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From: Vicki Talbott [mailto:vtalbott@the-tma.org.uk] On Behalf Of Tim Lord
Sent: 23 May 2005 15:14
To: Glen J (John)
Subject: Response to the Scottish Executive Consultation

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Dear Mr Glen

Please find attached our response to the Scottish Executive Consultation on the draft Smoking, Health and Social Care (Scotland) Act 2005 (Prohibition of Smoking in Certain Premises) Regulations 2005.

A hard copy is also in the post this evening.

Kind regards

Vicki Talbott

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PLEASE NOTE: THE ABOVE MESSAGE WAS RECEIVED FROM THE INTERNET.

direct line: 020 7544 0111
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our ref: CO/vt1542

23 May 2005

John Glen
Scottish Executive Health Department
Tobacco Control Division
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Edinburgh
EH1 3DG

Dear Mr Glen,

Response to the Scottish Executive Consultation on the draft Smoking, Health and Social Care (Scotland) Act 2005 (Prohibition of Smoking in Certain Premises) Regulations 2005

I am writing with the TMA's response to the Scottish Executive's consultation on the draft regulations as above. This submission is made on behalf of the TMA's principal member companies: British American Tobacco, Gallaher Ltd and Imperial Tobacco Ltd.

We responded in a comprehensive manner to the consultation undertaken by the Scottish Executive prior to the introduction of the Bill. We also provided evidence to the Health Committee of the Scottish Parliament in its Stage 1 consideration of the Bill. Likewise, we provided evidence to that Committee on Mr Stewart Maxwell's earlier Member's Bill. In responding now to the draft regulations, we do not think it necessary to restate those concerns. However, we would be happy to provide further comments, should they be required.

A completed copy of Annex D to your consultation document is attached. The views of the TMA on the issues raised in Annex B are as follows:

We, and others, believe that Part 1 of the Smoking, Health and Social Care (Scotland) Bill raises substantial human rights issues. As these are relevant to much of what we have to say on the specific draft regulations and consultation questions, it is appropriate that we highlight them first.

When the Joint Committee on Human Rights at Westminster recently reported¹ on its scrutiny of two private Bills² which, similar to Part 1 of the Scotland Bill and its draft regulations, would

¹ Joint Committee on Human Rights, *Scrutiny: Fifth Progress Report, 12th Report of Session 2004-05*, HL Paper 77, HC 437, 10th March 2005

² Liverpool City Council (Prohibition of Smoking in Places of Work) Bill and London Local Authorities (Prohibition of Smoking in Places of Work) Bill.

impose a comprehensive ban on smoking in work and public places, the Committee found that the Bills raised important European Convention on Human Rights (ECHR) issues. The issues that the Joint Committee raised may be related to Part 1 of the Smoking, Health and Social Care (Scotland) Bill as follows:

whether Part 1's prohibition on smoking is a proportionate interference with the right to private life under Article 8 ECHR, having regard to the scope of the exemptions from the prohibition;

whether the power of entry to search premises is compatible with the right to respect of private life and home under Article 8 ECHR;

whether requiring a person to provide their name and address on pain of criminal penalty is compatible with Article 8 ECHR; and,

whether the burden of proof in the statutory defences available under Part 1 is compatible with the right to a fair trial under Article 6(1) ECHR and the presumption of innocence under Article 6(2).

We deal in more detail with the Article 6 ECHR issues arising from clause 1(3) of the Bill in our response to Q4 below. It is appropriate, however, to comment at the outset on the Article 8 ECHR implications of the Bill and draft regulations generally.

A prohibition on smoking in work and public places constitutes an interference with smokers' right to respect for private life under Article 8(1), which must therefore be justified under Article 8(2). It also engages the right to respect for home under Article 8(1), as it regulates conduct in places that are also people's homes.

Whilst the protection of public health is of course a legitimate aim prescribed under Article 8(2), this is not of itself sufficient to justify the interference with Article 8 rights. In order to be justified, the interference must also be necessary in a democratic society, which stipulation requires, *inter alia*, that the interfering measure is proportionate.

A properly conducted assessment of the proportionality of a measure that interferes with the right to respect for private life under Article 8 ECHR must consider a range of matters in order to arrive at a meaningful conclusion as to whether the interference goes further than is necessary to achieve the aim. In particular, it should involve an objective and critical examination of the reliability and weight of the evidence concerning the risks associated with environmental tobacco smoke (ETS), in order to assess the persuasiveness of the argument for interfering with the ECHR rights. That has not been undertaken in this case. It should also consider what other less intrusive means of regulatory smoking would be sufficient to achieve the legitimate legislative aims of protecting the health and safety of others, and what exemptions from any prohibition are appropriate in order to protect the other competing rights and interests, including those of smokers.

The consultation papers on the draft regulations make reference to 'humanitarian' reasons, but do not consider the regulations in terms of ECHR rights. Neither Part 1 of the Bill nor the draft regulations seeks to achieve a proper balance between the competing rights and aims; instead they follow Ministers' stated twin principles of 'comprehensive scope and limited exemptions', inappropriately basing the decision as between policy options 2 and 3 wholly on speculative 'value-for-money' considerations.

The evidence on ETS and the health of the non-smoker that has been cited in support of Part 1 of the Bill and the draft regulations is not adequate in nature or extent to provide sufficient justification for the extreme interference with ECHR rights entailed in an absolute prohibition on smoking in work and public places.

When the Health and Safety Commission and Executive of the UK considered the issues in 1999, they took the view that there was already sufficient legislation governing smoking in the workplace and that, in workplaces that are also public places - and particularly those in the hospitality sector - the issues that ETS may raise are best and most appropriately dealt with on a case-by-case basis and not by legislation imposing either a prohibition or prescriptive requirements.

Within this context, it is also appropriate to question why it is considered right and acceptable to sweep away the ability of employers and employees, in agreement with each other, voluntarily to adopt smoking policies that either prohibit smoking or permit smoking in certain designated places. According to the Office for National Statistics, in 2003 50% of people in Great Britain reported that they worked in places where smoking was prohibited; 38% worked in places where smoking was permitted only in designated places; and 4% reported that they worked on their own and determined their own smoking policy at work. There is no sufficient justification for undermining this approach.

We now turn to the specifics of the draft regulations and the questions posed in the consultation.

Regulation 1: Citation, interpretation and commencement

Q 1. The definitions are clear enough but those premises which are exempt (Regulation 3 (2) and Schedule 2) should properly be listed in the Act so that the primary legislation thereby complies with the ECHR. The Act could then contain a general prohibition in all other places which would obviate the need for the extensive list of definitions in Schedule 2. The Act should also include a clause allowing Scottish Ministers to permit smoking in places where it would otherwise not be permitted.

As currently drafted, premises may only be totally exempted from the prohibition. We believe it would be more appropriate to give Scottish Ministers power to make regulations permitting smoking in, or in part, of certain places where smoking would otherwise be prohibited, subject to compliance with requirements specified in the regulations.

Our view is well known - that an appropriate and proportionate response requires that smoking should be permitted in certain no-smoking premises that meet requirements laid down in regulations. Irrespective, however, of this view, we strongly believe that such a provision would be more effective in implementing the existing exemptions. For example, it would avoid the awkward and unsatisfactory provision in the draft regulations relating to "designated hotel bedrooms", which are currently listed as exempted places in Schedule 2, and in such a manner as would permit all bedrooms in a hotel to be so designated. We suggest that a power to make regulations permitting smoking in, or in part, of certain places subject to the requirements of the regulations is the most appropriate way of dealing with situations where a total ban is not appropriate, allowing Scottish Ministers to regulate smoking on such premises.

The fact that firstly, clause 4 of the Bill, coupled with Regulation 3(3)(c), provides that, not only premises to which "the public or a class of the public has access [whether on payment or otherwise, and whether as of right or by virtue of express or implied permission]", but also premises "which are being used by and for the purposes of a club or other unincorporated association", and secondly, Schedule 1 specifically includes all "club premises", indicates a clear intention to make all clubs no-smoking premises. We suggest that this is not compliant with Article 8 ECHR. Amongst clubs, membership clubs, which are democratically governed by the members, are very distinct private places in respect of which such interference is inappropriate. That may also be the case with other clubs, where either the membership determines certain rules (such as membership being subject to members' approval, or determination of the smoking policy). All clubs, by definition, are not places to which the public has access as of right; that should be a decisive factor in determining whether premises are subject to the prohibition on smoking.

Regulation 2: Display of no smoking notices

Q2. Clause 3 of Part 1 of the Bill requires notices to be displayed both inside and outside premises that state that the premises are no-smoking premises and that it is an offence to smoke there or knowingly permit smoking. Regulation 3 specifies the minimum size of a no-smoking notice, the size of the international "no-smoking" symbol that it must incorporate and requires the notice to include the name of a person to whom a complaint may be made by any person who observes another person smoking in the premises. It also requires a similar notice in vehicles.

We find these requirements to be excessive and unnecessary. In many cases, we believe that they will be unworkable. They would involve thousands of Scottish owners and operators of no-smoking premises in unnecessary extra expense in obtaining and fixing what will have to be especially made signs. It is surely a sufficient requirement for no-smoking places to be signified by the display of the internationally recognised no-smoking sign.

Regulation 2 (1) (c) states the requirement to display the name of the person to whom a complaint may be made. It should however be noted that individuals have a right to privacy (Article 8 ECHR) and may not wish their name to be displayed. When an individual is named that person is unlikely to remain the constant point of contact and it is not clear as to what contact details – address, telephone number etc – will be required to be displayed.

Regulation (2) then goes on to oblige the person having the management or control of the premises to display the notice in such a manner that it is protected from tampering, damage, removal or concealment. We believe that the primary legislation should include a provision protecting that person by making it an offence to remove, cover, mutilate, deface or alter any sign.

Regulation 3: "No-smoking premises"

Q3. The terms "premises", "wholly enclosed", "the public" and "has access" are used in Part 1 of the Bill and are fundamental to that Part and the precise scope of the prohibitions and criminal offences that it creates. However, the meanings of those terms are left for definition or

elaboration in the regulations. We find this to be a most surprising legislative approach, given the great significance of the terms in the legislation.

We note from Annex B of the consultation document that there is continuing examination of whether the given definition of "wholly enclosed" in the draft regulations delivers the policy intention, which is stated in Annex B to be *"to designate all those premises listed in Schedule 1 to the regulations, provided that they are either wholly enclosed or, where they are not wholly enclosed, the extent to which they are not wholly enclosed is significant."*

In our opinion, there should in practice be no confusion about the meaning of "wholly enclosed". If a place is not wholly enclosed, either permanently or temporarily, it would be self evident at the relevant time. When wholly enclosed it would be subject to the prohibition; when not wholly enclosed, either temporarily or permanently, the prohibition would not apply.

Again, however, Scottish Ministers may wish to consider the merit of enabling regulations to be made under Part 1 that would avoid the need for places to be either no-smoking or exempt, without any consideration of the particular circumstances and conditions that apply.

Regulation 4: Fixed penalty time limits, amounts and payments.

Q4. Fixed penalties should be served at the time of the offence and not retrospectively regardless of time limit. Smoking is a legal activity and potentially criminalizing smokers by these penalties is highly regrettable.

The penalty to someone who permits smoking is set by Regulation 4(2) at £200, reduced to £150 for payment within 15 days. The offence may be considered to be more serious than that of the smoker. Nonetheless, we believe that at £200 the fixed penalty is excessive. Again, there is likely to be reluctance on the part of the person concerned to go to the courts – the personal costs of doing so might be high, given the risk of conviction of a criminal offence, which may importantly affect that person's business reputation or record. The reluctance is likely to be even greater, given that under clause 1(3) it is the defendant who has to prove his defence.

It is questionable whether the requirement under clause 1(3) of the Bill that the defendant must prove that he took all reasonable precautions and exercised all due diligence not to commit the offence, or that there was no lawful or practicable means by which he could prevent the person from smoking is compatible with the right to a fair trial under Article 6(1) ECHR and the presumption of innocence under Article 6(2). We therefore consider that the Bill should provide that where evidence sufficient to raise an issue with respect to the defence is adduced, the onus should be on the prosecution to prove beyond reasonable doubt that the defence is not made out.

Regulation 5: Application by councils of fixed penalties and account keeping.

Q5. The reference to deficit in this regulation implies a potential financial burden on Councils. Enforcement action may therefore be constrained by cost concerns thereby bringing the law into disrepute.

Schedules to the Regulations

Q6. We would not wish to see any additions to the list in Schedule 1 but rather the option to permit, within certain of the listed premises, the provision of smoking rooms for the specific and exclusive use of smokers.

Schedule 2: Exemptions

Adult care homes

Q7. It is right that provision be made for both smokers and non-smokers in adult care homes. Residents should be free to exercise their freedom of choice to smoke if they so wish.

Psychiatric hospitals and psychiatric units

Q8. The same comments apply as for Q7 above.

Hotel, guest house and B&B bedrooms.

Q9. It is quite right that proprietors should be free to designate bedrooms in which smoking may be permitted. By the same token they should be free to designate other rooms within their premises for the specific and exclusive use of smokers.

Omissions from Schedule 2

Q10. Premises that we believe should be added to the list of exemptions are as follows:

Any retail establishment dedicated to, or predominantly for the sale of, tobacco or tobacco products.

The stage area of any enclosed theatrical production site, where smoking is an integral part of the production.

Any club premises to which the public does not have access as of right.

Those parts of the premises of a tobacco manufacturer where smoking is integral to the operations being conducted.

Places where religious ceremonies involving the use of tobacco are taking place.

Draft Regulatory Impact Assessment

We have no comments on the draft RIA except to say that it appears highly speculative. As we have made clear on previous occasions, the information and assumptions on which the assessment is founded are controversial and uncertain, and are used in a manner that is not consistent with the precepts of epidemiological and statistical methods. The population attributable risk estimates are entirely speculative and do not provide a proper basis for the determination of public policy. That said, even the RIA remarks that, by changing certain assumptions, the 'value-for-money' estimates for policy options 2 (smoke-free legislation) and 3 (legislation but with exemption for the hospitality industry) would be reversed. (Annex C of the

consultation document, RIA Sensitivity Tests p 18). It will be interesting to see if the claimed benefits are in fact realised in future years and, if not, whether the Executive will amend legislation accordingly.

Yours sincerely

A handwritten signature in black ink, appearing to read 'TGF Lord', written over a horizontal line.

TGF Lord
Chief Executive

Enc. Annex D duly completed.