

# SMOKING, HEALTH AND SOCIAL CARE (SCOTLAND) ACT 2005

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## EXPLANATORY NOTES

### THE ACT

#### **Part 1: Smoking: Prohibition and Control**

##### *Section 1 – Offence of permitting others to smoke in no-smoking premises*

4. Subsections (1) and (2) make it an offence for the person who is in charge of no-smoking premises, having the management or control of those premises, to knowingly permit others to smoke there. The person in charge will be regarded as having permitted that other person to smoke if he or she knew, or ought to have known, that the other person was smoking there.
5. Two defences are provided under subsection (3). The first defence open to the accused person is to prove that they, or anyone working for them, had taken all reasonable precautions and had tried to the best of their ability to stop any other person from smoking in their premises. The second defence open to the accused is to prove that there were no lawful and reasonably practicable means by which they could prevent the other person from smoking in their premises.
6. Subsection (4) provides that the offence of permitting others to smoke in no-smoking premises is subject to a maximum penalty, on summary conviction, of a fine not exceeding level 4 on the standard scale (currently £2500).

##### *Section 2 – Offence of smoking in no-smoking premises*

7. Subsection (1) makes it an offence for a person to smoke in no-smoking premises.
8. Subsection (2) provides that it is a defence if the person accused of smoking can prove that they did not know, and could not reasonably be expected to have known, that the premises in which they were smoking were no-smoking premises. This might arise in instances where, for example, no-smoking signs had been removed or had failed to be displayed. The onus is however on the accused to prove this.
9. Subsection (3) provides that the offence of smoking in no-smoking premises is subject to a maximum penalty on summary conviction of a fine not exceeding level 3 on the standard scale (currently £1000).

##### *Section 3 – Display of warning notices in and on no-smoking premises*

10. Subsection (1) requires “no-smoking” signs to be conspicuously displayed in, on or near, and so as to be visible and legible from outside, no-smoking premises. The person who is in charge of those no-smoking premises, having the management or control of the premises, is liable for any failure to display such signs. Failure to display signs is an offence. The signs to be displayed must state that the premises are no-smoking premises and that it is an offence to smoke there or knowingly to permit smoking there.

11. Under subsection (2) it is a defence for anyone accused of failing to display “no-smoking” signs to prove that they or anyone working for them or representing them as an agent took all reasonable precautions and exercised all due diligence to ensure that signs were in place as required.
12. Subsection (3) gives the Scottish Ministers powers to make regulations which will provide further details as to the manner of display, form and content of the no-smoking signs. Regulations under this provision will be made under the affirmative resolution procedure, so that they cannot be made until the Parliament has approved a draft.
13. Subsection (4) provides that the offence of failing to display warning notices in and on no-smoking premises is subject to a maximum penalty on summary conviction of a fine not exceeding level 3 on the standard scale (currently £1000).

#### ***Section 4 – Meaning of “smoke” and “no-smoking premises”***

14. Subsection (1) provides the meaning of “smoke” which in the context of Part 1 of the Act means to smoke tobacco or any other substance or mixture which can be smoked. This subsection further clarifies that a person is to be taken as smoking if the person holds or is otherwise in possession or control of lit tobacco or any other lit substance or mixture which can be smoked.
15. Subsection (2) provides for “no-smoking premises” to be defined as such premises or classes of premises of a kind mentioned in subsection (4), which will be prescribed by the Scottish Ministers under regulations. Subsection (3) allows the Scottish Ministers to exclude, by means of those regulations, certain premises, or parts of premises, or classes or premises or parts of premises, from the definition of “no-smoking premises”. Regulations made under subsection (2) are to be made by affirmative procedure.
16. Subsection (4) lists the kinds of premises which are to be prescribed as “no-smoking premises” under subsection (2), being premises which are wholly or substantially enclosed and (a) to which the public or a section of the public have access, (b) which are used wholly or mainly as a place of work, (c) which are being used for the purposes of a club or an other unincorporated association and (d) which provide education, health or care services.
17. Subsection (5) clarifies that those premises described in subsection (4)(b) as a place used for work include those premises where people work for no financial advantage such as, for example, voluntary workers.
18. Subsection (6) gives a further power to the Scottish Ministers to define or elaborate by means of regulations on the meaning of certain expressions used under subsection (2).
19. Similarly, and as above, subsection (7)(a) empowers the Scottish Ministers to define or elaborate by means of regulations the meaning of “premises” by reference to the person or class of person who owns or occupies the premises, whilst subsection (7) (b) allows the Scottish Ministers to define or elaborate the meaning of “premises” to include specific forms of public transport as they see fit.
20. Subsection (8) allows the Scottish Ministers to make regulations to modify subsection (4) by adding to or removing from the kinds of premises listed there. Again, any such regulations will require to be made by affirmative resolution.
21. Subsection (9) relates to the “no-smoking” notices which are to be displayed under section 3(1). Subsection (9) provides that where regulations are made under subsection (2) which define or elaborate the meaning of “premises” to cover certain forms of transport, those regulations may provide how the “no-smoking” sign in relation to each form of transport is to be expressed, thus enabling bespoke “no-smoking” signs for the various forms of transport.

### ***Section 5 – Proceeding for offences under sections 1 to 3***

22. Subsection (1) links the start of the time limit for summary proceedings in pursuance of sections 1, 2 or 3 to the point at which the Crown is passed sufficient evidence on the offence to justify bringing a prosecution. This will prevent any lengthy or extended hearing processes consequential to the issuing of a fixed penalty notice under Part 1 of the Act resulting in a subsequent prosecution for that offence being time barred.
23. Subsection (2) provides that section 136(3) of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#) applies to section 5(1) as it does to that section. Section 136(3) of the 1995 Act provides that summary proceedings are deemed to commence when a warrant is granted, if it is executed without undue delay. Subsection (3) clarifies that a certificate from the Crown as to the date that evidence came to the knowledge of the Crown is conclusive evidence of that date.

### ***Section 6 – Fixed penalties***

24. Subsection (1) provides for a fixed penalty scheme under Schedule 1 to have effect. Schedule 1 sets out the details of how the fixed penalty system will work for offences committed under sections 1, 2 and 3 of the Act. An explanation of the provisions in the Schedule is given at the end of these notes.
25. Subsection (2) provides that the fixed penalty system will not extend to offences under section 1 (permitting others to smoke in no-smoking premises) or section 3 (failure to display warning notices in or on no-smoking premises) committed otherwise than by a natural person.

### ***Section 7 – Powers to enter and require identification***

26. Subsection (1) empowers an officer of a council to enter no-smoking premises in order to check whether an offence under sections 1, 2 or 3 has taken place or is being committed. The council which authorises the officer under this subsection will be the council in the area where the premises are situated. Officers of the council will, in general terms, have access to premises to which the public has access; this additional power is therefore a back-up power.
27. A council officer exercising a power of entry under subsection (1), may use force to gain entry if necessary under subsection (2) and may, under subsection (1) search the premises.
28. An offence is committed under subsection (3) if a person who an authorised officer of a council reasonably believes is committing or has committed an offence under sections 1, 2 or 3, or has information relating to the offence fails without reasonable excuse to give their name and address when requested to do so by the enforcing officer. The penalty for a person guilty of an offence under this subsection is on summary conviction a fine not exceeding level 3.

### ***Section 8 – Bodies corporate etc.***

29. [Section 8](#) provides that officers of companies and other corporations and members of partnerships can be held personally liable, in certain circumstances, for offences under Part 1 of the Act that their companies or partnerships commit.

### ***Section 9 – Sale of tobacco to under-age persons: variation of age limit***

30. Subsection (1) enables Scottish Ministers to raise by order the age in section 18 of the [Children and Young Persons \(Scotland\) Act 1937 \(c.37\)](#) (offence of selling tobacco etc. to under-age persons and other preventative measures). This allows them to raise the age from the current one of 16 years for the purchase of tobacco.

*These notes relate to the Smoking, Health and Social Care (Scotland)  
Act 2005 (asp 13) which received Royal Assent on 5 August 2005*

31. Subsection (2) requires that Scottish Ministers only make an order under subsection (1) after they have consulted on a draft with persons as they see as appropriate, for example local authorities and police bodies.

***Section 10 – Crown application***

32. Many enclosed public places will be operated and controlled by the Crown. Section 10 provides that Part 1 of the Act and any regulations made under it shall bind the Crown. Subsection (2) ensures that instead of making the Crown criminally liable for any contravention under this Part of the Act, the Court of Session may declare unlawful any act or omission of the Crown which constitutes a contravention.
33. Although the Crown itself cannot be prosecuted, subsection (3) ensures that the provisions in Part 1 apply to people in the public service of the Crown.