

**Response by the Tobacco Manufacturers' Association
to the call for evidence by the Health Committee of the Scottish Parliament
on the Scottish Executive's
Smoking, Health and Social Welfare (Scotland) Bill**

Introduction

In April 2004, we submitted written evidence to the Health Committee of the Parliament on the Prohibition of Smoking in Regulated Areas (Scotland) Bill proposed by Mr Stewart Maxwell MSP. Following the giving of oral evidence to the Committee in June, at the request of the Committee, we provided supplementary written evidence in July. When we responded to the Scottish Executive's consultation 'Reducing Exposure to Second-hand Smoking', we consolidated and updated our earlier submissions to the Health Committee. We trust that those previous, comprehensive and detailed submissions will be taken into account by the Committee in its consideration of the Smoking, Health and Social Care (Scotland) Bill, (the "Bill").

Publication of the Bill was accompanied by the documents required under Rule 9.3 of the Parliament's Standing Orders, and research papers and reports published by the Scottish Executive and NHS Health Scotland. Nonetheless, as requested, the evidence presented here is very brief. It is confined to Part 1 of the Bill and key observations on the accompanying, supporting documents.

Part 1 of the Bill

As the long title of the Bill makes clear, Part 1 has no relationship whatsoever to the remainder of the Bill, which is principally concerned with details of the provision of health and social care services in Scotland. In our opinion, Part 1 does not sit comfortably with the remainder of the Bill. We believe that if the Executive legislate in this area then it should be the subject of a stand-alone Bill.

To a substantial extent, Part 1 is also only enabling legislation. It creates the offences of smoking (clause 4), knowingly permitting smoking (clause 1) and not conspicuously displaying prescribed notices (clause 3), in enclosed 'no-smoking premises' or parts of premises. Beyond that, it reveals little about the reach of the ban that might be imposed and leaves a gaping hole to be filled by the exercise of the powers that it gives to Ministers to make regulations on definitions and other matters of fundamental relevance and importance to any prohibition.

We do not believe that this is right or acceptable. As Part 1 stands, the Parliament is effectively being asked only to agree to the principle that a ban, of indeterminate nature, is imposed, without any reliable, concurrent knowledge of the essential detail. Ministers may seek to provide reassurance, by stating the intention to publish draft regulations during the course of the parliamentary proceedings on the Bill. However, there is no guarantee that such indications will bear fruit and, in any event, it prompts the question, why is the Bill itself not more explicit at the outset?

The policy basis of the Bill

The policy reason for Part 1 of the Bill is stated in the Policy Memorandum to be the protection of public health, where it is said (para 10): “*The scientific evidence of the health risks of second-hand smoke is clear and irrefutable*”. The principal evidence that is cited in support of this belief is the reports of the SCOTH¹ and the research commissioned by the Executive and NHS Scotland from Glasgow² and Aberdeen universities³. We strongly dispute the claim of ‘clarity and irrefutability’ and the reports that are cited in support of this assertion.

In our previous evidence on legislative proposals in Scotland referred to above, we provided detailed evidence on the epidemiological studies and meta-analyses that have been undertaken and published on environmental tobacco smoke and health. In that evidence, we explained why, there was no justification for the kind of prohibition that the Bill would permit, and which Ministers have indicated they intend to introduce. We took great care to provide that evidence in an objective manner that would enable the reader to make his or her own judgement.

The research and reports commissioned and published by the Scottish Executive and NHS Scotland

The research commissioned by Glasgow University, carried out by **Professor Hole** aims to estimate the number of deaths from “the major smoking-related causes of death in Scottish adults which can be attributed to passive smoking.” His report draws on various published meta-analyses and seeks to relate their risk findings to the Scottish situation.

¹ Department of Health, *Report of the Scientific Committee on Tobacco and Health* (1998) and *Second-hand Smoke: Review of Evidence Since 1998* (2004)

² David Hole, *Passive smoking and associated causes of death in adults in Scotland* (2004)

³ Ludbrook, Bird, van Teijlingen, *International Review of Health and Economic Impact of Regulation of Smoking in Public Places* (2004)

Nowhere in this report is the evidence for a relationship between environmental tobacco smoke and various diseases examined. Instead it is one of many assumptions made from the outset. The exercise is fraught with sparse information and data, and the necessity to make a number of assumptions.

The evidence for environmental tobacco smoke being a cause of disease is inconclusive. Furthermore, it is difficult to estimate the degree of exposure to environmental tobacco smoke in the population, with any reliability.

Professor Hole's report cannot be regarded as providing reliable estimates of the impact of environmental tobacco smoke on the health of Scotland's population.

The **Aberdeen University review** of the evidence on the health and economic impact of the regulation of smoking in public places must also be put into a proper perspective. The review provides scant information on data sources and methodology, and is replete with assumptions that are highly contestable, all of which makes detailed critical analysis impossible. Its conclusions are speculative, imprecise by their very nature, and unreliable.

Regulatory impact assessments, with which the review approximates, as does the financial memorandum to the Bill, are notoriously unreliable when, of necessity, they are largely speculative in terms of data and conclusions. That fact would be 'clearly and irrefutably' demonstrated were they to be followed-up, after an appropriate period, by an assessment of the real, actual effect of the measure in question.

The Policy Memorandum at paras 23 to 27 identifies the steps that were taken by the Executive to consult the public. To coincide with the publication of the Bill, the Executive released four, separate **research reports evaluating attitudes to smoking**. These reports, commissioned from a variety of private sector research agencies, used different methodological and sampling techniques among both general and specific target population groups. These included an Omnibus survey, a youth consultation exercise, focus groups and a broader public consultation exercise.

Shortcomings in the methodologies deployed compromise the certainty with which conclusions can be drawn from the data. The surveys actually reached conclusions that are diametrically opposed to the position in support of which they were adduced. Far from demonstrating universal public support for an outright ban on smoking in public places, the four reports actually demonstrate

strong backing for the introduction of new restrictions but not a blanket ban, and restrictions moderated by exemptions to new legislation.

In the **Omnibus survey**, of those "in favour of an outright ban" (54%), 66% thought that there should be exemptions, the majority (57%) spontaneously suggesting that pubs should be exempted from any ban and 21% suggesting that clubs be exempted. Only a small minority (24%) were actually in favour of an outright ban without any exemptions.

The **youth consultation** comprised one national and four regional polls. This consultation had serious design and other methodological shortcomings, but the findings were that a sizeable majority (66%) of the total sample believed that there should be places where smoking was permitted.

Amongst the unspecified twelve **focus groups**, designed to put qualitative flesh on the bones of quantitative omnibus research, the findings included the telling statement that *"... it is by no means straightforward as to exactly what level of change should be introduced. Many people that we spoke to in the focus groups are not in favour of a total ban for a number of reasons."*

The **public consultation** received a response rate of just under 9% (53,474 completed questionnaires from 600,000 distributed). Given the self-selective nature of the sample, it is unsurprising that 80% of respondents were in favour of a law to make enclosed public spaces smoke-free, with only 18% opposed. On exemptions, the overall response from both individuals and organisations was 35% in favour, 56% opposed. However, many more individuals responded than organisations, and merging the responses conceals the fact that of the organisations which responded to the poll, only 42% were in favour of an outright ban, 44% were opposed.

In short, all four of the pieces of research commissioned by the Scottish Executive were flawed methodologically and statistically. The flaws included: over and under-representation by gender, age, region or smoker status; the aggregation of results across different methodologies and across different groups of participants; the ignoring of possible question framing and context effects; and the use of self-selecting rather than truly representative samples.

In line with other surveys of public opinion, both in the UK as a whole (Forest/Populus 2004) and of Scotland specifically (Forest/Populus 2005), around two-thirds of those polled in the Qualitative Scottish Executive surveys supported a ban when presented with a "ban/support" option. However, when

representative samples were asked whether they supported exemptions, the figures reverse – around two-thirds, of either those in favour of a total ban or of the whole sample, were found to be in favour of exemptions. These findings show that the Scottish Executive’s proposed comprehensive ban is out of line with public opinion.

The abandonment of the voluntary approach

At paragraph 12 of the Policy Memorandum, there is an attempt to justify the abandonment of the voluntary approach to the regulation of smoking. There, the Executive acknowledges that much progress has been made through the voluntary approach, albeit less pronounced in the hospitality sector. In the next sentence, the Executive states: *“This has led to the conclusion that legislative action is now required if we are to make any real progress in this area.”* This is not an obvious and necessary conclusion. Indeed, the progress achieved should surely be regarded as evidence to support continuation of the voluntary approach, albeit perhaps with more ambitious targets and determination on the part of the hospitality sector.

We understand that owners and operators in the hospitality sector believe that they should be allowed to run their own businesses without undue interference. They will obviously do that in their own best commercial interests, having due regard for the health, safety and welfare of their employees, and the wishes and preferences of their customers and clientele. As the public expresses – through the giving of their own custom and through opinion polls – their wish for more non-smoking facilities, those facilities have been and are increasingly being provided. Market mechanisms are well able and suited to determine the most appropriate smoking policies, whether in Scotland or elsewhere in the United Kingdom. We believe that it is wrong to dismiss the merits of voluntarily adopted self-regulation and to ignore the substantial disadvantages of compulsion through legislation, for example that it creates criminal offences.

In order further to justify legislation, however, the Policy Memorandum states that an approach to create separate smoking and non-smoking areas within leisure and hospitality premises *“is difficult to justify on public health grounds given that there is no defined safe level of exposure to second-hand smoke...”* and that *“a complete ban on smoking in all enclosed public places would provide the most comprehensive protection to public health and also has the advantage of being simpler to implement.”*

Even if it is assumed that environmental tobacco smoke causes serious diseases, there is no obvious reason why it should be necessary to introduce stricter

treatment than, for example, the risk of exposure to radioactive contamination, workplace noise, radiofrequency radiation or carcinogens generally. In all those cases, regulation does not seek zero exposure, but rather reductions to levels which are as low as reasonably achievable, or which fall below certain minimum dose thresholds. Legislation should be proportionate to the need that it aims to address. Proportionate regulation is more likely to command public respect and is easier to enforce. European regulation, for example, should not automatically “aim at zero risk, something which rarely exists. In some cases, a total ban may not be a proportional response to a potential risk.”⁴

Conclusions

Our overriding concern is that the Scottish Executive has not yet had the opportunity to examine and review the essential fundamental and scientific evidence before making such an important policy decision.

Furthermore, we are concerned that this proposed legislation does not reflect the views of the Scottish people. The Executive’s own consultation process highlighted the fact that the public were against a blanket ban but recognised a need for greater restrictions. We would urge the Executive to take on board the public’s views and encourage more no-smoking areas in Scotland, whilst allowing smoking to be permitted in certain places.

Finally, we would question the validity and appropriateness of the legislation. If its purpose is the health, safety and welfare of employees then the Scottish Parliament lacks competence to legislate in this area.

We trust that here we have clearly explained, albeit very briefly, why we disagree with the bill. Should the Committee wish, we would be pleased to appear to give oral evidence.

⁴ Communication from the European Commission on the precautionary principle, Com (2000) 1 final (2/2/2000)