



# Mitchells & Butlers

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Mr John Glen  
Scottish Executive Health Department  
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26 May 2005

**RESPONSE TO THE CONSULTATION ON THE SMOKING, HEALTH AND SOCIAL CARE  
(SCOTLAND) ACT 2005 (PROHIBITION OF SMOKING IN CERTAIN PREMISES)  
REGULATIONS 2005 (the "Regulations")**

Dear Sir,

I am writing to submit my comments on the Smoking, Health and Social Care (Scotland) Bill (Prohibition of Smoking in Certain Premises) Regulations 2005, on behalf of Mitchells and Butlers, now that we have had the opportunity to study it in some detail. As you will be aware, Mitchells & Butlers is one of the UK's leading operators of managed pubs, bars and restaurants, offering eating, drinking and entertainment for our customers in over 2,000 outlets, of which over 100 are located in Scotland. We employ over 2,000 people in Scotland and our businesses are at the heart of many Scottish communities.

We welcome the opportunity to comment on the contents of the draft regulations and trust our detailed comments will be seriously considered in finalising the regulations.

While the Company supports the goal of the Scottish Executive to provide more smoke free areas in Scotland's pubs and clubs, we do have some concerns about a number of matters contained in the Bill, which we do not believe are in the best interests of the community or the licensed trade.

There are a number of reasons why the Company opposes the smoking provisions within the Bill:

Firstly, Mitchells & Butlers is committed to the industry-wide initiative of a phased process of introducing a large smoke free area in all outlets across Scotland, England and Wales, which we believe would result in more choice for our non-smoking customers, and an increase in the health benefits for our staff. Along with 17 other major UK companies, we are committed to ensuring 35% of the trading space in our outlets is smoke free by December 2005, increasing up to 80% of each outlet being smoke free by December 2009. We are already in the process of implementing a rule prohibiting smoking at the bar and back of house at all of our outlets. Weighing up the balance of health, customer and commercial interests, we are firmly of the view that the provisions of our own industry proposals are superior to those proposals set out in the Bill.

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Secondly, we do not believe the proposals for a total smoking ban in all premises as outlined in the Bill are supported by Scottish public opinion. This is borne out by the results of a public opinion survey commissioned by the Scottish Executive on this issue and by the Scottish Executive's own consultation which showed, at best, mixed support for the proposal. In addition, in a recent poll 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.

Thirdly, we believe the economic and financial research on which the decision to proceed with a total smoking ban in Scotland is inaccurate and we fear that the Bill, if implemented, would have a detrimental impact on the licensed sector in Scotland and therefore our staff and our customers. Pubs are at the heart of many communities and given that many community based pubs are still solely reliant on their drinks business, we would expect to see a large number of such pubs facing closure if their core customers (many of whom smoke) are deterred from visiting by being unable to smoke whilst they enjoy a drink. Relating this to our own business, research shows that 67% of Scottish pub goers are also smokers, therefore it is our belief that a total smoking ban would greatly reduce turnover in our outlets which in turn would restrict our ability to invest further in these outlets in Scotland, to the likely detriment of both the economy and the customer experience going forward.

Although it is clearly impossible to quantify the precise economic impact of a total ban, we believe it will be a significant cost. By way of illustration, recent reports from Ireland suggest that volume sales of beer have fallen by 10% in the first five months of the smoking ban, with sales in Dublin down 14% (Figures from AC Nielsen.). Official government statistics estimate that so far some 7,500 jobs have been lost within the industry.

#### **Enforcement of any ban on smoking**

In relation to the implementation of any actual ban, Mitchells & Butlers strongly supports the view proposed by Andy Kerr MSP in December 2004 that licensees who a) take reasonable steps to display signage making customers aware of the no smoking provisions, b) remove ashtrays from the premises and c) ask customers to stop, should be able to claim a due diligence defence. The safety and interests of our employees is critical and we feel it would be inappropriate for our employees to be faced with either the risk of either physical harm for trying to enforce a smoking ban on non co-operative customers or the alternative criminal sanctions for failing to actively enforce a smoking ban. We believe that specific enforcement officers are best placed to manage the enforcement of any smoking ban.

In its report, the Scottish Parliament's Health Committee also called for the introduction of clear guidance to enforcement authorities on the implementation of the legislation to avoid possible differential enforcement across 32 local authorities in Scotland – we fully support this view.

#### **Smoking Criminal Offences**

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 the loss of a premises licence for Mitchells & Butlers and/or the loss of a personal licence for the licensee following conviction.

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. We therefore believe that any such conviction should be excluded from consideration under the terms of the Licensing (Scotland) Bill. In the absence of licensees being able to rely on a due diligence defence, we think a system of warnings (culminating in a fixed penalty fine) is the only fair way deal with licensees who repeatedly permit smoking on their premises.

### **Pavement Licensing**

Mitchells & Butlers believes that, in the event of the implementation of the proposed legislation, licensed premises should be permitted to hold pavement licenses, particularly for urban outlets, which do not have any other external facilities. The current availability of pavement licences is very restricted in Scotland (e.g they are not available all year round) and this is another area that would need re-consideration by the Executive.

### **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. Given the possible extreme sanction of a licensee losing their licence we would suggest that this fixed penalty period should be reduced.

### **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 feel that this would be difficult to manage as it would be difficult and costly for any enforcement officer to assess prior convictions before a fine is issued.

### **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 would prefer the more flexible approach adopted under the smoking ban in the Republic of Ireland, which would allow the creation of non "wholly enclosed" spaces.

In conclusion I hope our comments will be received constructively and seriously considered when reviewing the comments received on this consultation exercise.

Yours sincerely,

  
**Adam Batty**  
Director of Legal Services

For and on behalf of  
Mitchells & Butlers plc