

THE AGAINST AN OUTRIGHT BAN (AOB) GROUP

**SUBMISSION TO THE SCOTTISH EXECUTIVE'S
CONSULTATION ON THE
SMOKING, HEALTH AND SOCIAL CARE (SCOTLAND) BILL
(PROHIBITION OF SMOKING IN CERTAIN PREMISES) REGULATIONS**

20 May 2005

Introduction

The AOB Group was formed in the Autumn of 2004 to communicate the views of the majority of pub owners in Scotland as to how to maximise health and financial benefits from tobacco restrictions.

The membership of the AOB Group includes the Scottish Licensed Trade Association, the Scottish Beer and Pub Association, the Scottish Wholesalers Association and several multiple pub groups which are based in central Scotland. **Altogether, we represent circa 3,500 licensed trade retailers in Scotland as well as the bulk of the brewing industry in Scotland.**

Whilst we support tobacco restrictions, we are strongly in favour of choice and we fully endorse the views expressed at Westminster by Dr John Reid, the then UK Health Minister, in November 2004.

“We believe that, in a free society, men and women ultimately have the right within the law to choose their own lifestyle.”

Our membership has been heavily involved in working with the Scottish Executive to reduce tobacco consumption in licensed premises. We were the principal contributors to the Scottish Voluntary Charter Group which promoted the introduction of smoke free areas and better quality ventilation from year 2000 onwards. We came to recognise that voluntary action does not provide a level playing field as individual licensees are naturally reluctant to take steps to restrict smoking if such steps place them at a competitive disadvantage. So, in May 2004, we asked the (then) Deputy Health Minister to introduce through legislation five measures which would have been compulsory for all licensed premises ranging from pubs, hotels, restaurants, sports clubs, social clubs and entertainment venues. The measures were:

- Smoking should be banned at the bar counter in all licensed premises.
- Smoking should not be permitted in any area where and when hot food is being served.
- All licensed premises (whether or not they sell food) should be required to allocated a minimum of 30% of total floor space as a non-smoking area and this percentage would be ratcheted upwards to 40% in year 2 and 50% in year 3.
- Every licensed premise should have a smoking policy sign at the entrance.
- Smoking should not be permitted in any area of licensed premises from which the public are excluded (ie back of house).

At the end of year 3 a review of progress would be made and appropriate further steps taken in the light of public opinion prevailing at that time.

The model proposed by us is very similar to the Norwegian model which has increased restrictions over a period of several years.

We do not underestimate the difficulties in introducing these measures but we believe that they will help Scotland to make a huge stride forward in improving choice for non-smokers and protecting their health as well as the health of employees in the industry. A firm message will be conveyed to the Scottish public in general and smokers in particular

and, over a period of time, we anticipate a significant increase in the presence of non-smokers in licensed premises.

We note paragraph 1 on page 2 of the Executive's Regulatory Impact Assessment which states that: "It is clear to the executive that statutory action is now required to increase smoke-free places in order to protect public health." We are frustrated by these comments in the Assessment which suggest that the licensed trade has been promulgating further voluntary action. This is not the case. Indeed, the licensed trade has made it clear on numerous occasions that we have been supportive of legislation in respect of tobacco restrictions, albeit to be introduced in a phased manner, and indeed have called for this.

In making this response on issues around the proposed legislation, we do so without prejudice to our continuing opposition to that legislation, believing that some of these issues, on possible enforcement of the legislation and so on, are so critical to the industry that we must use every opportunity to draw our concerns to the attention of the Scottish Executive

Our position remains unchanged from that of May 2004. We have heard nothing in the course of the consultation process and deliberations on the Bill itself which has convinced us that the provisions of the Bill will bring greater health and financial benefits to Scotland, in comparison to the provisions of our own proposals.

The reasons why we say that are as follows:

1. **There is no public support for the provisions of the Bill.** The Executive's own research has demonstrated that the majority of the Scottish public are not in favour of an outright ban of smoking in licensed premises. This is not to say that the public do not want increased restrictions on smoking – but they do not want, and are not ready for, an all out ban.

The mrak opinion poll concluded that although a majority of those surveyed supported a ban on smoking in enclosed public places, two-thirds of those also believed that exemptions should be considered for the licensed trade. Only 18% of those surveyed supported a total smoking ban.

The Scottish Executive evidence report gives a summary of the outcome of focus group studies and on page 21 states that "there was a deeply ingrained assumption that the pub is one of the few places where smoking should be freely allowed."

Further, in the evidence report on the outcome of youth consultation, the Scottish Executive states clearly that 66% of young Scottish people believe there should be some places where smoking is allowed (page 28). On page 29 the report goes on to say that "whilst smoking could be banned in most public places, some young people felt that some places should be exempt. Pubs and clubs were mentioned as the key areas that should be exempt. Young people suggested that there could be some "smoking bars" or there could be designated areas within pubs for smokers."

In the survey conducted by the UK Department of Health in 2003, 80% of participants wanted tobacco restrictions but, of these, 80% wanted exemptions for the licensed trade.

In the most recent poll, conducted by Populus, more than 75% of Scots were found to believe that smokers should have the right to smoke in public provided they do not inconvenience non-smokers.

In our opinion, the Scottish Government has wholly underestimated the importance of public support as part of major cultural change of this type.

2. **One of the consequences of the lack of public support for this legislation is, potentially, a sharp increase in the number of smokers choosing to switch their disposable income from pub going to take home consumption. This has been the experience in Ireland, as is highlighted in the cebr report referred to in point number 5 underneath.**
3. **There has been no Scottish Executive research into the potential health consequences of smokers ceasing to visit licensed premises and switching their disposable spend into take home drinking.**

The Evidence Report states that the best estimate of Scottish deaths from health problems resulting from ETS is 865 per annum. It also concludes that (up to) 120 of these deaths are as a result of ETS exposure in public places.

Therefore, approximately six-sevenths of health problems encountered from ETS are derived from domestic situations. It is quite possible that the outright ban approach will result in greater health problems as a result of an outright ban.

Under our own proposals, people will have the right to choose either a smoking or a non-smoking pub. Under the Executive proposals, people will have no such right of choice. Currently, more than 60% of pubgoers are smokers. If this legislation results in a significant switch from pubgoing to take home drinking/smoking, the risk of ETS exposure in domestic environments will increase. Non-smoking partners, relatives and children of smokers who are persuaded to drink more at home have no escape from the impact of ETS – or at least they have less chance of escape from the impact than those who visit licensed premises.

A recent addition of the British Medical Journal carried a report of research which has concluded that children exposed to ETS in domestic environments are more than three times more likely to experience lung cancer and related diseases in later life than children who are not exposed to ETS in domestic environments.

4. **The Scottish Executive has failed to carry out any research on whether or not smoking cessation is greater following an outright ban on tobacco usage in public places than it is following phased restrictions on tobacco usage in public places.**

There is no evidence from Ireland on this very important issue. Mr Brian Monteith, MSP recently tabled a motion in the Scottish Parliament in which he quoted statistics suggesting that smoking cessation in Norway was actually greater during periods of tobacco restrictions than it has been since a full ban was implemented last summer. It is worth quoting the motion in full for easy reference purposes.

“That the Parliament recognises that Norway's ban on smoking in all public places, introduced in 2004, has failed to reduce the incidence of smoking; recognises that, according to Statistics Norway's annual survey of smoking practices, the number of Norwegians between the age of 16 and 74 who smoke daily, which had dropped from 29% to 26% in 2003 without a smoking ban, has dropped by only 0.3% in 2004

following the ban; recognises that the number of daily smokers among young Norwegians aged 16 to 24 actually increased, rising to 23.7% from 22.8% in 2003; acknowledges that smoking bans do not necessarily reduce the incidence of tobacco consumption, and calls on the Scottish Executive to reflect on the Norwegian example before pressing ahead with its plans for a similar total ban in Scotland."

5. The Scottish Executive has not fully researched the benefits of effective ventilation systems.

In the 1998 UK White Paper *Smoking Kills* para 7.23 states "ventilation systems can improve the comfort and welfare of public and employees. The best systems can, provided they are properly operated and maintained, protect non-smokers from exposure to carcinogens."

The Executive has ignored the conclusions of the University of Glamorgan report which found that the contaminants in the atmosphere of a smoking- permitted, well ventilated pub in Glasgow (the Doublet) were fewer than in the atmosphere of a no-smoking non-ventilated pub in Glasgow (the Phoenix).

The University of Glamorgan report has been criticised in a peer group review but the authors of the report remain convinced that their conclusions are correct. We believe that there has been insufficient follow up by the Scottish Executive to ascertain whether or not the University of Glamorgan report is correct in its findings. If it is, a better health option for the Scottish Executive would be to insist on all smoking permitted pubs to have ventilation installed to a minimum standard.

We would point out that ventilation has been endorsed as a solution to smoking problems by the European Union and, indeed a majority of Scottish MEPs voted in favour of ventilation. Italy has adopted ventilation as part of its smoking solution and we understand that Germany is about to follow suit. We would ask the straight question "If the installation of ventilation is good enough for the rest of Europe why is it not good enough for Scotland in tackling smoking issues?"

6. The Scottish Executive has based its decision to proceed with a blanket smoking ban on a range of research which we believe to be fundamentally flawed. Much of it is irrelevant and it is incomplete. The principal piece of research was the "international review" undertaken by the University of Aberdeen. However, the international review considered the "specific effects on the hospitality sector" of a smoking ban using a number of studies - eleven of which related to restaurants and four to hotels. Significantly, only one related to the experience in bars (in California) and the report indicated that "this was the only study available to model results for Scotland". **This research has been used as the basis for large parts of the Regulatory Impact Assessment, the conclusions of which must also be questioned.**

The AOB Group commissioned the Moffat Centre for Travel and Tourism Business Development, Glasgow Caledonian University, to undertake a project to source, review and evaluate existing research which has been undertaken in analogous destinations and countries which have legislated for either an outright or a phased ban on smoking in workplaces. This included the aforementioned international review undertaken by the University of Aberdeen.

The Moffat Centre conclusions include:

- **The weakness of the international review is its lack of relevant evidence to:**

(a) support the argument that an outright ban in all workplaces will reduce the number of smokers when increases in smoking may be displaced elsewhere eg in the home.

And

(b) make a claim that a no smoking policy will not harm the hospitality business, particularly bars.

- Nearly all the governments in the countries and states reviewed for this work, with the exception of Ireland, have given significant notice of their intention to introduce a total ban on smoking in hospitality establishments. This is only fair given the apparent difference in perception of the public towards smoking in different categories of hospitality premises. The Scottish Executive could take a lead from the experiences of other nations' legislature.
- It has been acknowledged as a weakness in the Executive's commissioned research that the studies reviewed do not include analysis of a total ban situation. This is compounded by the lack of transferability of the cases used in their argument.
- A Government backed investigation into the effects of the ban in Ireland could be undertaken, using a cross sectoral group that encompasses health experts, industry practitioners and Government policy makers. This would surely provide a consensus on the effects of and timescale for introducing a total ban, if that was the conclusion of the group.

Given the lack of robustness within the research produced by the University of Aberdeen on which the Scottish Executive based its decision and on the incompleteness and non-transferability of the international studies analysed, we do not believe that the Executive has justified its assertion that a smoking ban will cause minimal impact to the hospitality sector, and specifically pubs in Scotland.

7. **The AOB Group has been alarmed by the lack of any in depth study of the financial impact of the smoking ban.** We commissioned the Centre for Economics and Business Research (London) to independently review the economic impact on both the licensed trade and the beer industry in Scotland.

Its findings include:

- The value of annual turnover in the licensed trade will decline by £105m.
- Annual profits in licensed premises may decline by £86m.
- Employment in the licensed trade can be expected to decline by 2,300 jobs initially.
- About 142 average sized licensed premises may close as a result of decreased trade.
- The Chancellor of the Exchequer may lose out on a total of £59m in annual tax revenues from the Scottish licensed trade.

8. The AOB Group proposal is similar to the UK Government's proposal in that it provides choice for both smokers and for non-smokers. **To create a divide in smoking policy between Scotland and England will put our nation at a significant competitive disadvantage.** There is a strong possibility that tourists will favour English destinations – where the visitor is free to choose between smoking and non-smoking venues – as opposed to Scottish destinations where there is no choice. The Moffat Centre research makes it clear that “boundary hopping” is common in the USA where different States have different regulations.
9. What we have found most surprising throughout the consultation process is the apparent assumption that a blanket ban is the best possible option to improve public health and benefit the economy. **The debate seems to have been dominated by “black versus white” – either an outright ban or the status quo.** There have been no discussions between the Scottish Executive and the AOB Group concerning the practicalities of the proposals which we have put forward. For us, this has been a source of considerable frustration. There appears to have been no serious consideration given to the introduction of tobacco restrictions along the lines of those successfully implemented in countries such as Australia and Norway where a phased approach has proved to be acceptable to all stakeholders.
10. **Little recognition seems to have been afforded to the ramifications of a downturn in the Scottish leisure industry and the consequences of lower employment.** The fear of unemployment affects the mental and physical welfare of all those who work in any industry which is subjected to such sudden cultural change as that being proposed.
11. **Moreover, no assessment has been made by the Scottish Executive of the potential disruption of communities and social disorder through the provision of this legislation.** Scotland has many licensed premises which form part of tenemental buildings and it is not possible for licensees in these landlocked situations to provide external smoking facilities for their customers, due to neighbourhood nuisance and noise issues. The likelihood is therefore that many Scottish streets will be disrupted by groups of smokers indulging their addiction on pavements outside the front of pubs and clubs. This will in turn bring new problems for the authorities to deal with and it will be impossible to introduce a law which forbids people to stand and smoke in unenclosed areas (unless tobacco is banned altogether). Once they leave the freehold of the premises, customers of licensed establishments cease to be the responsibility of the licensees.

Further, it is universally agreed that smoking is more prevalent in the less affluent areas of Scotland's cities and towns. Smoking bans are likely to hit hard in the more deprived communities, driving people to stay at home rather than make their regular visits to their favourite hostelrys. As the former UK Secretary of State for Health Dr John Reid has said on various occasions, - one of the few pleasures of the working man is to have a drink and a cigarette with his friends – if this right is denied him, community life will change radically, ripping the heart out of many localities.

Comment on the Regulations

As we have already stated, in making this response on issues around the proposed legislation, we do so without prejudice to our continuing opposition to that legislation, believing that some of these issues, on possible enforcement of the

We note under the provisions of the Smoking Bill that an offence will be created of "permitting others to smoke in no-smoking premises."

We also note within the Policy Memorandum on the Licensing (Scotland) Bill that it is the Scottish Executive's intention that these convictions can be reported to Licensing Boards in terms of the licensing regime, which could result in a licensee losing their liquor licence and subsequently their livelihood if they are convicted of this offence.

We strongly object to the Executive's intention in this matter which effectively puts the operators of any licensed premises in a uniquely precarious position of losing their livelihood whilst the operators of any other form of "no smoking premises" convicted of this offence will not be exposed to this sanction.

Pavement Licensing

During discussions with the Scottish Executive one issue which has been raised repeatedly by the licensed trade is the need for more effective access to be available to the trade to the practice of pavement licensing. Currently, this practice varies widely across Scotland, dependent on individual local authority opinion. Assuming that the smoking ban is implemented under the proposed legislation one of the few responses from licensees, especially in landlocked urban areas and city centres, will be to try and obtain permissions for pavement licensing.

We would urge the Scottish Executive to examine as a matter of urgency the provisions relating to pavement licensing as they are currently applied by local government and to simplify and develop the operation of the pavement licensing system so as to allow licensees maximum flexibility in responding to the challenge of introducing any smoking ban in enclosed public spaces.

Compliance Building

Given that the introduction of a smoking ban in enclosed public spaces will constitute a major change in public policy and the social acceptability of smoking we would point the Executive at the experience of the introduction of the smoking ban in Ireland.

The initial implementation of the ban was accompanied by a period of "compliance building" with the operators of no smoking premises including the licensed sector, as opposed to active enforcement. This period lasted a number of months following the introduction of the smoking ban, during which period, a very limited number of prosecutions were undertaken.

We would suggest that the Executive give an explicit commitment to compliance building being the preferred method of enforcement during the initial phase after the introduction of any smoking ban to allow time for the licensed trade and their customers to adjust and to minimise unnecessary confrontation.

Fixed Penalty Time Limits

We note from the regulations that enforcement authorities will be given up to seven days to serve a penalty notice for the smoking offences stipulated by the Smoking Bill. We appreciate that this may be in line with other practice in relation to legislation on dog fouling and littering. **However, we would suggest that seven days in the context of the smoking ban allows too much flexibility for enforcement authorities, and runs counter to the principles of justice given that the longer the period between an**

offence being highlighted and a penalty notice being issued the more difficult it is for an accused to prove their innocence.

Fixed Penalty Fine Levels

We note the suggestion of the Scottish Parliament's Health Committee in its Stage 2 report that consideration be given to an "escalating" fine tariff in relation to those who offend "persistently" under the Smoking Bill.

We would indicate our opposition to this suggestion which we believe would offer insurmountable practical problems in relation to accessing further information about smokers who offend prior to them being issued with a fine. Given the intended civil nature of the offences under the regulations, it would appear to run counter to the principles of the legislation to apply this extended sanction under the smoking ban legislation.

Definition of "wholly enclosed"

We note the definition of a "wholly enclosed premises" as set out in the regulations as being "... wholly enclosed, whether permanently *or temporarily*."

We are concerned that this definition if allowed to stand will restrict the ability of a licensed premises to utilise moveable walls to create open areas which are not wholly enclosed on the basis that if they secure these areas when there are no customers on the premises they will be creating a "wholly enclosed" space "temporarily."

We would ask that the Scottish Executive are more specific and flexible on this point so as to allow the trade the opportunity of creating non "wholly enclosed" spaces in line with established practice under the terms of the smoking ban in the Republic of Ireland.

Planning Issues

It is clear from the experience of the licensed trade in complying with the smoking ban in the Republic of Ireland that the creation of external smoking areas outside of licensed premises will be used by licensees to accommodate their smoking customers after a ban is introduced. We would suggest that as a minimum planning permission will be required for many external smoking solutions and that some of these will be expensive. **Licensees are entitled to know in advance whether or not their proposals to create "unenclosed spaces" will give them a facility which is in full compliance with the terms of the Act. Early answers and guidance from the Scottish Executive are therefore required on the creation of external areas and what type of physical structures will be acceptable under the legislation.**

Transitional Assistance

We would suggest that as a consequence of the smoking ban being introduced that some licensed premises particularly traditional community style pubs in landlocked urban locations as well as some pubs in rural areas, inevitably will see their trading performance significantly eroded as a result of the smoking ban, perhaps resulting in their closure. **We would ask that the Scottish Executive give some consideration as a matter of urgency to whether it could offer some form of transitional assistance, possibly through the operation of the non domestic rating system, to these premises. Transitional assistance would give these premises additional time to take action to try and improve their trading position and to diversify their operations in light of**

the smoking ban, perhaps preserving valuable community assets that would otherwise be lost.

Conclusions

The licensed trade has always been, and will always remain, supportive of the ultimate objective of a healthier Scotland. However, we strongly believe that the Scottish Executive has not afforded the time and consideration necessary to identify the best move for public health. As we have stated, there is a significant body of evidence to suggest that an alternative strategy, with the same aim, may further increase the health benefits achievable from restricting the use of tobacco in licensed premises.

Surely what is effectively the most radical move in public health policy this Government has seen deserves greater attention to detail?

We urge the Scottish Executive to take more time to conduct research into the financial and health benefits of alternative approaches prior to proceeding further on this matter. In addition, we would urge the Government to consider new and innovative ways to tackle smoking. This debate seems to have been dominated by an "all or nothing" approach. At no point in the process would it seem that anyone has really sat down and looked for the optimum solution.

We would hope that our observations on the practical issues around the enforcement and current drafting of the regulations and Smoking Bill legislation will be considered and taken forward by the Executive in the event of the Scottish Parliament ultimately agreeing the proposals to introduce a smoking ban in wholly enclosed public spaces in Scotland.

However, if the Scottish Parliament does pass the Smoking Bill, then we need 100% clarity in the shape of guidance notes, which we would suggest are developed up by the Scottish Executive in conjunction with the advice and counsel of the membership of the Implementation Group which has already been set up, and which give answers to the following questions:

- a) Where does the division of responsibility lie in respect of street nuisance problems emanating from pub goers leaving the licensed premises to smoke and loiter on street pavements? These areas are not usually part of the licensed premise and we see no reason why licensees should be expected to deal with any noise and nuisance issues outwith the scope of their control.
- b) Where does the division of responsibility lie between environmental health officers and licensees and how is enforcement to be dealt with generally?
- c) What is the practical meaning of an enclosed space? It is clear that as a minimum planning permission will be required for many external smoking solutions and some of these will be expensive. Licensees are entitled to know in advance whether or not their proposals will give them a facility which is in full compliance with the terms of the Act. Early answers are therefore required on this particular issue.

Should the Executive decide to give the decision a bit more thought we would be delighted to help in any way whatsoever.

**Stuart Ross
Chairman
Against an Outright Ban Group**

**Address:
c/o Spott Road
DUNBAR
East Lothian
EH42 1RS**

Landline Telephone Number:	01368-869106
Mobile Telephone Number:	07785-335700
e-mail address	stuart.ross@belhaven.co.uk