POLICY NOTE

THE PROHIBITION OF SMOKING OUTSIDE HOSPITAL BUILDINGS (SCOTLAND) REGULATIONS 2022

SSI 2022/152

The above instrument was made in exercise of the powers conferred on the Scottish Ministers by sections 4C(4), 4D(2), (4) and (5) and 40(1)(b) and paragraphs 4(1) and 5(2) of schedule 1 of the Smoking, Health and Social Care (Scotland) Act 2005[1] and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

Purpose of the instrument. The purpose of this instrument is to introduce a 15 metre no-smoking perimeter around hospital buildings.

Policy Objectives

Background

Section 2 of the Smoking, Health and Social Care (Scotland) Act 2005 ("the 2005 Act") makes it an offence to smoke in wholly or substantially enclosed public spaces. This had the effect of making it an offence to smoke inside a NHS hospital building but there are currently no legal restrictions on smoking outside on NHS hospital grounds.

In April 2015, all NHS Health Boards in Scotland implemented smoke free policies across their grounds. This built on existing Scottish Government guidance to Health Boards on the development and implementation of smoke-free policies and the creation of health-promoting hospitals.[2] [3] To support Health Boards to take a consistent approach across Scotland and to raise public awareness, NHS Health Scotland developed implementation guidance for Health Boards and launched a national information campaign in March 2015.[4]

There have been significant issues around compliance. It is not currently possible for Health Boards to enforce the ban as there is no sanction that can be applied if someone refuses to comply with the policy, other than asking the person to leave the grounds. However, this may not be desirable should a person be a patient. It is also difficult to enforce on large hospital grounds where a person could easily re-enter undetected.

To address compliance issues, section 20 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 ("the 2016 Act") inserted new sections 4A to 4D into the 2005 Act, creating new offences of permitting others to smoke in the no-smoking area outside hospital buildings and smoking in the no-smoking area outside hospital buildings. The no-smoking area outside a hospital building is the area lying immediately outside the hospital building and bounded by a perimeter a specified distance from the building, so far as the area forms part of hospital grounds. The distance from the building is specified in these Regulations as 15 metres. Section 20 of the 2016 Act will be commenced for the purposes of laying then

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[1] 2005 asp 13. Sections 4A to 4D were inserted, and schedule 1 was amended, by section 20 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (asp 14).
[2] http://www.sehd.scot.nhs.uk/mels/CEL2012_01.pdf
[3] http://www.scotland.gov.uk/Publications/2005/12/21153341/33417
[4] http://www.smokefreegrounds.org/

making this instrument ("the Regulations") and will come fully into force when these Regulations come into force.

This approach will effectively extend the indoor smoking ban under the 2005 Act to include an outside area. This is important given the size of some grounds. Setting a perimeter around buildings focusses on the areas where there is the highest level of traffic of people on foot leaving and entering the hospital and where there is a risk of smoke entering hospital buildings as a result of people smoking close to the building, in particular at entrances. It is also easier to enforce a prohibition backed by the criminal law near buildings given that some hospital grounds are vast in size. For areas beyond the perimeter, Health Boards will continue to operate smoke-free policies, as requested by the 2013 Tobacco Control Strategy[5] and the 2018 Raising Scotland's Tobacco Free Generation[6], in ways which best meet local needs. This is supported by an existing national campaign and investment in cessation support.

The main aims of introducing a formalised no-smoking area around hospital buildings are to:

- support the de-normalisation of smoking;
- help reduce the use of tobacco across the population;
- prevent or reduce exposure to second-hand smoke; and
- to ensure the NHS in Scotland is exemplar in the promotion of good public health.

These Regulations reflect the NHS's direct but compassionate message: it appreciates that smoking is a difficult habit to break but advises people to seek support to quit. The policy supports people who visit hospital for smoking cessation treatment, who have given up or who have reduced their smoking, and who might find it difficult to pass through areas close to entrances where people have congregated to smoke. The proposal will help people who have been advised to stop or reduce their smoking for periods of medical treatment. Social acceptability has a strong bearing on health behaviours and evidence shows that quitting is made more difficult if a smoker's social environment is filled with smokers.[7][8] One of the factors which influence whether a quit attempt will be successful is the extent to which a smoker is exposed to 'cues'.[9] [10]

While the enclosed public spaces smoking-ban in the 2005 Act was motivated by the desire to cut exposure to second-hand smoke, it may also have played an important part in de-normalising smoking. Support for the smoking ban increased significantly between 2006 and 2007 amongst smokers and non-smokers; and there has been a high level of compliance[11].

[5] Tobacco Control Strategy - Creating a Tobacco-Free Generation - gov.scot (www.gov.scot)
[6] Raising Scotland's tobacco-free generation: our tobacco control action plan 2018 - gov.scot (www.gov.scot)
[7] Scollo, MM and Winstanley, MH (2008) Tobacco in Australia: Facts and Issues. A comprehensive online resource, 4th edn (Cancer Council Victoria): (http://www.tobaccoinaustralia.org.au/downloadchapters/)
[8] Socioeconomic status and smoking: a review - PubMed (nih.gov)
[9] Scollo, MM and Winstanley, MH (2008) Tobacco in Australia: Facts and Issues. A comprehensive online resource, 4th edn (Cancer Council Victoria): Section7.7.2: 37-38. http://www.tobaccoinaustralia.org.au/downloadchapters/
[10] Socioeconomic Status, Social Context, and Smoking Lapse During a Quit Attempt: An Ecological Momentary Assessment Study - PubMed (nih.gov)
[11] Hyland, A, et al (2009) _The impact of smoke-free legislation in Scotland: results from the Scottish ITC Scotland/UK longitudinal surveys', European Journal of Public Health, 19(2) pp. 198–205.

The enforceable ban on smoking outside hospital buildings is an important contribution to the progressive de-normalisation of smoking.

Another aim of the Regulations is to prevent or reduce the public, patients and staff from being exposed to second-hand smoke around entrances and near windows and vents through which smoke could drift into hospital buildings. The health harms from second-hand smoke are well understood and the World Health Organisation advises that there is no safe level of exposure to the small particles in cigarette smoke.[12] Smoking around Scotland's hospitals continues to present a potential health risk to patients, visitors and staff, some of which are particularly vulnerable.

As highlighted in the policy memorandum for the 2016 Act[13], it is difficult to measure second-hand smoke outdoors as the chemical markers in the air may come from a range of other sources (for example, vehicle emissions). There is some evidence from studies of outdoor environments (primarily hospitality settings) which shows that it is possible, under certain conditions, to record levels of chemicals or particulates that could be attributable to second-hand smoke which approach those which are found in indoor areas where smoking is permitted. Smoke-drift from outside can lead to second-hand smoke levels inside building entrances and windows which may be high enough to warrant concern for those exposed to it over a prolonged period (for example, NHS staff working near vents).[14] Smoking outside entrances may also compromise indoor smoking ban effects and consideration needs to be given to those working with hospitals or visiting as a result to ensure their protection from second hand smoke exposure.[15] This evidence largely relates to second-hand smoke outside entrances to hospitality venues but it does serve as a useful comparator.

Outdoor tobacco smoke can be detected from at least 3 metres away from open-type outdoor smoking facilities, and has been detected from at least 9 metres away from a single cigarette being smoked on a roof-top.[16] It has therefore been recommended that a buffer zone be introduced to any areas where smoking occurs to protect pedestrians passing through from second-hand smoke, from at least 9 metres.[17][18] To take in to account influences on smoke drift such as weather conditions and wind speed, 15 metres has been identified as a reasonable, precautionary distance, which minimises the risk of people experiencing passive smoking whilst entering and exiting hospital buildings. This perimeter represents the busiest areas where the majority of patients, visitors and staff pass through and where the bulk of non-compliance with the current administrative ban takes place.

The Regulations provide that the 15 metre perimeter area is to be measured on a horizontal plane from the point where the external wall of a building meets the ground. Where a hospital building has an awning, canopy or other overhanging structure, all the land lying directly beneath that structure will fall within the no-smoking area, regardless whether it is within 15

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[12] Tobacco (who.int)
[13] Policy Memorandum (parliament.scot)
[14] Secondhand Tobacco Smoke Exposure in Open and Semi-Open Settings: A Systematic Review | Environmental Health Perspectives | Vol. 121, No. 7 (nih.gov)
[15] Secondhand smoke drift: examining the influence of indoor smoking bans on indoor and outdoor air quality at pubs and bars - PubMed (nih.gov)
[16] Determination of Outdoor Tobacco Smoke Exposure by Distance From a Smoking Source | Nicotine & Tobacco Research | Oxford Academic (oup.com)
[17] Secondhand Tobacco Smoke Exposure in Open and Semi-Open Settings: A Systematic Review | Environmental Health Perspectives | Vol. 121, No. 7 (nih.gov)
[18] Quantification of Outdoor Tobacco Smoke Exposure at Outdoor Smoking Facilities - PubMed (nih.gov)

metres of the building's external wall. This is designed to prevent individuals from congregating under overhangs or semi-enclosed areas creating impromptu smoking shelters and increasing the density of pollutants in the vicinity.

The Regulations set out the types of buildings that are to be considered "hospital buildings" for the purpose of the establishment of no-smoking areas. Generally speaking, "hospital buildings" are those used for the treatment and care of patients. Any buildings of a nature not described in the Regulations, for example laundry buildings or hospital accommodation, will not have a no-smoking perimeter area around them. These buildings and the areas around them will, however, fall under the NHS Smoke-free Grounds policy.

The 15 metre perimeter around hospital buildings only includes land that is considered to be hospital grounds. "Hospital grounds" is defined in section 4D of the 2005 Act as "land in the vicinity of the hospital and associated with it". This means that the no-smoking area could encompass roads and parking areas within 15 metres of a hospital building.

The Regulations provide that where a hospital entrance opens directly onto a public footpath, pavement or cycle path ("a path"), and that path would not otherwise be considered to be 'hospital grounds', any land forming part of that path and any connected paths are to be part of the no-smoking area. The boundary of that no-smoking area is 15 metres from the centre point of the entrance or, if closer, the point where the path meets land that is not a path, for example a road.

Where a hospital has a pre-existing area of land that is accessed from a hospital building and is a designated smoking area with fixed boundaries it will not form part of the no-smoking area for a period of one year. After one year, at the end of 5 September 2023, this exemption will expire. This is to allow time for hospitals to relocate designated smoking areas away from the 15 metre zone.

Under section 4A of the 2005 Act, the person who has management and control of the no-smoking area outside a hospital building commits an offence if they knowingly permit someone to smoke in that area. A person will be considered to knowingly permit smoking if they ought to have known that the person was smoking in the no-smoking area. It is a defence for an accused to prove that they, or their employee or agent, took all reasonable precautions and exercised all due diligence not to commit the offence, or that there were no lawful and reasonably practicable means by which the accused could prevent the person from smoking in the no-smoking area.

Under section 4B it is an offence to smoke within the no-smoking area outside a hospital building. It is a defence for an accused charged with an offence under this section to prove that the accused did not know, and could not reasonably be expected to have known, that the place in which it is alleged the accused was smoking was within the no-smoking area outside a hospital building.

The 2005 Act sets out the maximum penalties for those guilty of offences:

- A fine not exceeding level 3 on the standard scale for smoking in a no-smoking area outside a hospital building (currently £1,000);

- A fine not exceeding level 4 on the standard scale for knowingly permitting someone to smoke in a no-smoking area outside a hospital building (currently £2,500);

- A fine not exceeding level 3 on the standard scale for failing to display or failing to comply with the requirements for display of no-smoking notices (currently £1,000).

A fixed penalty notice may be issued in relation to offences committed by natural persons. This will enable a person to discharge their liability by paying a fixed penalty. These Regulations amend the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 ("the 2006 Regulations") to provide that the fixed penalty amount is:

- £50 for smoking in a no-smoking area outside a hospital building;

- £200 for knowingly permitting someone to smoke in a no-smoking area outside a hospital building;

- £200 for failing to display or failing to comply with the requirements for display of no-smoking notices.

If the fixed penalty is paid before the end of the period of 15 days beginning with the day on which the fixed penalty notice is given, a discounted amount is payable. These Regulations amend the 2006 Regulations to provide that the discounted amount is:

- £30 for smoking in a no-smoking area outside a hospital building;

- £150 for knowingly permitting someone to smoke in a no-smoking area outside a hospital building;

- £150 for failing to display or failing to comply with the requirements for display of no-smoking notices.

Section 4C of the 2005 Act requires Health Boards to display no-smoking notices at every entrance to the hospital grounds. This requirement does not apply to the hospital grounds established by these Regulations (where a hospital entrance opens onto a public path). Section 4C of the 2005 Act also requires the person having the management and control of a hospital building to display no-smoking notices at every entrance to the building. These Regulations set out the form and content of those notices. It is an offence to fail to display no-smoking notices and to fail to comply with the form and content requirements.

Enforcement of the Regulations will be undertaken by designated officers of a local authority. Although responsibility will vary across local authority areas, these tasks will normally fall under the auspices of Environmental Health. Those with management and control of hospital buildings should liaise with their local authority on this.

Consultation

A consultation titled *Prohibiting Smoking Outside Hospital Buildings*[19] ran from 8 October 2019 to 17 January 2020. The consultation was made available online at https://consult.gov.scot/. The consultation sought views on proposed regulations aimed at making it an offence to smoke outside hospital buildings or knowingly permit others to smoke there, to allow the regulations to be finalised and laid in the Scottish Parliament. The consultation sought views on the three points:

- The distance from hospital buildings which will form the perimeter of the no-smoking areas outside a hospital building, and how the perimeter around the building is determined in so far as whether the perimeter ends the specified distance from a wall or from any part of the building structure or otherwise.
- The manner of display, form and content of no-smoking notices.
- Whether there are any exceptions required for specific hospitals or specific buildings, or specific areas of land which should not be considered hospital grounds or part of the no-smoking areas respectively under the definitions in the Act.

The full public consultation[20] for the 2016 Act, which took place in 2015, had identified substantial support for appropriate regulation.

The 2019 consultation received 559 responses, comprising 513 individual responses and 46 organisational responses. The consultation attracted responses from a diverse range of organisations. NHS bodies represented almost half of all organisation responses (e.g. NHS Boards, hospitals and health and social care partnerships). Further, three NHS responses included the feedback and views gathered through their own consultation process which involved staff and/or patients. This was followed by third sector organisations (e.g. health improvement organisations/charities as well as smokers' rights bodies). Other public sector bodies were represented by local government and a related membership body.

The consultation attracted responses from those who strongly supported the proposals as well as some who did not. A clear majority of respondents agreed that the perimeter of the no-smoking area should be 15 metres from hospital buildings (72%). Organisations noted stronger levels of agreement with the proposal than individuals. Many of the respondents that were in favour of setting the perimeter at 15 metres considered the proposed distance "necessary", "justified" and/or "sufficient" to significantly reduce health risks for patients, visitors and staff.

The majority of respondents agreed that the perimeter of the no-smoking area should be measured from the outside wall of a building, and include all the land and areas beneath canopies or overhangs, even where they measure more than 15 metres from the side of the hospital building (72%). Organisations noted stronger levels of agreement with the proposal than individuals.

Concerns around the practical management of patients should a perimeter ban be imposed in mental health settings were expressed by those working in and having experience of such

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[19] Prohibiting smoking outside hospital buildings: consultation analysis - gov.scot (www.gov.scot)
[20] A Consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland: Analysis of Responses - gov.scot (www.gov.scot)

settings. These included fears that smokers may not agree to hospital admission if they were unable to smoke, that a ban could add risks to safety and security, and that cigarettes were commonly used as a de-escalation technique to calm situations.

Because of the concerns raised in responses, we decided to seek further clarification and sought additional detail and input from the Mental Welfare Commission for Scotland, the Mental Health Law Team at the Scottish Government and the Royal College of Psychiatrists in Scotland. After thorough examination of the arguments and the implications of exempting such hospitals, the Scottish Government formed the view that these concerns can be mitigated against and that there are no compelling, fundamental reasons to exempt psychiatric hospitals from the proposed legislation.

An ASH Scotland/YouGov survey, undertaken in 2015, indicated that 73% of a representative sample of the Scottish population would be in favour of a complete ban on smoking in hospital grounds.[21] There was also strong public support for national legislation to apply and enforce such a ban in a consistent and proportionate manner across Scotland.

No significant changes were made to the Regulations as a result of the consultation comments. However, a need for clear signage was indicated in the consultation and this was factored into the wording of the instrument. A sunset clause was added to allow a year-long transition period during which existing designated smoking areas within 15 metres of a hospital building could be relocated to outside the no-smoking perimeter area.

Impact Assessments

An Equality Impact Assessment, was completed on this instrument and was published in 2015. This has been reviewed and refreshed in March 2022 specifically for these Regulations.

All other impact assessments were pre-screened and found to have negligible or no significant impact from these Regulations. These will be published on the gov.scot website.

Financial Effects

Pre-pandemic the Scottish Government agreed to fund the signage costs and this commitment will be honoured. Local Authorities are already funded to undertake tobacco enforcement work and it is expected that any additional costs will be covered under existing budgets.

Scottish Government
Tobacco Control & Gambling Team
March 2022

[21] YG-Archive-140314-ASH-Scotland.pdf (d25d2506sfb94s.cloudfront.net)