

**Kumar N (Nim)**

**From:** patrick browne [patrick.browne@Geoghegans.co.uk]  
**Sent:** 27 May 2005 11:59  
**To:** Glen J (John)  
**Subject:** Smoking Bill - Prohibition of Smoking in Certain Premises Regulations - Response to Consultation



SBPA-SmokingBillRegulations.doc...

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Dear John

Please find enclosed the SBPA response to the above consultation

We are happy for the contents to be made public and I would be grateful if you would confirm receipt

Thanks

Regards

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**Smoking, Health and Social Care (Scotland) Bill  
(Prohibition of Smoking in Certain Premises) Regulations**

**Submission to the Scottish Executive's Consultation from  
The Scottish Beer and Pub Association (SBPA)**

**May 2005**

## **About the Scottish Beer and Pub Association (SBPA)**

The Scottish Beer and Pub Association was originally formed in 1906. Our members are made up of brewing and large pub companies representing the licensed trade industry in Scotland. The main aim of the Association is to contribute to the economic and social wellbeing of Scotland through employment, investment and training.

The Scottish Beer and Pub Association's members include Scottish Brewers Ltd, Tennent Caledonian Breweries Ltd, Carlsberg U.K. (Scotland) Ltd, Belhaven Group plc, The Caledonian Brewing Company, Diageo Ltd, Broughton Ales, Scottish and Newcastle Pub Enterprises, Mitchell and Butlers, Spirit Group, Punch Taverns plc & Maclay Group plc.

Our members account for 1,500 of the 5,100 licensed public houses in Scotland.

SBPA is a member of the industry body, the Against an Outright Ban Group (AOB), which is opposing the provisions in the Smoking Bill to ban smoking in enclosed public spaces. The AOB Group represents some 3,500 of the 5,000 pubs in Scotland.

A total of 150,511 people are employed in the licensed trade in Scotland and in the manufacture of alcohol products, including beer. 10,573 people are employed in manufacturing alcoholic beverages in Scotland, including beer.

**If further information is required please contact:**

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## Summary

SBPA is fully supportive of the objective of providing more smoke free areas in Scotland's pubs and clubs. Moreover, we are committed to providing more comfort and choice for non-smokers within the hospitality environment and to provide a more healthy work environment for our staff.

**However, we are opposed to the legislation relating to smoking in the Smoking, Health and Social Care (Scotland) Bill and will remain so.**

**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 licensed industry that we must use every opportunity to draw our concerns to the attention of the Scottish Executive.**

There are a number of reasons why SBPA remains opposed to the smoking provisions within the Smoking Bill:

Firstly, in May 2004, the licensed trade in Scotland put forward a proposal to the Scottish Executive, outlining a five-point plan which we believe would have achieved the Executive's objective of creating more smoke free areas in Scotland without the potential damage to the industry of an outright smoking ban. **We believe the Scottish Parliament should legislate for additional anti-smoking measures as outlined in the industry's five-point plan which we believe will maximise both the health and the financial benefits of tobacco restrictions.**

**Secondly, we oppose the legislation because 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 mixed support for the proposal.

**Thirdly, we believe the economic and financial research on which the decision to proceed with a total smoking ban in Scotland is fundamentally flawed and we fear that the Bill if implemented would have a detrimental impact on the licensed sector in Scotland, our staff, and our customers.** Indeed, studies commissioned by the Against and Outright Ban (AOB) Group, of which we are a member, bear this out.

**For the reasons as above we would ask the Scottish Executive to amend the clauses relating to smoking as outlined in the Smoking, Health and Social Care (Scotland) Bill in line with the proposal put forward by the industry in May 2004.**

**In the enclosed response we also make representations around the enforcement of any legislation, including representations on pavement licensing and some of the detail of the legislation.**

## **The Industry's Preferred Approach**

Over the last few years, we realise that there has been tremendous pressure to take positive action by way of legislation for smoke free areas. It is clear to the industry, as well as everyone else, that the status quo is not an option. Whilst significant progress was made on this issue through the Voluntary Charter in providing more smoke free areas and much better ventilation for pub goers, we recognise that voluntary action does not provide a level playing field as individual licensees are naturally reluctant to take steps to restrict smoking if these steps place them at a competitive disadvantage.

In recognition of this in May 2004, the licensed trade asked the Scottish Executive, through the then Health Minister, to legislate for smoke free areas and introduce five measures which would have been compulsory for all licensed premises ranging from pubs, hotels, restaurants, sports clubs, and social clubs, to entertainment venues. The points 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 allocate 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 (i.e., back of house).*

At the end of year three a review of progress would be made and appropriate further steps taken. This was very similar to the Norwegian model which has moved to a total ban over a period of years.

The licensed trade did not underestimate the difficulties in introducing these measures but we believed that if these measures were introduced, Scotland would have made 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 would be conveyed to the Scottish public in general and smokers in particular and, over a period of time, we would anticipate a significant increase in the presence of non-smokers in licensed premises.

**We will continue to strongly oppose the introduction of a total smoking ban believing instead that a stepped approach as outlined above is preferable.**

## **Scottish Public Opinion**

### **Responses to the Consultation on Smoking in Public Places**

The Scottish Executive undertook its "Consultation on Smoking in Public Places" before arriving at its decision to introduce a smoking ban.

The Scottish Executive's own consultation, although showing that 80% of respondents favoured a ban on smoking in enclosed public spaces, also showed that a bare majority, just 56% of respondents, favoured a total ban on smoking without any exemptions for any sector which is the proposal contained in the Bill.

### **mruk Research Findings**

mruk research were commissioned by the Scottish Executive to undertake a research exercise with a sample of the Scottish population, regarding smoking in public places and addressing aspects of the smoking in public places consultation exercise itself.

A key finding of the opinion survey was that: "Views were mixed with respect to the level of support for a law that would make enclosed public places smoke free, with just over half expressing support for such a law and around a third indicating that they were unsupportive.

"Overall, two thirds of those who would support such a law were also of the opinion that should such a law be introduced, exemptions should be considered, with pubs and clubs the most commonly suggested exemptions (57% and 21% respectively)."

This suggests 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, meaning that just one in five, or 18%, of those surveyed supported a total smoking ban.

**It is evident from the findings of the Scottish Executive's own consultation exercise that a bare majority of respondents want a total smoking ban in Scotland and that less than one in five respondents to a Scottish Executive commissioned survey support the proposed total smoking ban. These findings have been borne out by other surveys including research commissioned by the UK Department of Health in 2003.**

## **Flawed Scottish Executive Research and the Regulatory Impact Assessment**

The Scottish Executive based its decision to proceed with a total smoking ban on a range of research which we believe to be fundamentally flawed. This research included the "International Review of the Health and Economic Impact of the Regulation of Smoking in Public Places" undertaken by the University of Aberdeen.

There were a number of comments in the Summary version of the report which illustrated the weakness of this piece of research.

The Aberdeen Study considered the "specific effects on the hospitality sector" of a smoking ban and used a number of studies. 11 of these related to restaurants, four to hotels. Significantly only one related to the experience of bars in California. The report indicated that "this was the only study available to model results for Scotland."

In relation to the "quality and relevance of the literature," the Aberdeen Study indicates "There are a number of valid criticisms relating to the studies carried out in this area and these reflect the difficulties of conducting research into policy impacts. The problems include: the inadequacy of sales tax data to capture all the effects, the timing of the intervention in relation to the data periods; limitations to the smoking restrictions; compliance with the smoking restrictions; selection bias; and the transferability of the results to other settings. The failure to find any significant impact on revenues in the sectors analysed does not rule out the possibility of a small negative effect on business ... However, it is also the case that there has been no analysis of impacts within sectors and no analysis based on measures such as sales volume or profits."

The Study also makes no attempt to analyse the macroeconomic impact of any smoking ban on the Scottish economy, instead the report relies on the statement that "the net effect on the Scottish economy of any impact on the hospitality sector will be reduced as any change in spending is redistributed to or from other sectors of the economy. Expenditure that is diverted from or gained by the hospitality sector will be taken up in or lost from other sectors." However, the study also stated that "it was outwith the scope of this study to provide a full macroeconomic model of the net economic effects."

The flaws in this research are reproduced as part of the Regulatory Impact Assessment (RIA) accompanying the draft Regulations. Given the weakness of the Aberdeen University research we would question the validity of the Regulatory Impact Assessment that utilises this research.

**The Aberdeen research indicates that the health benefits and economic savings of a smoking ban in enclosed public places will take upto thirty years to be fully realised. We would therefore question whether the preferred course of legislative action identified and being currently pursued by the Scottish Executive is reasonable or proportionate, or indeed whether, as is indicated by the Ministerial declaration on the regulations, that the "benefits justify the costs." 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.**

## **Economic Impact of a Smoking Ban**

Tobacco is not a banned substance and research shows that 67% of Scottish pub goers are also smokers who are addicted to nicotine. The dictionary definition of addiction is "something, usually a narcotic drug, upon which people are dependent." So it is hardly surprising that the industry fears the impact of a total smoking ban as it could greatly reduce turnover in all licensed establishments with the possible exception of those which specialise in the provision of food.

A reduction in turnover would result in a much higher reduction in operating profit in most licensed businesses, further exacerbating the impact of a downturn in trade.

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.

It is impossible for us to quantify the precise economic impact in Scotland of a total ban but we take the view that it would have a significant effect on both large and small businesses many of which would become unsustainable.

**Research commissioned by the Against and Outright Ban (AOB) Group, of which we are a member, from the Centre for Economics and Business Research (CEBR), suggests that as a result of a smoking ban in Scotland:**

- **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**

**It should be stressed that these figures are based on the reduction in the volume and value of bar sales which has already been experienced in the Republic of Ireland and suggest that a total and immediate smoking ban introduced in Scotland would cost jobs and result in the closure of a significant number of licensed premises.**

## Enforcement

One of the most critical issues for the licensed trade going forward, assuming that the provisions relating to smoking in the Smoking Bill are enacted, will be the issue of enforcement of the regulations.

In discussions with representatives from the industry in December 2004, the Executive's Health Minister, Andy Kerr MSP, indicated that as long as licensees took reasonable steps in their premises to display signage making customers aware of the no smoking provisions; removed ashtrays from the premises; and asked customers to stop smoking if they did so, that this would constitute a "due diligence" defence against conviction of a smoking offence under the legislation.

The Health Minister, elaborated on this in an open letter which was published in Scottish Licensed Trade News (SLTN) on February 3<sup>rd</sup> 2005 stating that:

***"The AOB petition is incorrect in stating that it is your legal responsibility to enforce the ban. It is the role of enforcement officers to do this. And neither are we seeking to make criminals out of the publicans - the real culprits will be the smokers themselves who break the law."***

The industry has however become concerned at recent comments from the Scottish Parliament's Health Committee in its Stage 1 report on the Smoking, Health and Social Care (Scotland) Bill in which they proposed that:

***"The Committee recommends that enforcement be focused primarily on the role of those in control of a no-smoking premises and that the bill is amended at Stage 2 to this effect."***

**We would urge the Scottish Executive to remain committed to the original view which the Health Minister put forward in February 2005 which recognised the real difficulties which licensees could have in enforcing new responsibilities, not specifically related to running a licensed premises, under the smoking ban legislation and which placed the enforcement onus clearly on individual smokers as long as licensees took all reasonable steps short of physical confrontation with the smoker in enforcing the legislation.**

We note that during the Scottish Parliament Health Committee's deliberations on the Smoking Bill one of the main factors which motivated their focus on the managers of no smoking premises for enforcement was their desire to minimise the risks of physical confrontation between enforcement officers and individual smokers. **We find it therefore wholly inexplicable why the members of the Health Committee seem to believe it is acceptable for licensees and their staff to run this risk of physical confrontation and violence when this risk should not be borne by enforcement officers. This would seem to constitute double standards and will mean that confrontation with customers, with the risk of violence, is almost expected of licensees and their staff but not of enforcement staff.**

## **National Enforcement Guidance**

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.

**The industry believes that central "guidance" on enforcement as well as clear training for those who will enforce any smoking ban is an essential minimum requirement. Indeed, we would question whether "guidance" is itself adequate and whether the Scottish Executive should be more directly involved in policing any smoking ban in order to avoid differential enforcement which could see practice in one local authority area being permitted whilst in another it will result in prosecution.**

## **Smoking Criminal Offences and the Licensed Trade**

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.**

**We believe this runs contrary to the principles of natural justice given that the Scottish Executive is introducing new no smoking requirements which are not specifically targeted at the licensed trade, but which will expose the licensed trade to extreme sanctions which are specific and indeed unique to the trade. We believe this to be wholly unfair and would ask that any smoking offences are excluded from consideration under the terms of the Licensing (Scotland) Bill.**

## **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. 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 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 of 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 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.**

## **Conclusion**

As we have already stated, SBPA is fully supportive of the objective of providing more smoke free areas in Scotland's pubs and clubs. Moreover, we are committed to providing more comfort and choice for non-smokers within the hospitality environment and to provide a more healthy work environment for our staff.

**However, we are opposed to the legislation relating to smoking in the Smoking, Health and Social Care (Scotland) Bill and are concerned at the possible implementation and enforcement of any legislation.**

We would propose that the Scottish Executive and the Scottish Parliament delay the implementation of its proposals for total smoking ban in enclosed public spaces and instead work with the industry to develop the five-point plan put forward by the industry in May 2004.

As we have indicated if the impact of the smoking ban on the value and volume of beer sales already experienced in Ireland were replicated in Scotland we would possibly be faced with:

- **The value of annual turnover in the licensed trade declining by £105m**
- **Annual profits in licensed premises declining by £86m**
- **Employment in the licensed trade can be expected to decline by 2,300 jobs initially**
- **About 142 average sized licensed premises closing as a result of decreased trade**

**The licensed trade in Scotland and the membership of the Scottish Beer and Pub Association will of course continue to work in partnership with the Scottish Executive in furthering its objectives of promoting health and tackling smoking. We would however urge the Scottish Executive and the Scottish Parliament to think again before proceeding with the current proposals and to instead work with the industry to introduce the change we all want to see in a considered way.**

**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.**