



Law Society  
of Scotland

# Consultation Response

## Prohibiting smoking outside hospital buildings

17 January 2020



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee and Health and Medical Law sub-committee welcome the opportunity to consider and respond to the Scottish Government consultation: Prohibiting smoking outside hospital buildings (the consultation). The committees have the following comments to put forward for consideration.

## General Comments

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The committees note that the purpose of the consultation is to consider building on the introduction of offences for smoking in enclosed spaces in 2006. Additionally, it now aims to introduce a ban on smoking around hospital buildings as well. The intention is to use the Health (Tobacco, Nicotine etc and Care) (Scotland) Act 2016 (2016 Act)<sup>1</sup> that included provisions “to amend the prohibition on smoking in certain areas.”

Section 20 of the 2016 Act amends section 4 of The Smoking, Health and Social Care (Scotland) Act 2005 (2005 Act). That, in effect, introduces formal no-smoking areas outside hospital and new offences for allowing smoking in these areas<sup>2</sup> and for smoking in these areas.<sup>3</sup> The offences are for perpetrating as well as permitting.

Regulation making powers<sup>4</sup> are afforded in relation to:

- the manner of display, form and content of no-smoking notices<sup>5</sup>
- specifying the distance for the purposes of subsection (1)(b) of the 2015 Act and (b) determination of the perimeter around a building<sup>6</sup>

<sup>1</sup> <http://www.legislation.gov.uk/asp/2016/14/contents/enacted>

<sup>2</sup> Section 4A

<sup>3</sup> Section 4B

<sup>4</sup> Section 34(3) of the 2016 Act – subject to negative parliamentary procedure

<sup>5</sup> Section 4C (4)

<sup>6</sup> Section 4D (2)

- any exceptions that are required for specific hospitals or buildings or areas of land which should not be considered hospital grounds or part of the no-smoking areas respectively.<sup>7</sup>

We note that there are current restrictions on smoking in place including an administrative ban in March 2015 referred to as the Green Curtain Campaign<sup>8</sup> where the Scottish Government and NHS Scotland ask all not to smoke until there are off the premises. We appreciate that campaign however lacks the power of enforcement which was envisaged under the 2016 Act.

What would have been useful would have been to obtain information regarding how many offences are anticipated to arise after the ban is implemented.

## Section 1 No-smoking area

### **Question 1: Do you support the proposal that the distance from the hospital buildings which will form the perimeter of the no-smoking areas outside a hospital building should be 15 metres?**

No.

We understand the reasoning for the introduction of 15 metres distance. However, what if it is near a respiratory ward where a greater distance may be appropriate given the propensity to affect those within such wards. There may be other examples that are relevant in relation to other specific medical conditions.

While we appreciate that the aim of this proposal of a 15-metre perimeter is to provide consistency, we consider that there are too many variables which may prevent this from happening. The consultation itself acknowledges these variables as highlighted above which can be due to the design of the building, length of the building entrance and general ground size of the building and overhang from canopies.<sup>9</sup> These may also have the effect of moving the concentration of those who wish to smoke to another part of the hospital grounds or outside the hospital's areas of control.

We would imagine that car parks will be largely included within certain hospitals. Ignorance from the public may lead some to consider that smoking within their own vehicles would be exempt. How will the legislation or practice deal with that issue?

Our observations relate to the exact form/terms of the legislation as we can foresee potential technical challenges to any prosecution on the grounds that the distance affected by the no-smoking ban does not

<sup>7</sup> Section 4D (4)

<sup>8</sup> The Green Curtain Campaign, Scottish Government and NHS Scotland 2015

<sup>9</sup> Scottish Government (2019) Prohibiting Smoking outside Hospital Buildings. <https://www.gov.scot/publications/prohibiting-smoking-outside-hospital-buildings-consultation-paper/pp7-9>

accord with the terms of the legislation. There may well be challenges as to the distance of 15 metres<sup>10</sup> which satisfies the requirement of fair notice discussed under Question 3. Similarly, we can anticipate that challenges will arise as to the location of the person caught smoking and consequentially, for anyone prosecuted for permitting smoking to take place.

We understand the stated policy objective about moving towards a tobacco free generation by 2034. However, when this legislation is enacted, any technical loopholes which may be foreseen should be eliminated as far as possible.

The enforcement of the offences under the 2005 Act are much clearer cut in that it refers to enclosed area. There is much less room for dispute.

**Question 2: Do you support the proposal that the perimeter should be measured from the outside of wall of a building and include all land or area under any canopy or overhang event where those extend beyond 15 meters?**

We refer to our answer to Question 1.

## **Section 2- No-smoking notices**

**Question 3: Do you support the proposal to set out the wording and dimensions of no smoking notices as described above?**

No

We have several observations to make:

### **Content of the notice**

We have no expertise to comment on the size of the notice and we would suggest that it needs to be large enough to be easily seen and understood.

What does 'knowingly permit' mean? To whom is this directed? Should every NHS employee who walks past the smoker be liable if they don't enforce the ban? While it is recognised that employees have the

<sup>10</sup> *Normand v Walker* 1995 J.C. 5 may illustrate some of the issue that may arise when establishing a length/distance in respect of legislation that is essential to the proof. It involved the use of a ruler in court.

right to work in a smoke free environment, there is plenty of evidence to show that such employees are very reluctant to, or do not regard it their role to enforce this.<sup>11</sup>

NHS employees may be subject to abuse. Greater Glasgow Health Board reported 1,188 threats of violence made to NHS staff, between the end of May 2018 and May 31 2019, and a further 1,070 times where workers were verbally abused.<sup>12</sup> Some employees may be cautious that asking them to enforce such a ban may lead to additional confrontation.

The proposals for the content of the notice are entirely censorial. For example, the notice could also include brief direction to where evidence based quitting support could be found.<sup>13</sup>

### **Criminal:**

Given that a breach of smoking ban will result in a criminal conviction which carries implications for individuals, the publication of notices is essential. Commission of criminal offences should only be possible when it is made clear to persons that the type of the behaviour which is offending and that when found in breach, they face the consequences of the criminal law and appropriate sanctions.

Criminal law requires clarity where we endorse that such notices must contain clear information designating the area, the behaviour which is banned and the consequences that follow such actions.

When the consultation suggests that “penalties and fines apply”, this should recognise that these are criminal breaches where these are criminal penalties and would amount to convictions. Also, please note that convictions would only apply where sufficient admissible evidence is produced subject to the statutory defence. The statutory defence under section 4 B (2) states where:

“an accused is charged with an offence to prove that the accused did not know, and could not reasonably be expected to have known, that the place in which it is alleged that the accused was smoking was within the no-smoking area outside a hospital building.”

That means awareness raising is very important as we anticipate in relation to any specific hospital grounds where the notices are not correctly displayed, a significant number of challenges may arise.

That raises any issue too to deal with enforcement. Given the scale of the likely penalties, we would expect many offences would be likely to proceed by way of Fixed Penalty Notices. We repeat that it would be useful as part of the implementation to ascertain if there has been any quantification regarding the likely number of cases expected to arise and to be prosecuted as that could involve a potential impact on the court system. Again, if prosecutions are intended, there may be legal aid

<sup>11</sup> Shipley M, Allcock R (2008) Achieving a smoke free hospital; reported enforcement of smoke free regulations by NHS care staff. J Public Health (Oxf). 2008 Mar;30(1):2-7 at p2

<sup>12</sup> The Scotsman (2019) Scottish health board's staff suffered more than 5,000 physical and verbal assaults, stats show. Available from: <https://www.scotsman.com/health/scottish-health-board-s-staff-suffered-more-than-5-000-physical-and-verbal-assaults-stats-show-1-4971251>

<sup>13</sup> Gov UK (2019) PHE calls on all NHS trusts to ban smoking on hospital grounds. Available from: <https://www.gov.uk/government/news/phe-calls-on-all-nhs-trusts-to-ban-smoking-on-hospital-grounds> Accessed Jan 6 2020. pp1-2

issues and access to justice questions arising in the event of test challenges regarding the statutory defence, especially until such time as the offences become well established.

### **Public awareness**

Is it the Scottish Government's intention to implement a public awareness campaign regarding the introduction of the no smoking ban?

That would in our view be important to ensure the raising of awareness of the ban which would include advice regarding the types of notice which would be the same to ensure consistency of enforcement across Scotland.

- How does the Scottish Government intend to deal with those who may have additional support requirements, equality issues such as age, infirmity or language issues which may hinder or prevent the understanding of any notices?
- Is the intention to carry out an Equality Impact Assessment in relation to the introduction of any Regulations? See Question 8 below.

We would be interested in hearing about the Scottish Government's policy intentions in this regard.

### **Section 3- Exceptions**

#### **Question 4: Do you support the proposal that no specific hospital type should be exempted under the definition of "hospital" in the Act?**

Yes

We believe that there may be good reason to exclude premises where patients are in long term care. For example, a compassionate approach for those who are receiving long term, residential, psychiatric care and where smoking may provide comfort or temporary release from other health challenges.

If the Smoking in Certain Premises (Scotland) Regulations 2006 distinguished between hospices and hospitals and exempted adult hospices and designated rooms in psychiatric hospitals, why would that rationale not follow through to this consultation in designating certain areas being outwith the effects of this proposed ban?

#### **Question 5: Do you support the proposal that no-smoking areas will only apply to buildings used wholly or partly as a hospital?**

We believe that if the dominant purpose is to promote public health and smoke free practices within the hospital environment, then a consistency of application of any regulation will convey a more positive message and may be less confusing for those who smoke.

There is a double negative in the consultation regarding what buildings are to be treated as hospital buildings which may be confusing. Any legislation should clearly state what buildings are intended to be included.

**Question 6: Do you support the proposal that public footpaths, cycle paths and footpaths should be considered hospital grounds for the purpose of establishing no smoking areas outside the doorways of hospital building and that the size of the grounds would extend up to 15 metres from the centre of doorways?**

No

We refer to our answer to question 1. We stress the need for consistency and fair notice which is required in connection with the potential commission of any criminal offence.

#### **Section 4 -Nicotine Vapour Products (NVPs) on hospital grounds**

**Question 7: Do you support the proposal that the use of NVPs should be allowed as an alternative to smoking on hospital grounds but not within the no-smoking area outside hospital buildings?**

While the need for research remains, subject to broad interpretations and findings on the status of NVP's on health, it is generally recognised that many people find them a beneficial way to help quit smoking.

We therefore believe that the same consideration could be applied here as in question 4. Similar analogies could also be drawn from the fact that allowances are made for drug users currently in hospital by prescribing them methadone to alleviate their symptoms.

#### **Section 5- Equalities**

**Question 8: Do you consider there to be any positive or negative impact on equality as a result of the proposals in this consultation?**



We refer to our answer to Question 3.

There seem to be a number of possible equality implications which need to be addressed. Education and awareness raising in how to address these aspects seem to us to be vital and should be published in advance of commencement of any no smoking ban.



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