/](http://www.clearingtheairscotland.com/)

Information about giving up smoking is available from **Smokeline Scotland**  
**0800 848484** - 12 noon to 12 midnight, seven days a week.

Information about smoking in England is available from:

Department of Health's Customer Service Centre on 020 7210 4850, or go to:

<http://www.dh.gov.uk/tobacco>

**Annex 2 - CLOSED**