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HEALTH AND SAFETY COMMISSION

HSC's Response to Department of Health's (DH) Consultation Document (CD) on the Smokefree Elements of the Health Improvement and Protection Bill

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Issue

1. HSC's response to the Department of Health's (DH) consultation on proposals (Annex 1) for legislation to make enclosed public places and workplaces smokefree but with some exemptions.

Timing

2. Routine. The closing date for responses is 5 September 2005.

Recommendation

3. That HSC responds to the consultation in relation to the proposed scope and impact of the legislation on HSE and Local Authorities (LAs). A draft response is at Annex 2. We are advocating that the prohibition should extend to all licenced premises and private clubs, to bring smoking legislation in England into line with the position in Scotland and the likely position in Wales.

Background

The law, the science and HSE's present role

4. Section 2, HSWA, provides general protection for employees from the effects of second hand smoke (SHS) in the workplace. There is also a specific provision in the Workplace Regulations 1992 requiring employers to ensure that rest facilities include suitable arrangements to protect non-smokers from discomfort caused by tobacco smoke.

5. HSC/E relies on scientific evidence provided by DH's Scientific Committee on Tobacco and Health (SCOTH). This recognises that second hand smoke (SHS) is harmful but does not differentiate between workplace and social exposure. Based on this evidence HSE's policy has been generally to promote sensible, proportionate risk management of SHS and to encourage employers to adopt smoking policies in the workplace which give precedence to the wishes of non-smokers not to be exposed to SHS.

Government Proposals

6. The Government has decided that smoking in public places is a public health issue. The Scottish Executive leads on this in Scotland, while the DH does so in England and Wales. The situation is that:

- In Scotland, legislation has already been passed prohibiting smoking in enclosed public places with a few exceptions being made for places which are also people's homes such as hospices, care homes and prisons. The prohibition is likely to come into force in spring 2006.
- In England and Wales, the Government (DH) is proposing only a partial ban on smoking in public places in England in that, in addition to the exemptions included in the Scottish legislation, smoking will also be allowed in licensed premises which are private clubs or which do not serve food.
- The proposals include arrangements for the Welsh Assembly to introduce its own controls on smoking. The Assembly has indicated that it will introduce a more comprehensive ban along the lines of the Scottish legislation.

7. It is proposed that LAs will enforce the new legislation in **all** premises (including those where HSE enforces HSWA). It will be for them to decide how this work should be split among their enforcers, e.g. between food safety officers, trading standards officers and environmental health officers (EHOs).

Argument

8. The Government has said it will reconsider the scope of the proposed legislation to make all licensed premises smoke free if public consultation points to that. This is an opportunity for HSC to lead public opinion, based on the science and our experience of regulating health and safety over many years. The arguments for a wider ban in all licensed premises are these:

- **the science:** SCOTH is clear that second hand smoke is harmful. The Government's proposals appear to be at odds with equality in public health.
- **better regulation:** for regulation to be effective it must be capable of ready application by those to whom it is addressed. Differing restrictions in the UK will lead to confusion and lessen benefits. A uniform approach to smoking will be easier for employers, employees and the public to understand and comply with. (HSC expressed concern on this point on 5 April in the discussion about the Wider Health Agenda).
- **effective enforcement:** a simpler regime, with fewer and less complex exemptions, will aid enforcement by the LAs.

9. The proposal for all enforcement to be the province of LAs poses a risk that wider health and safety enforcement may suffer if there is disproportionate concentration on any new smoking ban. This is a point also worth making to Government.

10. There is a proposed exemption for premises which are people's homes, such as care homes or prisons. This is a more complicated issue, as an outright ban on smoking could contravene Human Rights Act provisions relating to the right to a home life. This will inevitably mean that some workers e.g. care workers may still be exposed to SHS and this will have to be addressed through control measures. However the same arguments cannot be put forward in relation to exempting certain licensed premises.

Consultation

12 Within HSE and Department of Work and Pensions.

Presentation

13 HSC's response, along with other responses to the CD, will be made available to the public.

Costs and Benefits

14 A partial regulatory impact assessment is in Annex 2 of the CD. This provides estimates for the costs, benefits and net benefit of four options for controlling exposure to second hand smoke. The options include the DH's proposal of a ban with exemptions and a full ban in all enclosed public places and workplaces. Comparing these options shows some extra net benefit from a full ban, mainly to members of the public rather than workers. However, the differences are not significant (plus or minus 10% typically) and the cost/benefit ranges for each option overlap.

Financial/Resource Implications for HSE

15. Although LAs will enforce this new legislation in all premises, we anticipate that implementation of a partial ban on smoking in licensed premises will lead to an increase in reactive work for HSE arising from external requests from interested organisations such as trades unions, bereaved families and employees to take enforcement action under HSWA. It is not possible to quantify the resource implications of this with any degree of certainty. Revised guidance on smoking at work may be needed to focus on exempted premises.

Other Implications

16. While the CD includes proposals for LAs to be appropriately funded to carry out their new enforcement responsibilities, there remains a risk that some LAs (who regard SHS as a priority) may divert already scarce EHO expertise to smoking enforcement at the expense of their other priority health and safety activities. This expertise would not be easily replaced. Based on experiences in Eire and other countries that have introduced similar controls, DH have concluded that enforcement action is likely to be highest in the first 6 to 12 months. It is likely that most enforcement will be undertaken either as part of regular visits or in response to complaints.

DRAFT REPLY FROM THE HSC CHAIR TO PATRICIA HEWITT

Consultation Document (CD) on the Smokefree Elements of the Health Improvement and Protection Bill

I am writing with the response of the Health and Safety Commission (HSC) to the invitation in the above CD to comment specifically on the proposed exemptions (in general) and on enforcement matters. We have views for you to consider in three areas.

First, mindful of the opinion of SCOTH that second hand smoking (SHS) is harmful, HSC judges that even greater benefits to public health – the public and workers alike - could flow from a wider prohibition to make all licensed premises and private clubs smokefree in England. We are concerned that the proposals run the risk of creating health inequality and this we consider would be undesirable.

Second, based on our experience of regulating workplace health and safety in Great Britain (GB) over many years, we judge there is more to be gained from a universal GB restriction on SHS. Differences in the regimes adopted within and between England, Scotland and possibly Wales will, we believe, cause confusion and uncertainty for employers, employees, and members of the public. We also think that differing regimes will hamper effective enforcement by the Local Authority (LA) enforcers; and there is a risk of HSE being drawn in to address complaints where there is no ban in licensed premises. All this, in our view, could well detract from the clear benefits of the legislation. So we see a better regulation case in a single regime to enable its ready application by those to whom it is addressed; and also to aid enforcement of the regime.

Thirdly, we welcome assurances in the CD that adequate funding will be made available for LA enforcement of this new legislation. But we are concerned that, regardless of the scope of the legislation, already scarce Environmental Health Officer *expertise* may be diverted from their wider health and safety portfolio (in those LAs that make smoking enforcement a priority and elect to use this particular group to take that work forward). This expertise would be difficult to replace. The Government may wish to encourage LAs to consider alternatives such as specially appointed staff to handle complaints.

Finally, I am pleased that your officials are working closely with the Health and Safety Executive on this topic. I am copying this letter to David Blunkett, Lord Hunt and to your Smokefree Legislation Team and equivalents in Scotland and Wales.

Bill Callaghan
Chair, Health and Safety Commission