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Recd 31/5/05

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Please ask for: Ken Jones
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Your Ref:
Date: 24 May 2005

Dear Sir

The Smoking Health & Social Care (Scotland) Act 2005 (Prohibition of Smoking in Certain Premises) Regulations 2005 Draft

Further to your letter and enclosures of 10 March 2005, please find attached preliminary comments of Scottish Borders Council on the consultation document.

The document has yet to be discussed by the Members of Scottish Borders Council and further comments may be issued in due course. I trust this is acceptable to yourselves but should you wish any further information on this or any other matter contained in the report, please contact me at the above address and telephone number.

Yours faithfully



Ken Jones
Environmental Health Manager

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Ken Jones – Environmental Health Manager

Consultation Point 1

Do the definitions of words ensure clarity of what premises are covered or exempted from the regulations. If not, how might they be improved?

Response: Whilst there is clarity within the regulations generally to show what premises are covered and which are exempted from the regulations, further clarification is required upon the position in relation to a) sports stadia, b) bus shelters, and c) public coach hire.

Consultation Point 2

Display of no smoking notices

It is proposed that the minimum size of a no smoking notice be 230mm x 160mm (approx 9" x 6") and specify that an international no smoking symbol of at least 85mm (approx 3") in diameter should be included. The sign must also specify the person to whom complaints can be addressed and be displayed on the premises in order that it is protected from tampering, damage, removal or concealment. Views are invited on this approach.

Response: Whilst there is a requirement that no smoking signs be conspicuously displayed inside and outside no smoking premises, there is no mention of how many notices are required per premises. It may be that in large establishments with a number of different restaurants/bars that a requirement should be included that signs are displayed in these areas. This would avoid any confusion, especially to tourists from outside the UK visiting. Clarity requires to be provided as to whom the sign must specify as the person to whom complaints should be addressed, i.e. should this be the person in charge of the premises, or the Local Authority enforcing the provisions of the Act.

Consultation Point 3

No Smoking Premises

Paragraph 1 of Regulation 3 brings into effect Schedule 1 which gives the premises or classes of premises which are to be no smoking premises. Paragraph 2 of Schedule 3 gives effect to Schedule 2 which sets out the premises or parts of premises which are excluded from the definition of no smoking premises. Paragraph 3 of Regulation 3 defines and elaborates on the term "premises", "wholly enclosed" and "has access" as they are used in the Bill. The Executive is continuing to examine whether the given definition of wholly enclosed which is contained in Regulation 3(b) delivers the policy intention which is to designate as no smoking premises all these 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.

Comments are invited on this formula and how it might be improved.

Response /

Consultation Point 3 Contd.

Response: Schedule 1 defines public transportation vehicles as no smoking premises whereas schedule 2 exempts private vehicles. Clarification is required where vehicles are privately hired for outings, journeys to events etc.

The position regarding sports stadia and bus shelters also requires clarification.

Consultation Point 4

Fixed penalty time limits, amounts and payments

The regulations provide that an enforcement officer can only serve a fixed penalty notice up to 7 days after the event. They also set out the amounts of fixed penalty associated with the various types of offence which are £200 for permitting others to smoke in no smoking premises, £50 for smoking in no smoking premises, and £200 for not conspicuously displaying warning notices in no smoking premises.

Where an offender pays a fixed penalty within 15 days, discounted amounts are charged, these being £150, £30 and £150 respectively.

Views are invited on the level of fixed penalties and time limits for payment.

Response: The requirement that officers can only serve a fixed penalty notice up to 7 days after the event is felt to be unduly onerous. Investigations may require to be undertaken as to whom the notice should be served upon which could take longer than 7 days. It is felt that 14 days would be more appropriate.

The question of fixed penalty notices in general for certain premises may need to be re-examined. For an officer of the Local Authority to attempt to serve a fixed penalty notice in a public house late in an evening may not be considered to be a safe system of work, especially if compliance rates are not as high as the Scottish Executive considers they will be.

At present the fixed penalty notice amount for not clearing up after a dog has fouled illegally is £40, rising to £60 if not paid within 28 days. For smoking in premises where smoking is prohibited it is proposed that the fine should be £30, rising to £50 if not paid within 15 days of the notice being issued. There is an inconsistency in this approach, which indicates that it could be seen to be a less onerous offence to be smoking rather than not clearing up after a dog. It is felt that the level of fees and the time limit should reflect those contained in the Dog Fouling (Scotland) Act.

There is no provision made for repeat offences and it is felt that consideration be given to increasing the fees for repeat offenders.

Consultation Point 5

Application by Councils of fixed penalties and account keeping

Regulation 5 requires Councils to keep accounts of their income and expenditure in respect of administration and enforcement of fixed penalty notices. Any deficit is to be made good by the Council and any surplus used to improve the amenity of the Council area. The Councils will be required to send an annual statement of the accounts they have kept to Ministers along with an explanation.

Views are invited on the general approach outlined here.

Response: No indication is given as to what is meant by the amenity of the Council area and guidance should be provided at what the income could be spent on. There is also an issue with regard to the amounts which are likely to be collected through fixed penalty fines. If the amount is very small, say under £500, then it will be an administrative burden on the Council to produce an annual statement to send to Ministers.

Requiring the Local Authority to make good any deficit incurred by the administration of this legislation could be counter productive, in that it could lead to the legislation not being enforced as effectively as perhaps it could be. The Executive should fund Local Authorities for additional costs incurred in administering this Act.

Guidance also requires to be provided as to what is meant by the term "explanation".

Consultation Point 6

Schedule 1 of the regulations sets out the definitive list of premises which will be no smoking premises for the purposes of the Act. This is required by the Bill which provides that Ministers will make regulations prescribing premises, or classes of premises, as "no smoking" premises. The Bill also limits the kind of premises that can be prescribed as being "no smoking" premises by making it a condition that they must be wholly enclosed and also fall within one of 4 stipulated categories. Schedule 2 lists the premises, or classes of premises, or parts of premises which will be exempted from the no smoking regime. There are a number of issues in relation to Schedule 1 and 2 on which views are being sought:

1. No smoking premises - The kind of premises which can be defined as no smoking are those which are wholly enclosed and:
 - a) to which the public or a section of the public has access
 - b) which are being used wholly or mainly as a place of work by persons who are employees
 - c) which are being used by and for the purposes of a club or other unincorporated association
 - d) which are being used wholly or mainly for the provision of education or of health or care services.

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Consultation Point 6 Contd.

It is the Executive's intention that the list of premises included in Schedule 1 to the regulations be definitive. Ministers will have the power to add to the list of no smoking premises by way of amendment of the regulations if it proves to be deficient in any way.

Views are sought on whether there are any premises which fall into the definition of no smoking premises at section 4 of the Bill and a) to d) above but which have been omitted from the list in Schedule 1.

Response: The list appears to be comprehensive and the definitions are sufficiently broad to cover premises to be regulated. Further clarification however is required upon sports stadia, bus shelters and private coach hire.

Consultation Point 7

Exemptions

- a) Adult Care Homes - Scottish Executive Ministers recognise that there are a number of issues which make it desirable to exempt adult care homes from this legislation, not least that these are effectively the homes of the residents.

Ministers also recognise that safety and other considerations mean that in many such establishments smoking is not permitted in residents' own rooms, the place which most closely equates to their private place of residence. For this reason particular consideration must be given to the impact of second hand smoke on non smoking residents and of staff. In order to address this issue, the Executive will investigate the best ways of ensuring that care homes implement smoking policies which provide smoke free social areas for non smoking staff and the targeting of cessation services and funds on those groups where it would have the greatest benefit.

The Executive seeks views on 1) general merits of this approach, 2) the development of smoking policies in residential care homes, and 3) the targeting of cessation services on the group.

Response: It would appear that the Executive intend to totally exempt adult care homes from the provisions of the Act. It is felt that this is the incorrect emphasis and that the situation should be reversed to making adult care homes non smoking throughout but providing smoking availability for residents who desire this. Consideration should be given to having research carried out as to the extent and numbers of persons in care homes who are actually smokers and how the care homes themselves feel that the problem could be best approached.

By the nature of adult care homes, it may be that through a period of time with less of the population in general smoking, that this will become less of an issue and will gradually lead to a reduction in services which have to be provided.

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Consultation Point 7 Contd.

The development of smoking policies and the targeting of cessation services are to be welcomed and supported.

- b) **Psychiatric Hospitals and Psychiatric Units** - The Executive views the position of patients in psychiatric hospitals and units, whether they are there voluntarily or on the basis of a compulsory order, to be different to general members of the public. They do not have a private room and may have limited access to the outdoors. For those reasons the Executive intends to exempt these locations and will explore with those involved in the care and treatment of people with mental illness as well as advocacy groups and patients themselves, whether arrangements might be developed to allow the legislation to extend to some or all psychiatric hospitals and units in due course.

Ministers recognise that the physical health profile of those with mental illness in Scotland is poor and smoking rates are traditionally high. Ministers are committed to reducing the health inequalities experienced by this group of patients and plan to implement a programme of targeted cessation across the sector in support of this aim. Views are invited upon 1) the general merits of this approach, and 2) the targeting of cessation services at this group.

Response: Staff working in psychiatric hospitals and units must be protected from the effects of passive smoking. It is however recognised that patients of these units are a particularly unique group and it is considered that the advice of psychiatrists and doctors treating these patients must be sought and their views taken on board as to the merit of this approach. The targeting of cessation services, not only at this group but at any other group is to be welcomed as the ultimate aim is a reduction in the number of persons smoking in Scotland.

- c) **Hotel, Guest House and Bed and Breakfast Bedrooms** - The Executive have drafted the regulations to include hotels, guest houses and bed and breakfast establishments to come within the scope of the law but to allow the proprietor the ability, if so desired, to designate bedrooms in which smoking may be permitted.

Views are invited on the merits of this approach.

Response: Bedrooms in hotels, guest houses and bed and breakfast establishments are temporarily the homes of individuals, albeit for a very short period, and as such people should be allowed to have the same freedom there as provided in their own homes, providing they have the owners consent. The approach here is to be welcomed and owners of these types of premises can decide themselves whether they wish to provide smoking rooms or not as marketing conditions dictate.

- d) **Omissions from Schedule 2** - The Executive invites views as to whether there are any premises which taking into account humanitarian, practical or other considerations, are omitted from the exemptions list in Schedule 2.

Response: See previous comments regarding sports stadia and private coach hire.