



5 October 2006

Health Improvement Directorate  
Department of Health  
Room 712  
Wellington House  
133-155 Waterloo Road  
London SE1 8UG

Dear Sir/Madam

**Smoke-free premises and vehicles – Consultation on draft regulations to be made under powers in the Health Act**

Please find attached a joint submission in response to the consultation on proposed regulations to implement the ban on smoking in public places from the Association of Licensed Multiple Retailers and the Bar, Entertainment and Dance Association. Between them, the two organisations represent over half of all UK pub, club and bar operators.

We also support and endorse the submissions made by both the British Institute of Innkeeping and the Federation of Licensed Victuallers.

ALMR and BEDA are keen to ensure that the proposed smoking ban is implemented smoothly and successfully so as to cause the minimum disruption to their members' commercial interests. In order to achieve this, it is essential that the regulations are clear and comprehensible, practical and enforceable. As currently drafted, we do not believe that the detailed rules will be easily understood by customers, licensees and enforcement authorities. Our concerns principally relate to the definitions to be applied to substantially enclosed premises or areas and potential confusion concerning the designation of company vehicles and rooms within guest accommodation.

We strongly urge the Government to revisit these sections of the proposals and ensure that the intention is clear and easily applicable to most commercial situations. Failure to do so may jeopardise the successful introduction of the ban and support for it.

Yours faithfully,

**Nick Bish, CMBII**  
Chief Executive  
ALMR

**Paul Smith**  
Chief Executive  
BEDA



## **EXECUTIVE SUMMARY**

The Association of Licensed Multiple Retailers (ALMR) and Bar, Entertainment and Dance Association (BEDA), welcome the opportunity to submit comments as part of the Government's consultation on proposed regulations to be made under the Health Act 2006. As the trade bodies representing the interests of pub, club and bar operators, the Associations have been intimately involved in the development of policy since the first White Paper in 1998 and ALMR helped to establish the industry's initial voluntary Charter on Smoking in Public Places. Our comments build on this background and on more recent representations made both to Ministers and to officials following the adoption of the Act.

1. The implementation of a smoking ban will be a major logistical challenge for small businesses, particularly pubs, clubs and bars.
2. The implementation of the ban presents an opportunity for us to improve customer facilities in line with radically changing needs. To do so, we need clear, unambiguous and workable regulations introduced in a timely fashion and supported by supplementary planning guidance.
3. The drafting of the regulations in respect of substantially enclosed areas is unclear and unduly inflexible. We recommend that it is amended to reflect actual rather than potential use and that a new definition of a roof be introduced.
4. We believe the requirement for all no smoking signs to include specific wording may not be proportionate. We also believe that the requirement should only be to display signs at or near the entrance to the premises.
5. We believe that the mandatory, legal requirements in relation to signage should be subject to a sunset clause.
6. We recommend that hotel, guest house, inn and hostel providers be free to designate a room for use by residents and their guests for smoking.
7. We recommend that further guidance on the application of the law relating to smoke-free vehicles is provided to clarify the status of private car use and the presence of work colleagues.
8. We continue to believe that the level of penalty applied to operators and that applied to smokers is neither proportionate nor fair. We believe there may be merit in revising upwards the level of fines to be applied to an individual breaking the law.
9. We believe the offence should be reworded to focus on allowing someone to smoke on smoke free premises rather than 'failing to prevent' them doing so. A due diligence defence should also be included in the regulations.
10. We would urge Government to avoid setting an actual implementation date before the detailed regulations are finalised and published.
11. We anticipate that the average time to have extra facilities in place would be **8 months** from the adoption of the regulations.
12. We believe that a planned and timely implementation means that the potential adverse effects – noise, litter, economic and commercial - are avoided and managed.



## **SMOKE-FREE PREMISES AND VEHICLES**

### **Consultation on draft regulations to be made under powers in the Health Act**

#### **Background and context**

By way of background, the *ALMR* is the only national trade body dedicated solely to representing the interests of licensed retailing companies – principally pub and bar operators and particularly independent companies with fewer than 50 outlets. *BEDA* represents the UK's late night club and bar sector - from large corporate operators to independent clubs and bars. Between the organisations we represent, directly or indirectly, more than 30,000 individual licensees – around half the UK licensed retail estate.

Many *ALMR* members are predominantly suburban community or rural offerings and stand to be most affected by the implementation of the smoking ban since they are not infrequently operating at the margins of profitability. In addition, *ALMR* members also operate about 4,000 letting rooms through their small hotels, inns and lodges, and are therefore particularly affected by the proposed exemptions for designated smoking rooms in guest accommodation. Many *BEDA* members' venues will be landlocked – operating as they do on high street circuits - with no external areas. The introduction of the Licensing Act 2003 has led to greater competition in the sector, coupled with changes in employment law and other regulatory burdens, this has increased pressure on margins for members of both organisations.

There is no doubt that the implementation of a smoking ban will be a major logistical challenge for small businesses in our sector in particular. Well over a third of regular pub and club customers are smokers and this figure rises to 46% of customers in community pubs<sup>1</sup>. It is in the interest of public health and good order that these smokers are accommodated appropriately so that they are not forced back into the home, and are monitored and controlled so that they do not create a nuisance for local residents and passers-by. Accommodation of smokers will also help to minimise the potential negative commercial impact of the ban.

The implementation of the ban therefore presents an opportunity for us to improve customer facilities in line with radically changing needs. In order to do so, however, we need clear, unambiguous and above all workable regulations introduced in a timely fashion. We also believe that the regulations should be supported by supplementary guidance on implementation and compliance as well as national planning policy guidance.

In responding to the consultation document, we have sought to focus our comments on ensuring a smooth and successful implementation. The industry is committed to achieving the best possible outcome and we are committed to working with Government to deliver this. We have sought to group our comments in the same structure as the consultation document. Paragraph numbers refer to either the proposals or the draft regulations.

---

<sup>1</sup> GfK Martin Hamblin 2005



## **Introduction**

### Future reviews of legislation

We note that a comprehensive evaluation of the legislation should be published within 3 years of implementation. We believe that this evaluation should include an assessment of signage requirements. The regulations relating to signage should contain a sunset clause ending the legal requirement to provide signs in a specific, mandatory format pending the outcome of this evaluation.

### **Smoke-free (General Provisions) Regulations**

#### Definitions of “enclosed” and “substantially enclosed” premises

We are somewhat surprised that the consultation document does not invite comments on the definitions to be used in determining whether an area is enclosed or substantially enclosed and therefore required to be smoke-free. This is the main area of concern to the licensed retail trade and we are concerned that the regulations as drafted are unclear and provide little guidance to operators as to which areas of their overall premises – particularly external facilities – are required to be smoke free.

We suggest that the draft regulations be amended to clarify the areas of question/uncertainty set out below. Alternatively, supplementary guidance should be provided to operators and enforcement agencies clarifying how this definition is to be applied in practice.

The definition of a substantially enclosed space mirrors that set out in the Scottish regulations. However, it remains vague and uncertain and we note that as a result, in Scotland, local councils felt obliged to develop their own policies setting out their interpretation of the requirements and that these differed considerably from area to area. We also understand from our members in Scotland that this difference of interpretation has been carried through into enforcement activity, with certain structures deemed to fall within the definition of substantially enclosed and therefore required to be smoke free in one area and deemed to be outside the scope of the regulations in another. This is not a satisfactory state of affairs as it leads to uncertainty for business and inhibits investment. It is also one of the reasons why the Government rejected the option of devolving control over smoking to local authorities.

Section 2(2) of the regulations states that premises are substantially enclosed if they have a ceiling or a roof. No statement is made as to how premises or areas are to be classified if they do not have a roof or ceiling or structure capable of acting as a roof or ceiling eg. traditional walled courtyards. We assume that the absence of such a structure means that the area does not fall within the definition of “substantially enclosed” and that smoking is allowed regardless of the nature of the walls. For the avoidance of doubt, we believe that the regulations should make this clear.

Section 2(4) goes on to define a roof as being one which “includes any fixed or moveable structure or device which is capable of covering all or part of the premises as a roof”. It specifically includes canvas awnings.

We find this position to be somewhat bizarre and fails to meet the Government's test for proportionality. Whilst this works for an actual premises or permanent structure, it is nonsensical when applied to external areas which may be provided by licensees.



We accept that roofs and permanent structures which cover the whole of the area should automatically render that premises or area smoke-free. The problem comes when the definition of a roof is applied to “part of the premises”. Does this mean that a sun-awning over a patio or an umbrella at outside seating would render the whole of a beer garden smoke free if the garden failed to meet the 50% wall test? This is the logical interpretation of the regulations as currently drafted but we do not believe that it is the intention.

We believe that section 2(4) should be redrafted to remove the reference to “part of”. This would place the focus of attention back on to consideration of the wall area and the degree of ventilation into an area. It would also give businesses certainty in terms of investment in temporary roof coverings and umbrellas.

Alternatively, we believe there may be merit in further defining a roof by reference to the percentage of area covered. For example, if more than 50% of the area was covered by a roof or a roof-like structure, then this would render the area smoke-free. Again, this would provide certainty for operators and enforcers alike and it would also avoid the situation whereby the erecting of an umbrella to protect customers from the sun resulted in a courtyard or beer garden being deemed to be smoke free.

Finally, in respect of temporary or moveable structures which are capable of being used as a roof or walls, we believe that the smoke-free status of the area or premises should be determined by actual use rather than potential use. For example, a publican investing in a canvas awning to protect customers from the sun on an external patio or in a stand-alone canvas half-wall structures to demarcate an area should not find himself unable to allow his customers to smoke outside when they are not in use. Equally, someone hiring a marquee should be able to roll-up the sides to make a gazebo which complies with the regulations. It is also worth noting in this context that external areas may be covered at night for security reasons.

We therefore recommend that section 2(3) is amended to remove the reference to “opened or shut”. Section 2(4) should be amended to remove the reference “is capable of”. Both of these amendments would ensure that the regulations were directed towards actual rather than potential use. Self-enforcement, supplemented by enforcement inspections and whistle-blowing will ensure that this is not abused.

Ideally, we would like to see the regulations amended to take account of the above points. However, if the proposed approach is adopted as currently drafted, then we believe it is essential that supplementary guidance is published providing information and guidance on how this definition is to be applied in practice. We also believe that there would be merit in publishing national planning guidance setting out which structures require planning permission and which do not, as well as guidance on how such applications are to be handled.

We fully accept, however, that the area must be smoke free when these temporary structures are in use if the definition of “substantially enclosed” is met. Our aim in seeking clarity is not to get around the requirements, but rather to make them more flexible and workable in a business environment and hence to increase support and therefore compliance.

Compliance with the smoking ban in the Irish licensed trade has been remarkably high. This is likely to be at least partly as a result of the growing provision of high quality facilities for customers who choose to continue to smoke. Crucially, the rules on construction of these



facilities were clear some months before the ban was introduced. They were creatively interpreted by licensees and flexibly controlled by local authority representatives.

In contrast, in Scotland the regulations on smoking facilities were still only available in draft form just 4 weeks before the implementation date. This effectively provided no time at all for operators to draw up the necessary plans and gain permissions needed in order to undertake the work required. Moreover, the absence of clear national guidance meant that local authorities interpreted the national rules differently and there was confusion and uncertainty on all sides. As a result, when the ban was introduced only 1% of licensees had successfully obtained permission for external shelters. As a result, there was no provision for customers but more importantly no tools in place to manage and control potential nuisance. It is imperative that such a situation is avoided in England.

### Signage requirements for smoke-free premises and vehicles (Question 1)

We note the Government's intention for signage requirements to be proportionate and not to present unnecessary burdens on businesses. To this end, we welcome the decision to make such signage readily available during the lead-up to the implementation of the ban. We trust that this will be freely available to businesses and will be accessible at least 3 months in advance of the implementation date. This will enable businesses to make informed decision as to whether to use the Government's signs or invest in their own bespoke signs.

However, we believe the requirement for all signs to include specified wording relating to the law may not be proportionate. Many businesses – particularly offices and general workplaces - will already have no smoking logos and signs in place and to require these to be replaced simply because they do not contain the mandatory wording seems somewhat perverse – particularly since the Government recognises this in respect of vehicles.

We also note the requirement to display a sign at all entrances to the workplaces. Again, this seems somewhat at odds with the notion of proportionality in respect of most offices. Would it not be more proportionate to require a sign to be displayed prominently within the premises?

In respect of licensed premises, we acknowledge that there may be merit in placing the sign at the entrance to the premises, but believe that this need not be contained within legislation. The requirement should be to position a prominent sign so as those entering and using the premises are aware that smoking is not permitted. There should be no mandatory requirement for this to be displayed at all public entrances nor for the sign to contain specific wording. This would avoid operators having to replace existing appropriate signage at the door or at the bar.

If signage is to be maintained in the format set out in the draft regulations, then we believe it should relate only to the principal public entrance. We have no doubt that most operators will wish to continue to use table top no-smoking signs and this will obviate the need to include signs at all public entrances eg from the beer garden or external facility back into the main bar.

As noted above, we believe that the mandatory, legal requirements in relation to signage should be subject to a sunset clause.



### Compliance and Enforcement (Question 2)

We are content with the Government proposals in relation to compliance and enforcement as set out in sections 2.21-2.25 of the consultation document, and especially welcome the commitment to the enforcement approach being non-confrontational. Accordingly, we have no further response to make to question 2.

We note the reference to the fact that local authorities will be reimbursed for any extra costs they face as a result of this legislation. We accept this, but believe that it should only relate to costs directly resulting from implementation of the legislation as drafted. In keeping with the provisions of the Licensing Act 2003, local authorities should not be reimbursed for indirect costs nor for activities which go beyond the legal requirements of the Act and regulations.

### ***Smoke-free (Exemptions and Vehicles) Regulations***

#### Private Accommodation (Question 3)

We believe this section of the regulations to be clear and workable. We therefore have no comment in response to make.

#### Accommodation for guests and club members

We support the inclusion of exemptions to allow guest bedrooms in hotels, guest houses, inns, hostels and members' clubs to be designated as smoking rooms and believe that the proposals for designating such rooms and the conditions to be applied to them are workable.

We note, however, that the requirements for mechanical door closers and permanent designation of smoking rooms may cause more problems for small operators with a limited number of guest bedrooms.

#### Other residential accommodation (Question 4)

We believe that the drafting of the consultation document is confusing in this area and open to interpretation. Para 3.12 appears to suggest that it will only be possible to designate smoking rooms other than guest bedrooms in certain types of establishment. However, para 3.23 (d) appears to suggest that it would be open to hotel and other accommodation providers to designate a lounge or other room as a smoking room. We would therefore urge the Government to clarify this as a matter of urgency.

We recommend that hotel, guest house, inn and hostel providers be free to designate a room for use by residents and their guests where smoking may take place providing that it meets the minimum conditions set down in the legislation. This exemption would only be open to premises which provide guest accommodation and therefore the exemption should be restricted in the case of private members' clubs to those which provide this facility.

#### Questions 5&6

The Associations have no comments to make in respect of the proposals relating to performers and research facilities.



### Specified conditions for premises with designated rooms for smoking (Question7)

Our response to this section is predicated on the basis that those providing guest bedrooms will also be allowed to designate other communal rooms within their premises as smoking rooms for the use of residents and their guests.

We note the requirement that all doors opening on smoke-free areas of the premises should have mechanical closers. We believe that this will be a requirement under most fire safety risk assessments and should pose no problems for the hotel and accommodation providers. It is possible that it may be of greater issue to small operators with only limited guest or letting rooms and we trust that a light touch will be applied in relation to enforcement.

### Smoke-free vehicles (Question 8)

We believe these provisions to be clear and workable and have no further comments to make in response to make. However, we believe that there would be merit in producing clear and detailed guidance on how this is to be applied in practice so that individuals know when a car is being used for work purposes - in particular the status of private cars used in this way – and whether this is affected by the presence of a work colleague in the car.

### ***Smoke-Free (Penalties and Discounted Amounts) Regulations***

We understand that the details of the level of fine and nature of the penalty are set out in primary legislation and are not, therefore, the subject of consultation. However, we continue to believe that the level of penalty applied to operators contrasted with that applied to smokers is neither proportionate nor fair.

The fine for failing to display a non-smoking sign is to be £1,000 or £200/150 if dealt with by way of a fixed penalty notice. This seems excessive given that the real test will be whether smoking is allowed or is taking place within the premises. We are concerned that pubs, clubs and bars will be targeted in particular and licensees subject to fines on the basis of a subjective judgment that a sign should have been displayed on a particular door or a substantially enclosed area is not signed.

Our concerns would obviously be lessened if changes were made to the regulations on signage as set out above.

We remain concerned at the punitive level of fine to be applied to an operator who fails to prevent smoking in a smoke-free place. We continue to believe that this is disproportionate but note assurances given in Parliament that this is to be a maximum and only applied to repeat offenders.

We believe it would be possible to give some comfort to the vast majority of law-abiding licensees who are presently concerned that they may find themselves penalised for the actions of a customer, which either they were unaware of eg someone smoking in the toilets or a corridor, or unable to prevent. It is worth noting in this context that it will be up to staff to ask a customer to put out a cigarette and some may receive abuse – both verbal and physical – as a result. Licensees are fearful that they will be penalised as an easier target than an individual smoker.

We believe therefore that the offence should be reworded to focus on allowing someone to smoke on smoke free premises rather than 'failing to prevent' them doing so. This focuses on



the intention of the licensee and actions which may have been taken. It also provides for a due diligence defence, which we believe is imperative to be introduced. An alternative would be to insert the word “knowingly” into the offence as drafted and provide supplementary guidance on how the offence is to be interpreted and any due diligence actions by the licensee to be taken into account in determining whether to prosecute.

Finally, in order to provide a more proportionate and balanced penalty structure, there may be merit in revising upwards the level of fines to be applied to an individual breaking the law. This would send a clear and unambiguous signal that the behaviour is inappropriate and unacceptable and encourage greater personal responsibility. The present level of fine represents no deterrent effect. It is worth noting in this context that the comparable fines in Scotland are £1,000 for individuals and £2,500 for operators

### ***Timetable***

The introduction to the consultation document makes references to a planned implementation of summer 2007. We have already written separately to the Minister about the timing of the introduction of the ban. We acknowledge that this is not the subject of the current consultation, but nevertheless thought it would be helpful to re-present our main concerns for the sake of completeness.

Rather than focusing on a particular date on which the ban will take effect, our members are more concerned with the processes which must be gone through before a ban can be implemented successfully. A start date of Summer, Autumn or Spring is arguably of little difference to the industry. Whilst we acknowledge that the continuing uncertainty on timings is not helpful, from a commercial point of view, early confirmation of the date is less important than confirmation of the timetable leading up to implementation.

What small businesses crucially need is a guaranteed minimum time period between adoption and implementation of the regulations – a principle recognised by the Government’s Better Regulation Commission<sup>2</sup>. This will enable them to plan and invest with certainty and have the necessary facilities in place to accommodate smokers when the ban takes effect. As we have seen in Scotland and with regard to the implementation of the Licensing Act, the more rushed the process, the greater the burden for operators and local authorities. In the case of the Licensing Act, the setting of an implementation date ahead of the detailed regulations being finalised meant that implementation was a shambles and there was a loss of credibility for the legislation as a whole – something we would all wish to avoid. We would therefore urge Government to avoid setting an actual implementation date before the detailed regulations are finalised and published.

We have attached as an appendix to this submission a time-line setting out the necessary steps an operator must go through to obtain the necessary permissions and create an external facility which complies with the regulations. Based on the experience of our members in Scotland and our understanding of the planning and licensing processes we anticipate that the average time to have extra facilities in place would be **8 months** from the adoption of the regulations.

---

<sup>2</sup> Implementation of the Licensing Act 2003, A review by the Better Regulation Commission, April 2006



### **Conclusion**

Failure to resolve uncertainties with regard to external facilities and moves to announce a start date ahead of the regulations being finalised could jeopardise a successful implementation. It is clear that in the immediate aftermath of a ban, smokers will need to be accommodated and managed. A planned and timely implementation means that the potential adverse effects – noise, litter, economic and commercial - are avoided and managed.

The comments and suggestions set out above are designed to ensure that the legislation is as robust, clear and workable as possible well ahead of the date when the ban will take effect. If these proposals are taken into account and outstanding issues of concern addressed well ahead of the start date, then we believe that the implementation of the ban will take place smoothly and successfully.

### **Ealing**

5 October 2006