

PUBLIC HEALTH (WALES) ACT 2017

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3

Tobacco and Nicotine Products

Chapter 1 - Smoking

12. This Chapter contains provisions that make enclosed and substantially enclosed public premises and shared workplaces smoke-free, as well as some specific non-enclosed premises. These are referred to as ‘smoke-free premises’. For the purpose of this Chapter, ‘smoke-free’ means that smoking is not permitted, unless the premises are exempted by regulations made under section 16 of the Act.
13. This Chapter restates Chapter 1 of Part 1 of the Health Act 2006 (“Smoke-Free Premises, Places and Vehicles”) in relation to Wales, with some minor modifications. It also brings additional settings into the smoke-free regime in Wales, namely outdoor care settings for children, school grounds, hospital grounds and public playgrounds.
14. Regulations can also provide for additional premises to be smoke-free in certain circumstances. These additional smoke-free premises do not need to be enclosed or substantially enclosed. Regulations may also provide for vehicles to be smoke-free; such vehicles are referred to as ‘smoke-free vehicles’ in this Chapter.

Section 4 - Smoking

15. This section provides the definition of “smoking” for Chapter 1 of Part 3 of the Act. The definition covers the smoking of cigarettes, pipes, cigars, herbal cigarettes and waterpipes (often known as hookah or shisha pipes) etc. It does not encompass “e-cigarettes”.

Section 5 - Offence of smoking in smoke-free premises or vehicle

16. This section makes it a criminal offence to smoke in smoke-free premises or in a smoke-free vehicle. The offence may only be tried in the magistrates’ court and is punishable on conviction by a fine not exceeding level 1 on the standard scale. The levels on the standard scale are set out in section 37 of the Criminal Justice Act 1982. A fixed penalty notice may be issued by an authorised officer instead of prosecution (see section 27).

Section 6 - Offence of failing to prevent smoking in smoke-free premises

17. This section requires managers of smoke-free workplaces, public premises and outdoor care settings for children to take reasonable steps to prevent smoking in those places. The Welsh Ministers may make regulations imposing corresponding duties in respect of smoke-free school grounds, hospital grounds and public playgrounds, and any additional smoke-free premises and smoke-free vehicles designated by the Welsh Ministers under sections 13 or 15. Any person who fails to comply with these duties

is committing an offence. The offence may only be tried in the magistrates' court and is punishable on conviction by a fine not exceeding level 4 on the standard scale. The levels on the standard scale are set out in section 37 of the Criminal Justice Act 1982.

Section 7 - Workplaces

18. This section details what is meant by “workplaces” in the context of the smoke-free premises in this Chapter. A “workplace” is a place that is used as a place of work by more than one person (irrespective of whether such people work there at the same time), or is a place of work for one person but is somewhere that the public may have access to for certain purposes. For instance, a shop where only one person works would be a workplace for the purposes of the Chapter. Where only parts of the premises are used as a place of work, only those parts are smoke-free. In all cases, only those areas that are enclosed or substantially enclosed are smoke-free. All workplaces are smoke-free all of the time, except that a dwelling used as a workplace is smoke-free only when being used as such. So for instance if a person uses their home as a workplace, and members of the public might come to it to obtain the goods or services offered, his/her home will be smoke-free only in the parts of it used as a workplace, and only when those parts are being used by the person for work.

Section 8 - Premises that are open to the public

19. This section details what is meant by “premises that are open to the public” in the context of smoke-free premises in this Chapter. It includes all premises that are open to the public or a section of the public (irrespective of whether this is by invitation or not, or whether there is a charge for entry or not). So, for example, places of worship, private members' clubs and all licensed premises would be open to the public for the purposes of this Chapter. Where only parts of the premises are open to the public, only those parts are smoke-free. All such premises are smoke-free only when open to the public and only in those areas that are enclosed or substantially enclosed.

Section 9 - Outdoor care settings for children

20. This section provides that outdoor care settings for children in Wales are smoke-free premises. It provides details about what is meant by “outdoor care settings for children” in the context of smoke-free premises in this Chapter.
21. The areas covered by this section are the outdoor areas of those premises which are covered by Part 2 of the Children and Families (Wales) Measure 2010. These are premises which provide day care or child minding for a child or children under the age of 12.
22. The outdoor areas are only smoke-free when the premises are being used for day care or child minding. In the case of child minders providing care in their own homes, the outdoor areas are only smoke-free if one or more of the children are in the outdoor area.

Section 10 - School grounds

23. This section provides that school grounds in Wales are smoke-free premises. It provides details about what is meant by “school grounds” in the context of smoke-free premises in this Chapter.
24. Grounds being used by a school but that do not adjoin the school are smoke-free only when, and in those parts, being used for the provision of education or childcare (subsection (3)). So for example, if a school has a sports field that is for its sole use, but which is across the road from the school, the sports field will be smoke-free only when being used for educational or childcare purposes. “Childcare” is defined in section 28.
25. But if the sports field adjoins the school, it will be smoke-free when it is being used for the purpose of education or childcare, or when the school itself is being used for

education or childcare (subsection (2)). So, in this instance the sports field will be smoke-free both during school hours, and if (for example) there is an after-school club in the school hall, while the club is being held.

26. Schools that provide residential accommodation to pupils may designate an area where smoking is allowed. The Welsh Ministers may specify in regulations conditions relating to any such designation, for example about the size or location of the designated area. Premises which are used to any extent as a dwelling are not smoke-free under this section, so, for instance, the garden of a caretaker's house within the school grounds would not be smoke-free.

Section 11 - Hospital grounds

27. This section provides that hospital grounds in Wales are smoke-free premises. It provides details about what is meant by "hospital grounds" in the context of smoke-free premises in this Chapter. It includes all grounds that adjoin the hospital, are used by or occupied by it, and are not enclosed or substantially enclosed. An area may be designated within the hospital grounds where smoking is allowed. The Welsh Ministers may specify in regulations conditions relating to any designation, for example about the size or location of any designated area.
28. There is an exemption from the smoke-free requirements for the grounds of adult care homes and of adult hospices, and for dwellings. So if, for instance, a member of staff has accommodation provided within the grounds of the hospital, the garden of his/her home will not be smoke-free. Nor will the garden of an adult hospice be smoke free.

Section 12 - Public playgrounds

29. This section provides that outdoor public playgrounds in Wales are smoke-free premises. It provides details about what is meant by "public playgrounds" in the context of smoke-free premises in this Chapter. Outdoor premises will amount to a playground if they meet the requirements specified in subsection (4). These requirements focus on local authority involvement, the purpose for which the premises are used, and the presence of playground equipment. Premises that amount to a playground are smoke-free within a boundary if there is one, or in the absence of a boundary, then within 5 metres of playground equipment. "Playground equipment" is defined in section 28.

Section 13 - Additional smoke-free premises

30. This section gives the Welsh Ministers a power to make regulations to designate additional smoke-free premises. These premises do not need to be enclosed or substantially enclosed (i.e. they may be open spaces). The Welsh Ministers can only designate additional smoke-free premises if they are satisfied that designating those premises as smoke-free is likely to contribute towards the promotion of the health of the people of Wales.
31. The regulations made by the Welsh Ministers may also provide for exemptions to the smoke-free status of any additional smoke-free premises. The regulations may, for example, allow the person in charge of the premises to designate areas in which smoking is to be permitted. The designation would have to be in accordance with any conditions set out in the regulations.
32. Premises used wholly or mainly as a dwelling cannot be made smoke-free using this regulation-making power.

Section 14 - Further provision about additional smoke-free premises: dwellings

33. This section limits the Welsh Ministers' power to designate premises used partly as dwellings as additional smoke-free premises. Dwellings may only be designated as smoke-free by the Welsh Ministers to the extent that they are not enclosed or

substantially enclosed and are workplaces or open to the public. They may only be made smoke-free when being used as workplaces or are open to the public; and in those areas which are being used as workplaces or are open to the public.

Section 15 - Smoke-free vehicles

34. This section gives the Welsh Ministers a power to make regulations providing for vehicles to be smoke-free.
35. An equivalent power to make regulations applying to vehicles for the purposes of smoke-free premises under the Health Act 2006 is included at section 5 of that Act. Regulation 4 of the Smoke-free Premises etc. (Wales) Regulations 2007, made in exercise of the power at section 5 of the Health Act 2006, sets out that enclosed vehicles shall be smoke-free if used for transport of members of the public, or as a workplace for more than one person. These regulations stay in place until regulations are made using the powers in this section of this Act.
36. The Welsh Ministers can only designate a vehicle as being smoke-free where they are satisfied that designating that vehicle is likely to contribute towards the promotion of the health of the people of Wales.

Section 16 - Smoke-free premises: exemptions

37. This section gives the Welsh Ministers a power to make regulations to exempt premises or places in Wales from the requirement to be smoke-free. These regulations may exempt defined premises or specific areas within premises. For example, a designated bedroom within a hotel or a designated room in a research or testing facility could be exempted from the smoke-free requirements.
38. An equivalent power to exempt premises, for the purposes of smoke-free premises under the Health Act 2006, is included at section 3 of that Act. Regulation 3 of the Smoke-free Premises etc. (Wales) Regulations 2007, made in exercise of the power at section 3 of the Health Act 2006, sets out the premises within which managers may designate smoking rooms (i.e. may designate rooms as being exempt from the smoke-free requirements of the Health Act 2006). Exemptions currently apply to specific rooms within care homes, adult hospices, mental health units, research or testing facilities, hotels, guesthouses, inns, hostels and members' clubs. These regulations stay in place until regulations are made using the powers in this section of this Act.

Section 17 - Signs: smoke-free premises

39. This section requires a person who occupies or manages smoke-free premises to display smoke-free signs in accordance with regulations. Requirements for smoke-free signs may include details about how they are to be displayed, specifications regarding the dimensions of the sign, the minimum text size and font, any graphic or symbol that must be included and any mandatory warning message that must be included. The Welsh Ministers may also make regulations that place a corresponding duty on those who occupy or manage additional smoke-free premises (section 13) and smoke-free vehicles (section 15). Regulations may also require signs to be displayed in areas designated as not smoke-free. Regulations made under this section cannot require smoke-free signs to be displayed in premises used as dwellings.
40. Failure to comply with these requirements is an offence. The offence may only be tried in the magistrates' court and is punishable on conviction by a fine not exceeding level 3 on the standard scale. The levels on the standard scale are set out in section 37 of the Criminal Justice Act 1982. A fixed penalty notice may be issued by an authorised officer instead of prosecution. Section 27 contains more details on fixed penalty notices.

Section 18 - Enforcement authorities

41. This section names local authorities as the enforcement authorities for this Chapter. It also allows for the police to be named in regulations as an additional enforcement authority in relation to the smoking restrictions for vehicles.
42. The section also places a duty on enforcement authorities to enforce the smoke-free provisions in this Chapter. Enforcement authorities may arrange to transfer a particular case to another enforcement authority, for example, where those enforcement authorities are investigating the same person for offences relating to smoke-free premises and vehicles.
43. The meaning of the term “authorised officer” is also set out in this section. An authorised officer is any person authorised by the enforcement authority to carry out its enforcement functions. An authorised officer may or may not be an officer of the enforcement authority.

Section 19 - Powers of entry

44. This section confers powers on an authorised officer to enter any premises in Wales, apart from premises used wholly or mainly as a dwelling, at any reasonable time if they consider it necessary to investigate an offence in this Chapter. The section applies to a vehicle as if it were premises.
45. Authorised officers must not use force to enter premises or vehicles when exercising their power under this section. Authorised officers must present evidence of their authority before entering any premises or vehicles if they are asked to do so. Section 67(9) of the Police and Criminal Evidence Act 1984 provides that, while acting in the course of their enforcement functions, authorised officers of the enforcement authority must have regard to the relevant code of practice made under that Act. Therefore, authorised officers must have regard to the PACE Code of Practice B in the exercise of their enforcement functions.

Section 20 - Warrant to enter dwelling

46. This section provides that a justice of the peace may issue a warrant to enable an authorised officer to enter a premises used wholly or mainly as a dwelling in certain circumstances. A warrant may be issued only where the justice of the peace is satisfied that there are reasonable grounds to believe that an offence has been committed at the premises, and that it is necessary to enter the premises for the purpose of establishing whether such an offence has been committed. Entry may be obtained by force if need be. This section applies to a vehicle as if it were premises.

Section 21 - Warrant to enter other premises

47. This section provides that a justice of the peace may issue a warrant to enable an authorised officer to enter any premises, including vehicles, in Wales, if they consider it necessary in relation to an offence in this Chapter. This excludes premises used wholly or mainly as dwellings which are dealt with in section 20. The section sets out the circumstances in which a warrant may be issued. Entry may be obtained by force if need be.

Section 22 - Supplementary provision about powers of entry

48. This section enables an authorised officer entering premises under section 19, 20 or 21 to take with them any other persons or equipment as the officer considers appropriate. It also requires that if the occupier of premises that an authorised officer is authorised to enter under sections 20 or 21 is present at the time the authorised officer seeks to execute the warrant, the occupier must be told the officer’s name; the officer must produce documentary evidence that the officer is an authorised officer; the officer must produce

the warrant and supply the occupier with a copy of it. It also requires that if the premises are unoccupied or the occupier is temporarily absent, the authorised officer must leave the premises as effectively secured against unauthorised entry as the officer found them. The provisions in this section also apply to a vehicle.

Section 23 - Powers of inspection etc.

49. This section confers power on authorised officers to carry out inspections of premises and vehicles. Officers may request items, inspect them, take samples from them and/or take the item(s) and/or samples from the premises. For example, officers may wish to review CCTV footage of the premises, retain smoking debris for evidence purposes, or take documents or copies of documents. They may also request information and help from any person but that person is not required to answer any questions or produce any document which they would be entitled to refuse to answer or produce in the course of court proceedings in England and Wales. The authorised officer may analyse any samples taken. The authorised officer must leave a statement detailing any items that have been taken, and identifying the person to whom a request for the return of property may be made. The provisions in this section also apply to a vehicle.

Section 24 - Obstruction etc. of officers

50. This section provides that any person who intentionally obstructs an authorised officer from carrying out their functions under this Chapter is committing an offence. Any person who fails without reasonable cause to provide the officer with facilities that are reasonably required by the officer to carry out their functions is committing an offence. However, a person is not required to answer any questions or produce any document which they would be entitled to refuse to answer or produce in the course of court proceedings in England and Wales. The offence may only be tried in the magistrates' court and is punishable on conviction by a fine not exceeding level 3 on the standard scale. The levels on the standard scale are set out at section 37 of the Criminal Justice Act 1982.

Section 25 - Retained property: appeals

51. This section provides an additional safeguard relating to the powers of entry and inspection provisions. It enables a person with an interest in anything taken away from premises by an authorised officer under section 23(1)(c) to apply to a magistrates' court for an order requesting the release of the property. Depending on the court's consideration of an application, it may make an order requiring the release of the retained property.

Section 26 - Appropriated property: compensation

52. This section provides a right for a person affected by the taking possession of property under section 23(1)(c) to apply to a magistrates' court for compensation. Where the circumstances set out in subsection (2) are satisfied (i.e. that the person has suffered loss or damage as a consequence of the property being taken and the loss or damage is not due to their neglect or failure to act), the court may order the enforcement authority to pay compensation to the applicant.

Section 27 - Fixed penalty notices

53. This section allows authorised officers to issue fixed penalty notices (FPNs) to persons believed to have committed certain offences under this Chapter. A fixed penalty can be issued for the following offences:
- smoking in smoke-free premises or vehicles;
 - failing to comply with signage requirements.

54. FPNs may be issued to a person, partnership or an unincorporated association. Payment of the FPN discharges the person believed to have committed an offence from being convicted for the offence in court. The section also introduces Schedule 1 on fixed penalties (for commentary on this, see Schedule 1 below).

Section 28 - Interpretation of this Chapter

55. This section sets out the meaning of key terms used in this Chapter.
56. The section also provides that the Welsh Ministers may make regulations to define what is meant by “enclosed”, “substantially enclosed” and “not enclosed or substantially enclosed” for the purposes of this Chapter.