

Health Bill

Smoking in Workplaces & Enclosed Public Places

Briefing Note for MPs: Second Reading Debate



Smokefree Action brings together leading UK health and medical organisation, professional bodies and other groups working towards smokefree workplaces and enclosed public places. Please see www.smokefreeaction.org.uk/links for a full list of members.

Introduction

"Every time I've ever introduced a reform in Government, I wish in retrospect I had gone further"
Prime Minister Tony Blair speaking to the 2005 Labour Party Conference

"There is a danger we will come up with some stupid, pathetic compromise"
Former Health Secretary Frank Dobson MP, speaking on smoking in public places to an Edinburgh conference of the BMA in October 2004 <http://thescotsman.scotsman.com/politics.cfm?id=1235672004>

"I have formally advised the Health Secretary that the evidence supports the approach on smoke-free public places and workplaces and it is the action that should be implemented... I am totally opposed to the various hybrid proposals that were discussed and my view was made known to members of the relevant Cabinet Sub-Committee"
Chief Medical Officer Sir Liam Donaldson, letter to Cancer Research UK, 7th November.2005

Executive Summary

1. An end to all smoking in workplaces and enclosed public places would protect non-smokers from the damaging effects of secondhand smoke, and would encourage many smokers to quit. The partial ban proposed in the Health Bill will protect many workers and members of the public but leave some of those at most risk still exposed to the health risks of secondhand smoke. It will also reduce the number of smokers quitting as a result of the legislation, worsen health inequalities and produce perverse and unfair competition between licensed premises.
2. Smokefree legislation is essentially a yes/no question. Once the health and safety case and public health benefits are conceded it is really not possible to find a compromise (whether exemptions for some premises, separate smoking areas, ventilation systems or whatever) that is both practical and logical.
3. There is still time for the Government to ensure that workplaces and enclosed public places in England will have the same protection from secondhand smoke as will soon be available in Scotland, Wales and Northern Ireland and already exists in the Irish Republic. The current Government proposals for England are a cumbersome and ineffective mess.

Key Points

4. The scientific evidence on secondhand smoke is clear and overwhelming. The Government's scientific advisers on the Scientific Committee on Tobacco and Health reported that exposure to secondhand smoke increases the risk of heart disease and lung cancer in non smokers, in both cases by about a quarter. Four fifths of the country's five million asthma sufferers say that secondhand smoke makes their condition worse. Smoking at work in Great Britain is probably responsible for up to three times the number of premature deaths each year as all industrial injuries and accidents (600 compared to 200+). Bar workers are currently routinely exposed to levels of smoke equivalent to a moderate smoker, but smokefree legislation dramatically reduces this exposure. The Government cannot achieve its targets for cutting overall smoking prevalence rates without comprehensive smokefree legislation. Claims that workplace bans displace smoking to the home are without foundation – research in Ireland shows the opposite effect. **Paragraphs 19 to 33 of this paper summarise the key health evidence on secondhand smoke, the evidence on secondhand smoke and workplace exposure, and the likely effect of smokefree legislation on smoking prevalence rates.**
5. The exemption from smoking restrictions proposed in the Bill for pubs that do not serve food and for membership clubs was contained in the Labour manifesto. However, the manifesto also promised to protect the health of bar staff by ending smoking in the "bar area". This promise cannot be met by for example drawing a line in the floor of a pub to designate the bar area, since smoke drifts. The Government has not explained how the current Bill will protect the health of all bar staff. **Paragraphs 35 to 39 of this paper set out the policy background to the**

smokefree sections of the Health Bill.

6. The Health and Safety Commission has backed comprehensive smokefree legislation without the exemptions for pubs and clubs. **Paragraphs 40 to 42 of this paper set out the HSC's position on the issue.**
7. Scotland has passed comprehensive smokefree legislation, the National Assembly for Wales has voted overwhelmingly in favour of such legislation, and the UK Government has announced that comprehensive smokefree legislation will be introduced in Northern Ireland. In announcing this legislation, Northern Ireland Health Minister Shaun Woodward used arguments that apply just as strongly to England. **Paragraphs 43 to 46 set out the current position on smokefree legislation in these countries.**
8. The Bill is strangely drafted and difficult to amend. It would allow the Government to issue subsequent regulations ending smoking in some, all or no enclosed public places and workplaces, and add any other category of public place it chose. This is partly because the Bill was printed before the Government agreed on its policy. **Paragraphs 47 to 57 explain the key Clauses of the Bill and raise the issue of whether it is properly drafted.**
9. The exemption in the Bill for pubs that do not serve prepared food would worsen health inequalities. Survey evidence shows that 45% of pubs and bars in the most deprived areas of England would be exempt, compared to 14% of pubs in the least deprived. The proportion of pubs and bars not serving prepared food could rise to 40% if the final legislation includes the proposed exemption, as many pubs could cease to serve food in order to continue to allow smoking. This exemption also threatens to undermine the Government's alcohol strategy. **Paragraphs 58 to 65 set out the key evidence on the exemption for wet-led pubs proposed in the Bill and its effect on health inequalities.**
10. The proposed exemption for membership clubs would in effect allow the members of such clubs to vote to damage the health of their staff. The exemption would also create unfair competition between pubs and clubs. **Paragraphs 66 to 69 discuss this exemption.**
11. Partial smokefree legislation would be more difficult and expensive to enforce and would add to the regulatory burden on business. The Government has ignored advice from its Better Regulation Taskforce on this point. Exemptions proposed in the Bill could add about 50% to the enforcement costs to local Councils. **Paragraphs 70 to 75 discuss the implications of partial legislation for enforcement and for the regulatory burden on business.**
12. The Department of Health has failed to release an analysis of its public consultation on the Bill. About 60,000 replies were in fact received, and about four fifths of these backed comprehensive smokefree legislation. **Paragraphs 76 to 77 give the results of the DH consultation.**
13. Exemptions for wet-led pubs and clubs will lead to legal action under health and safety legislation and the Human Rights Act. Workers in exempted premises made ill by secondhand smoke will still be able to sue their employers for damages. They may also have a case under human rights law because they will have been denied protection given to other workers and members of the public on the basis of scientific evidence about secondhand smoke and health. **Paragraphs 78 to 80 discuss the legal instability of partial smokefree legislation.**
14. Exempted pubs and clubs will become the focus for tobacco industry marketing. A recent Observer investigation showed how Philip Morris is already targeting pubs and clubs to market the Marlboro brand. **Paragraphs 81 to 83 show how the tobacco industry could use exemptions to help sell cigarettes, reducing the impact of the Bill on smoking rates and making health inequalities worse.**
15. When asked whether they support a law to ensure that *"all enclosed workplaces including all pubs and all restaurants must be smokefree"*, about three quarters of the British public say yes. Experience in Ireland, New York and elsewhere shows that the popularity of smokefree legislation also rises sharply after it comes into effect. **Paragraphs 84 to 87 give evidence on**

public attitudes to smokefree legislation.

16. Trade bodies and major employers in the hospitality industries oppose the proposed exemptions from smokefree legislation. Many would prefer comprehensive legislation because it is easier to apply and avoids unfair competition, particularly between licensed premises. **Paragraphs 88 to 90 give key quotes from industry sources on the issue.**

17. The tobacco industry and its front groups like to talk about “compromise solutions” to smoking in public places. They are particularly keen to promote ventilation as an alternative to ending smoking. The scientific evidence shows that ventilation is largely ineffective in dealing with the health risk from secondhand smoke. Research at the European Commission’s Joint Research Centre has shown that a ventilation system would need to have “*wind-tunnel*” force to eliminate secondhand smoke. **Paragraphs 91 to 93 show why “compromise” solutions on smoking in public places – particularly ventilation systems – don’t work.**

18. The tobacco lobby and sections of the hospitality trade often claim that smoking restrictions are bad for business. The objective evidence does not support this claim. One year after smokefree legislation came into effect in New York, business receipts for restaurants and bars had increased, employment had risen, virtually all establishments were complying with the law, and the number of new liquor licenses issued had increased. In Ireland, retail sales figures show that sales of beer, wine, spirits and food in pubs rose by 1.1pc in July 2005 compared with the previous month, showing an annual increase of 5.8pc. **Paragraphs 94 to 95 show that smokefree legislation is not bad for business.**

**See www.smokefreeaction.org.uk
for detailed evidence on the case for comprehensive smokefree
legislation**

Health Bill

Smoking in Workplaces & Enclosed Public Places

Detailed Brief

Key Facts: Smoking and Health

Secondhand Smoke and Health

19. The scientific evidence that secondhand smoke is a danger to health is now clear and overwhelming. It was summarised in the November 2004 report to the Department of Health from the Scientific Committee on Tobacco and Health (SCOTH) <http://www.advisorybodies.doh.gov.uk/scoth/PDFS/scothnov2004.pdf>. SCOTH concluded that *“knowledge of the hazardous nature of SHS has consolidated over the last five years, and this evidence strengthens earlier estimates of the size of the health risks. This is a controllable and preventable form of indoor air pollution. It is evident that no infant, child or adult should be exposed to SHS. This update confirms that SHS represents a substantial public health hazard.”* SCOTH estimated the increased risk of heart disease in non-smokers exposed to secondhand smoke at 25%, and the increased of lung cancer at 24%. SCOTH also noted that *“some groups, for example bar staff, are heavily exposed at their place of work”*.

20. Certain population groups are particularly vulnerable to the health effects of secondhand smoke: children, pregnant women, people with existing cardiovascular or cerebrovascular disease, and those with asthma and other respiratory disorders. Moreover, those in lower socioeconomic groups are at greater risk of exposure than those in better-off groups. There is no safe level of exposure to secondhand smoke. <http://www.bma.org.uk/ap.nsf/Content/Smokefree>. The United States Center for Disease Control and Prevention has determined that the risk of acute myocardial infarction and coronary heart disease associated with exposure to tobacco smoke is non-linear at low doses, increasing rapidly with relatively small doses such as those received from secondhand smoke, and has warned that all patients at increased risk of coronary heart disease or with known coronary artery disease should avoid all indoor environments that permit smoking.ⁱ

21. Secondhand smoke worsens the symptoms of asthma and undermines the effectiveness of asthma medication. There is also growing evidence that smoking is a primary cause of asthma in adults and young people. According to Asthma UK:

- There are 5.2 million people in the UK with asthma. In surveys, 82% (the equivalent of 4.3 million people) have said that second-hand smoke makes their asthma worse.
- Secondhand smoke is known to trigger asthma and exposure to second-hand smoke at work doubles the chance of an adult developing asthma.
- Secondhand smoke is the second most common asthma trigger in the workplace

22. Smoking in public places reduces the choice available to people as to where they can go. Results from Asthma UK's National Asthma Panel show that:

- 40% of adults with asthma are discouraged from accessing smoky pubs.
- 55% of parents of children with asthma avoided restaurants and places with smoky atmospheres
- 1 in 5 people with asthma feel excluded from parts of their workplace where people smoke. <http://www.asthma.org.uk/news/news127.php>

Secondhand Smoke and the Workplace

23. Around half of all workers in Great Britain continue to be exposed to other people's smoke at work. Many such workplaces are operated by small firms and employ relatively low-paid staff. Workplace smoking is of course also common in the hospitality trades – restaurants, pubs, casinos etc. Using Government data and with results checked by the Office of National Statistics, ASH has calculated that 2.2 million people work in places where smoking is allowed throughout and a further 10.4 million in places where smoking is allowed somewhere on the premises www.ash.org.uk/html/press/040903.html.

24. Professor Konrad Jamrozik of the University of Queensland estimated in a paper published in the British Medical Journal that exposure to secondhand smoke in the workplace causes 54 premature deaths each year among hospitality industry employees – or more than one a week, and more than 600 deaths each year across the UK. This is more than three times the number killed each year in industrial injuries and accidents. www.ash.org.uk/html/press/050302.html.

25. Bar workers and customers in smoky bars can be exposed to very high levels of smoke over an evening. For example, in February 2005 the Huddersfield Examiner measured cotinine (a by-product of nicotine) and carbon monoxide levels in three non-smokers after a night in a smoky bar. The cotinine measurements ranged from 3.9 to 5.5 ng/ml (the norm for a non smoker is 1.7ng/ml) and CO readings ranged from 12ppm to 17ppm - the norm for a non smoker being 1 or 2 ppm. 17 ppm is a reading one would expect to get for a moderate smoker. <http://www.newsbackup.com/about609136.html>

26. Smokefree legislation has been shown to reduce dramatically the exposure of hospitality trade workers to secondhand smoke. In New York, a study of 104 workers in the hospitality industries one year after the City's smokefree legislation came into force showed that hours of exposure to secondhand smoke in hospitality jobs decreased from 12.1 hours to 0.2 hours, and saliva cotinine concentration decreased from 3.6 ng/ml to 0.8 ng/ml. The prevalence of workers reporting sensory symptoms declined from 88% to 38%. <http://tc.bmjournals.com/cgi/content/abstract/14/4/236>

Smokefree Legislation and Smoking Prevalence Rates

27. In the UK (2003/4), about 28% of men and 24% of women aged over 16 smoked cigarettes, with an overall prevalence rate of 26%. The decline in smoking rates over recent years has been heavily concentrated in older age groups: i.e., almost as many young people are taking up smoking but more established smokers are quitting. Smoking is highest among those aged 20-24: 38% of men and 34% women in this age group smoke.

28. Men and women in manual socio-economic groups are more likely to smoke than people in non-manual occupations. 20% of men and 17% of women in the professional and managerial groups smoke compared with 34% of men and 30% of women in routine and manual groups.

29. The Government has set a target to reduce smoking prevalence rates to 21% or less by 2010; and to reduce smoking among routine and manual groups to 26% or less over the same time period. <http://www.statistics.gov.uk/cci/nugget.asp?id=866>

30. Paragraph 14 of the Regulatory Impact Assessment published with the Health Bill estimates that ending smoking in all workplaces and enclosed public places would reduce overall smoking prevalence rates by 1.7%. (0.7% of this effect is estimated to result from the direct effect of ending smoking in employees' own place of work, and 1% from more places outside smokers' own place of work going smoke free).

31. The RIA gives no assessment of the reduction in prevalence rates that would be achieved if the Government's proposed exemptions were adopted. This estimate should be sought through PQs and during debate on the Bill. The RIA does assess the net benefits of a full ban as £1,714 to £2,116 million, compared with £1,304 to £1,904 million for a partial

ban as proposed by the Government.

32. The RIA also states that the value of averted deaths of customers from the partial ban would be £150-250 million, whereas for a full ban it would be £350 million. For this purpose, one year of additional life expectancy is valued at £30,000 – **so the Government estimates that up to 6,667 more customer life years will be lost through illness due to secondhand smoke as a result of its partial ban.**

33. An important article in the October 2005 edition of the research publication *"Tobacco Control"* reported a study which found that smokefree bans are an effective intervention in preventing young people smoking. Young people living in towns with a strict smoking ban were substantially less likely to progress to established smoking than youths living in towns with weaker regulations.ⁱⁱ

34. **It is sometimes suggested that ending smoking in workplaces displaces smoking into homes – increasing domestic exposure to secondhand smoke.** Speaking to the House of Commons Health Selection Committee on February 23rd 2005, [John Reid, then Secretary of State for Health](#), said that *"In Scotland, for instance, they have decided to go for a complete ban on smoking. I came to the conclusion that that was not a good thing on health grounds, apart from anything else, because you get a displacement of smoking from some public areas to the home - and most of the evidence about passive smoking is about the home....what we do know, for instance in Ireland and we would anticipate in Scotland, is that a percentage of people who previously went to the pub to smoke will now get a carryout and take it home. I think the percentage in Ireland is about 15 per cent"*. **There is no objective evidence for this claim whatsoever – not a single peer reviewed study has ever demonstrated such an effect. In fact, the evidence shows the reverse – workplace bans lead to less smoking in the home as smokers quit and awareness of the dangers of secondhand smoke rises. Research by Dr Geoffrey T Fong of the University of Waterloo shows that the proportion of homes in Ireland allowing smoking has fallen significantly since the workplace ban came into effect.** <http://www.smokefreeeurope.com/assets/downloads/geoffreytfong.pdf>

Smokefree Legislation: Policy Background

35. The White Paper on public health, published in November 2004, proposed legislation to end smoking in the great majority of workplaces and enclosed public places. This proposal was also contained in the Labour Party's General Election manifesto (in Chapter 4 under "Healthy Choices for All"). A Health Bill was included in the Queen's Speech on 17th May 2005. The Bill has flagship status.

36. The Labour Party manifesto commitment read: *"We recognise that many people want smoke-free environments and need regulation to help them get this. We therefore intend to shift the balance significantly in their favour. We will legislate to ensure that all enclosed public places and workplaces other than licensed premises will be smoke-free. The legislation will ensure that all restaurants will be smoke-free, all pubs and bars preparing and serving food will be smoke-free; and other pubs and bars will be free to choose whether to allow smoking or be smoke-free. In membership clubs the members will be free to choose whether to allow smoking or to be smoke-free."*

However, whatever the general status, to protect employees, smoking in the bar area will be prohibited everywhere. These restrictions will be accompanied by an expansion of NHS smoking cessation services to encourage and support smokers to improve their own health by giving up smoking. Starting with the poorest areas of the country we will introduce health trainers to help people maintain their healthy choices. By 2010, through this activity we plan to reduce the health inequalities that exist between rich and poor."

37. On Wednesday 26th October, Health Secretary Patricia Hewitt issued the following statement:

“Proposals agreed by Cabinet colleagues are:

- *restaurants will be smoke-free*
- *pubs and bars preparing and serving food will be smoke-free*
- *membership clubs will be exempt*
- *‘non-food’ pubs and bars will be free to choose whether to allow smoking, or be smoke-free*
- *in any event, smoking in the bar area will be prohibited everywhere. We shall consult further on the best method to achieve this, including on discrete smoking rooms or areas to protect staff*
- *we will monitor these proposals and there will be a review after three years.”*

38. Bullet point 4 above suggests that the Government will consult further about exactly how “smoking in the bar area” will be prohibited. It would of course be impossible to protect workers or customers from secondhand smoke if the “bar area” is defined as an arbitrary space in a room where smoking is still permitted. Smoke drifts and does not stop at a white line in the floor.

39. Private legislation to introduce smokefree provision in workplaces is currently before the House of Lords, brought by Liverpool City Council and London local Authorities. These Private Bills, which do not exempt pubs, clubs and bars, received their Second Reading in July and are awaiting detailed consideration by an expert Lords Committee early in 2006. A further Private Bill is also expected to be deposited later this month by several Merseyside Local Authorities, led by Wirral Metropolitan Borough Council, to introduce smokefree provision for all workplaces in their Boroughs. If the Health Bill were to be amended to cover all workplaces, including pubs, bars and clubs, the promoters have indicated that these Private Bills would not proceed.

Health and Safety Commission

40. The Government should certainly commit to be guided by the Health and Safety Commission in drafting smokefree regulations. These regulations should ideally be subject to HSC approval in regard to protection of workers and public.

41. Bill Callaghan, Chair of the Health and Safety Commission, wrote to Patricia Hewitt during the consultation on the Bill calling for exemptions for pubs and clubs to be dropped. A paper approved by the HSC at its meeting on 27th July 2005 stated that:

“The arguments for a wider ban in all licensed premises are these:

- ***the science:*** *SCOTH [the Government’s Scientific Committee on Tobacco and Health] 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...*
- ***effective enforcement:*** *a simpler regime, with fewer and less complex exemptions, will aid enforcement by the Local Authorities.”*

42. The letter to the Health Secretary stated: *“We are concerned that the proposals run the risk of creating health inequality and this we consider would be undesirable.”*

Scotland, Wales and Northern Ireland

43. On 30th of June 2005, the Scottish Parliament passed comprehensive smokefree legislation, which will come into effect in all fully and substantially enclosed public places at 6am on March 26, 2006.

44. The National Assembly for Wales does not have primary legislative powers. However, on Tuesday 24th May 2005, the National Assembly voted in favour of calling for powers to introduce comprehensive smoking restrictions covering all workplaces. The Health Bill would give the Assembly the powers it is seeking.

45. Northern Ireland health minister Shaun Woodward announced on Monday 17th October that comprehensive smokefree legislation covering the province would come into effect in April 2007. Mr Woodward said: *"I am confident that on top of the overwhelming health arguments for total control, the economy will not only suffer but that there will be opportunities for it to expand."*

46. If the UK Government has decided that comprehensive legislation is correct in Northern Ireland, why is it not also correct in England?

Is the Bill Properly Drafted?

47. The drafting of the smokefree section of the Health Improvement and Protection Bill is extremely strange, and questions are already being asked about whether it is acceptable under Parliamentary rules.

48. It should be noted that the Bill was printed *before* the Cabinet concluded its discussion of the smokefree issue, and was therefore written to allow the Government to produce any of a whole range of different results, depending on what final approach was agreed.

49. Part 1 of the Bill is drafted to give the National Assembly for Wales powers to introduce its own legislation covering the Principality. Since the Assembly does not have primary powers, the Bill gives the Assembly powers to introduce secondary legislation on the issue. At the same time, it gives the UK Government powers to introduce secondary legislation covering England.

50. However, the major difference between Wales and England will be that the Assembly's legislation will go through a full process of consultation, debate, scrutiny and amendment. In England, the secondary legislation will be subject to the affirmative resolutions procedure – it will receive a 90 minute debate, followed by a single vote. No amendment will be possible.

51. Clause 1 of the Bill states that it concerns smokefree public places, and helpfully defines "smoking" as including tobacco and any other smoked substance. This goes further than the November 2004 White Paper and should be welcomed.

52. Clause 2 of the Bill prohibits smoking in places of work and enclosed places open to the public. Places of work must be smokefree all the time; enclosed places which are not workplaces but to which the public has access need only be smokefree at times when they are open to the public.

53. Clause 3 states any exemptions will be specified in regulations. Clause 3(2) states that:
*"(2) **Examples** of descriptions of premises which **may** be specified are the following, or any subset of the following —*

- (a) premises where a person has his home, or is living whether permanently or temporarily (including hotels, care homes and prisons and other places where a person may be detained),*
- (b) licensed premises,*
- (c) premises in respect of which a club premises certificate is in force."*
(our emphasis).

54. Clause 4 allows the "appropriate national authority" to designate any other place as

smokefree, whether enclosed or not. These may be designated smokefree at specific times, subject to specific conditions, in specified areas, etc. Clause 5 of the Bill allows for vehicles to be designated as smokefree.

55. The result seems to be that the Bill gives the Government complete discretion as to which premises shall be smokefree, It is therefore consistent with designating as smokefree *all, some or no* workplaces and public places.

56. How can the Bill be usefully amended? For example if Clause 3(2) were amended to remove licensed premises from the Bill, what would be the effect? Since this list is simply a list of “*examples*” which “*may*” be specified, it would appear to have no effect at all – the Government could still designate as smokefree in the ensuing regulations any category of premises it chooses!

57. Is the Bill as it stands properly drafted? This should be checked with the Public Bill Office and raised during debate. Draft Regulations may be published before the Report Stage of the Bill – will these be available in time to allow sensible debate in the Standing Committee?

Exempted Pubs and Health Inequalities

58. Smoking prevalence rates are substantially higher in poorer communities; this is the biggest single contributing factor to differences in life expectancy between social classes. The proposed exemptions would exacerbate health inequalities because those on lowest incomes would be most likely to remain exposed to second-hand smoke in pubs and clubs, and because the exemptions would make low-income smokers less likely to quit as a result of the new law. This key point has been accepted by Health Secretary Patricia Hewitt. In oral evidence to the Health Select Committee on Thursday 27th October 2005 she said: *“I agree that one of the problems with the policy we set out in the manifesto and the distinction between the food and the non food pubs is that there are more non food pubs in the poorer communities of our country. That is a disadvantage.”*
<http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmhealth/uc623/uc62302.htm>

59. ASH commissioned the research firm IFF Research Ltd to survey 1252 public houses and wine bars to establish: how many pubs currently do not serve prepared food; where such pubs are located; and what their likely future business decisions might be in relation to prepared food if the legislation includes the proposed exemptions. The survey showed that 29% of pubs and bars would currently be exempted from the legislation, at the top end of the estimate given in the November 2004 White Paper (10% to 30%).

60. These premises would be concentrated in poorer communities. **The IFF survey found that 45% of pubs and bars in the most deprived areas would be exempt, compared to 14% of pubs in the least deprived. The survey also showed that the proportion of pubs and bars not serving prepared food could rise to 40% if the final legislation includes the proposed exemptions.** <http://www.ash.org.uk/html/press/050905.html>

61. On a scale of 1-5 where 1 is the least deprived area and 5 is most deprived the detailed figures from the IFF survey are as follows:

- 1 – 86% serve food (as defined by the white paper legislation but not including crisps etc.)
- 2 – 82% serve food
- 3 – 75% serve food
- 4 – 63% serve food
- 5 – 55% serve food

62. If the current exemption survives the Parliamentary passage of the Bill, publicans say that many will stop serving food. The IFF survey suggests that in future pubs will divide as follows

by area – where 1 is least deprived and 5 most deprived.

- 1 – 21% smoking throughout but no food served
- 2 – 29%
- 3 – 38%
- 4 – 42%
- 5 – 50%

Across England, the proportion of pubs not serving food could rise by a third – from 29% at present to 40%. (IFF used “super output” areas for this purpose – such areas are larger than wards and produce statistically significant results).

63. The regional breakdown of results was as follows:

	Currently do not serve food	Claim smoking will be allowed and will not serve food after proposed legislation	+/- %
East Midlands	32%	36%	+4
Eastern	19%	35%	+16
London	25%	31%	+6
North East	41%	50%	+9
North West	41%	45%	+4
South East	19%	30%	+11
South West	20%	33%	+13
West Midlands	29%	43%	+14
Yorkshire and Humberside	38%	57%	+19
Wales	35%	45%	+10
Total	29%	40%	+11

The current situation with regard to smoking in pubs was:

Region	Smoking throughout (%)	Separate areas for smoking and non smoking (%)	Separate rooms for smoking and non smoking (%)	No smoking at bar only (%)	No smoking throughout (%)
East Midlands	41	43	8	8	1
Eastern	48	33	12	4	2
London	52	28	3	18	-
North East	44	36	9	11	1
North West	55	35	3	6	1
South East	46	40	11	3	1
South West	44	39	10	5	-
West Midlands	42	43	7	8	1
Yorks & Humberside	49	33	9	6	3
Wales	45	37	13	4	1
Total	47	37	8	7	1

64. A separate survey of pubs and clubs in the North West (*“Impact of partial smokefree legislation on health inequalities: Evidence from a survey of 1150 pubs in North West England”*) showed that 44% of pubs and bars in the region do not prepare and serve food - with the figure rising to 63% in the most deprived areas. 13% of those pubs serving food in the North West stated that they were likely to stop doing so in response to the Government’s proposals.
http://www.biomedcentral.com/imedia/4716197617796129_manuscript.pdf

65. The survey results also provide evidence to show that the exemption would undermine the Government’s alcohol strategy – which includes an attempt to control

binge drinking by encouraging the consumption of meals when drinking alcohol. Clearly, if fewer pubs serve food as a result of the exemption from smoking restrictions for wet-led pubs this will be less likely to happen.

Clubs

66. Private clubs could also be exempt from smokefree provisions, following a vote of members. There are 19,913 registered clubs - clubs owned by the members - in England and Wales (Source: Department for Culture, Media and Sport Statistical Bulletin Liquor Licensing, England and Wales, July 2003-June 2004). There are also around 150,000 sport and recreation clubs, all of which could be exempt under the current drafting of the Bill. **It is unacceptable that members of clubs should have the right to vote to damage the health of their staff.**

67. Many private clubs are in effect bars – competing with pubs in their local area. Exempting them from smokefree legislation will create unfair competition and will be bitterly opposed by the pub trade as well as by the health lobby. Many clubs may also not wish to incur the bureaucracy and expense of regular ballots on smoking.

68. The study of pubs and clubs in the North West referred to in paragraph 59 above found that unrestricted smoking is allowed in 61% of licensed members' clubs in the North West. The proportion allowing unrestricted smoking rose from 31% in the more affluent areas to 68% in the most deprived areas. It is clear that exempted clubs will be concentrated in deprived communities, thereby exacerbating health inequalities.

69. However, it should be noted that pubs, casinos etc will not simply be able to convert themselves into private clubs for the purposes of gaining exemptions from smokefree legislation. Such clubs would have to be registered clubs owned by or on behalf of the members (hence not commercial businesses). The definition of such clubs is given on the DCMS website at:

http://www.culture.gov.uk/alcohol_and_entertainment/licensing_act_2003/qualifying_clubs.htm

Enforcement Costs and Regulatory Burden

70. Jane MacGregor of Jane MacGregor Associates (and the Local Authority Co-ordinating Office for Regulatory Services: LACORS) surveyed seven authorities, representing London Borough, Unitary, Metropolitan and District Councils covering different regions of the country and very different social settings. The Councils estimated that Option 4 in the DH consultation document (legislation with proposed exemptions) would be up to twice as expensive to enforce as Option 2 (comprehensive smokefree legislation). It would also require more frequent and intrusive inspections, a clear and unnecessary burden on business.

71. The estimated financial costs to enforce Option 2 range from £12,800 through to £37,440 the variance is attributable to the different size of the respective authorities and the relative costs of enforcement staff. This compares to the range of £19,200 to £56,160 for the enforcement of Option 4. This data indicates that the likely annual cost to Local Authorities of enforcing Option 2 is in the range of £4.5m - £13.3m; compared to £6.8m - £19.9m of enforcing Option 4.

72. We understand that the Government's Better Regulation Taskforce also opposed the proposed exemptions on the grounds that they would lead to more expensive and burdensome enforcement. This advice has not been published.

73. The partial ban proposed would produce evident absurdities, for example the need to define "food" so as to distinguish between food and non-food pubs. Non-food pubs will be allowed to sell "pre-packaged ambient shelf-stable snacks". Ministers might be pressed in debate for a working definition of this term.

74. The Chartered Institute of Environmental Health, the professional body for environmental health officers, has warned that a serious ethical issue arises for its members as to whether it is professionally acceptable to participate in the enforcement of a law which unjustifiably fails to protect whole categories of vulnerable people and could be open to subsequent challenges under Human Rights Legislation.

75. Voluntary compliance is the key to success of the prohibitions on smoking. It will minimise the need for enforcement activities and costs to regulators and businesses. Voluntary compliance will be maximised if all workplaces and public places become smokefree at the same time, allowing national media campaigns to provide simple straightforward messages with universal application. Smokers will know that they cannot smoke in any indoor workplace and public place and members of the public will be encouraged to have confidence in challenging smoking indoors whenever they observe it taking place. This will reduce the burden on the enforcement agencies both in giving specific advice about which premises are affected and in dealing with complaints of alleged and suspected breaches.

DH Consultation

76. The DH consultation on the Health Bill concluded on 5th September 2005. However, the results of the consultation have not yet been published.

77. We understand that around 60,000 responses were received. Of these, more than four fifths supported comprehensive legislation. Fewer than one tenth supported the Government proposal.

Legal Challenges

78. Any attempt to exempt a category of workplaces from smokefree legislation would be subject to legal challenge. The date of “guilty knowledge” under the Health and Safety at Work Act 1974 (HSWA) has now clearly passed in relation to secondhand smoke. Therefore, employees made ill by such exposure in the workplace will have a case for damages against their employer, claiming negligence and citing a breach of the HSWA as evidence. This would remain possible in respect of any premises exempted from a general prohibition on smoking under the Health Bill. ASH has been working with the personal injury and trade union law firm, Thompson’s, to identify such cases.

79. ASH also commissioned a legal opinion on the Human Rights Act implications of the proposed exemptions from Keir Starmer QC and Keir Southey, which suggests that employees in exempted premises could have a case under the Act. The advice states that ***“It is our opinion that the European Convention on Human Rights (‘the ECHR’) may require the Government to ensure that the proposed ban is wider so that it extends to all those who have no choice as to whether they are exposed to second hand tobacco smoke.”***

80. Health Secretary Patricia Hewitt has stated, on the face of the Health Bill, that it is consistent with the European Convention. The ASH opinion should be raised in debate.

Tobacco Industry Marketing and Lobbying Strategy

81. The exemptions under the Health Bill will also allow the tobacco industry to continue to use pubs and clubs as marketing tools. Over 80% of young people start smoking before they are 18 and for many, if not most, smoking becomes a habit in hospitality venues. The Observer newspaper revealed in its 25th September 2005 issue that Phillip Morris is now targeting bars and clubs with *“themed installations”* intended to promote Marlboro to young people as a premium cigarette brand. We understand that the company has also begun a similar exercise promoting budget brands in pubs, bars and clubs in poorer communities in Northern England. The Observer quotes an industry source as saying that: *“the tobacco firms are looking to create extensive ‘design languages’ in bars and clubs and other venues through*

the use of particular types of furniture or material which will make people think of their brands”.
http://observer.guardian.co.uk/uk_news/story/0,6903,1577892,00.html

82. Clearly, if many pubs, bars and clubs are exempted from smokefree legislation this marketing campaign will be easier to undertake and likely to prove much more effective in selling cigarettes to young adults. The Government should be asked what plans it has to prevent exempted premises from being used for marketing campaigns of this kind.

83. A Philip Morris internal memorandum from 1992 stated that *“total prohibition of smoking in the workplace strongly affects industry volume. Smokers facing these restrictions consume 11% to 15% less than average and quit at a rate that is 84% higher than average ... these restrictions are rapidly becoming more common ... Milder workplace restrictions, such as smoking only in designated areas, have much less impact on quitting rates and very little effect on consumption”.*

<http://legacy.library.ucsf.edu/cgi/getdoc?tid=qhs55e00&fmt=pdf&ref=results>

Public Opinion

84. Cancer Research UK and ASH commissioned polling firm BMRB and to conduct a poll on public support for smokefree legislation. The results showed that 73% of those polled support a law to ensure that *“all enclosed workplaces including all pubs and all restaurants must be smokefree”.*

85. The BMRB poll also showed that 85% of people would visit bars and pubs as often – or even more often – if they were smokefree by law. Therefore, if the Government opts for comprehensive legislation, covering all bars and restaurants, it will get public support. The fact that separate polling covering pubs alone produces lower levels of public support – particularly in the “push polls” conducted by tobacco lobby groups - need not be a political barrier to progress.

86. When the Office of National Statistics first asked a question about smokefree provision in Autumn 2003, only 20% of people wanted no smoking allowed anywhere. When they asked the same question in Autumn 2004 this had risen to 31%. In a YouGov poll commissioned by ASH and conducted in August 2005, 41% wanted pubs to be smoke free. Public support for completely smokefree pubs doubled from 2003 to 2005. Respondents were then given peer reviewed scientific evidence about the harm caused by secondhand smoke and asked the question again. This time a clear majority, 52%, did not want smoking allowed anywhere in pubs.

87. It is already the case that legislation including pubs and restaurants is more popular here than it was in Ireland prior to its introduction there. Independent research conducted in Ireland after the legislation was published but before it was implemented found that 67% supported the inclusion of pubs and restaurants in the legislation. That compares with 73% of people in Great Britain asked the same question this July. And once the legislation comes in support will continue to grow. Research carried out by the Irish Department of Health three months after the legislation was implemented found that support had risen to 82% http://www.otc.ie/Uploads/1_Year_Report_FA.pdf

Industry Opinion: Useful Quotes

88. The British Beer & Pub Association says that pubs will feel under pressure to take food off their menus, turning them into 'drinking dens', to avoid the commercial damage that might be done by a ban. Chief Executive Rob Hayward said: *“This is groundhog day. We are back to square one, with a proposal that is unworkable and grossly unfair on Britain’s pubs. I hope further consultation will make the Government think again. Our first major concern centres on the proposed exclusion of clubs from the ban. There are more than 20,000 clubs ranging from Labour and working mens’ clubs to big sports clubs. Across the country, clubs compete head-*

to-head with pubs. The fact that you will be able to eat, drink and smoke in clubs but not in pubs is a gross distortion of the market and threatens to put many local community pubs out of business. If the Bill really is about protecting workers health, where is the logic in this distinction? The Government's food distinction is almost unworkable. We are now back trying to define what is or is not food. Our own members are telling us that 20 per cent of pubs will take food out in order to remain smoking. How does this square with the Government's alcohol policy, which is supposedly trying to encourage more food in pubs?"
http://www.beerandpub.com/content.asp?id_Content=2265&id_Content_Parent_Override=97

89. The British Institute of Innkeeping *"strongly opposes the proposal that members clubs are exempt from the ban. If the basis for banning smoking is to protect staff working in licensed premises, those working in members' clubs deserve the same protection. Allowing smoking in members' clubs would lead to a migration of drinkers from local pubs into the members' clubs, which could essentially become smoking clubs. This loss of custom to small licensed premises could drive them out of business"*.

http://www.bii.org/index.cfm/asset_id,673134/fuseaction,news/index.html

90. British Hospitality Association chief executive Bob Cotton said: *"A total ban would have been a cleaner cut. Cleaner for staff. Cleaner for the industry. Instead, years of government dithering has produced an unhealthy compromise. Let's hope parliamentary scrutiny can reverse this non-decision."*

<http://www.caterersearch.com/Articles/2005/10/28/303231/Smoking+decision+is+no+decision+at+all.htm>

Why "Compromise" Solutions Don't Work

91. An Australian study in 2004 found that 'no smoking areas' in licensed clubs contained as many tobacco toxins as smoking areas, and even when the club 'no smoking' areas were completely separate rooms, there was no material reduction in the level of harmful toxins in the air. The study involved comparison of the levels of atmospheric nicotine, particulate matter and carbon monoxide in the 'no smoking' and general smoking areas of 17 licensed clubs in Sydney. <http://www.cancercouncil.com.au/editorial.asp?pageid=1834>

92. Ventilation systems in smoking areas that are not fully segregated will not protect people in non-smoking areas. Research by D Kotzias and others at the European Commission Joint Research Centre's INDOORTRON facility concluded that *"... changes in ventilation rates simulating conditions expected in many residential and commercial environments during smoking do not have a significant influence on the air concentration levels of ETS constituents, e.g. CO, NOx, aromatic compounds, nicotine. This suggests that efforts to reduce ETS originated indoor air pollution through higher ventilation rates in buildings, including residential areas and hospitality venues, would not lead to a meaningful improvement in indoor air quality. Moreover the results show that 'wind tunnel'-like rates or other high rates of dilution ventilation would be expected to be required to achieve pollutant levels close to ambient air limit values"*.
http://www.smokefreeeurope.com/assets/downloads/dimitrios_kotzias.doc

93. In 1999, the Health and Safety Executive estimated that the initial installation costs of ventilation equipment in all organisations not currently separating smokers and non-smokers would be between £580 million and £2,400 million, with an annual maintenance cost of about 10% of the initial outlay. The HSE estimated that the total cost of a voluntary scheme for all workplaces to have either smoking rooms or mechanical ventilation would consist of 'one-off' costs of between £1,259 million and £3,167 million in 1998/99 prices and recurring costs over ten years of £1,889 million to £5,694 million. ⁱⁱⁱ

Economic Impact

94. The tobacco lobby and sections of the hospitality trade often claim that smoking restrictions are bad for business. The objective evidence does not support this claim. For example, in March 2004, a report on the impact of the legislation was issued by the New York City Department of Finance, the Department of Health and Mental Hygiene, the Department of

Small Business Services, and the Economic Development Corporation. It concluded that: “One year later, the data are clear. . . Since the law went into effect, business receipts for restaurants and bars have increased, employment has risen, virtually all establishments are complying with the law, and the number of new liquor licenses issued has increased—all signs that New York City bars and restaurants are prospering.”

http://www.health.state.ny.us/nysdoh/tobacco/reports/docs/nytcp_eval_report_final_11-19-04.pdf

95. In Ireland, the Vintners Federation of Ireland and other groups have claimed that the smokefree law has reduced pub takings by “20-30%”. This claim is false. Indeed, Irish retail sales figures show that sales of beer, wine, spirits and food in pubs rose by 0.5% in July 05, with an annual increase of 5.1% (volume figures, seasonally adjusted)

<http://www.cso.ie/releasespublications/documents/services/current/rsi.pdf>

Endnotes

ⁱ Pechacek, Terry F.; Babb, Stephen, "Commentary: How acute and reversible are the cardiovascular risks of secondhand smoke?" *British Medical Journal* 328: 980-983, April 24, 2004.

ⁱⁱ Siegal M, et al. Effects of local restaurant smoking regulation on progression to established smoking among youth. *Tobacco Control* 2005; 14:300-306.

ⁱⁱⁱ Health and Safety Executive (HSE). *Draft regulatory impact assessment for an approved code of practice on passive smoking at work*. London: Health and Safety Executive, 1999.