These documents relate to the Prohibition of Smoking in Regulated Areas (Scotland) Bill (SP Bill 20) as introduced in the Scottish Parliament on 3 February 2004

PROHIBITION OF SMOKING IN REGULATED AREAS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. The following documents are published to accompany the Prohibition of Smoking in Regulated Areas (Scotland) Bill introduced in the Scottish Parliament on 3 February 2004:
   - Explanatory Notes;
   - a Financial Memorandum; and
   - the Presiding Officer’s Statement on legislative competence.

The Financial Memorandum and Presiding Officer’s statement are required under Rule 9.3 of the Parliament’s Standing Orders. A Policy Memorandum is printed separately as SP Bill 20–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Non-Executive Bills Unit on behalf of Stewart Maxwell, the member in charge of the Bill. They have been prepared in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY OF AND BACKGROUND TO THE BILL

4. The Bill is directed at smoking and, in particular, aims to prevent people from being exposed to the effects of passive smoking in public areas where food is being supplied and consumed.

5. The Bill does this by:
   - defining areas where smoking is not permitted (regulated areas);
   - making it an offence to smoke in regulated areas;
   - making it an offence for owners, occupiers and the like to knowingly permit smoking in regulated areas;
   - requiring signs to be clearly displayed inside and outside regulated areas; and
   - providing that offences can be prosecuted summarily.

COMMENTARY ON SECTIONS

Section 1: Regulated areas

6. Section 1 sets out the areas to which the Bill will apply. These are described as regulated areas.

7. Subsection (1) provides that any enclosed public space is a regulated area while food is supplied and consumed in that space. It also makes a similar provision during a prescribed period before food is supplied and consumed. Smoking in a regulated area is made an offence by section 3 and permitting smoking in such an area is made an offence by section 4.

8. “Enclosed” and “public space” are defined in subsection (5): an “enclosed” space being a single space which is fully enclosed except for openings, and “openings” being doors and windows and the like which are capable of being closed. The Bill relates to spaces and not rooms. Therefore where different rooms are separated by a gap that is not capable of being
closed - for example an arch, a passageway or a stairway - these rooms (and the gap which connects them) will form part of the same enclosed space for the purpose of the Bill.

9. “Public spaces” are spaces that the public, or a section of the public, has access to; including those they pay to enter. The definition covers cafes, restaurants and bars, and larger buildings like hotels, railway stations, airports, shopping centres and the like. Schedule 2 provides a non-exhaustive list of places that are covered by the definition including, for example, private clubs and places of employment.

10. The prescribed period provided for in subsection (1)(b) is defined in subsection (4) as a period of 5 days or such longer period as the Scottish Ministers may provide by an order made by statutory instrument. Establishing such a period is intended to ensure that eating areas are free from the effects of smoke. This may take varying times depending upon the size of the area, the decoration and room coverings and the rate of change of fresh air to remove smoke particles. A period of 5 days is taken as a minimum period to allow for an average room, typically furnished to be relatively clear of the harmful effects of smoke particles.

11. Power is given to Scottish Ministers to extend the period. It might be appropriate to do this if it can be determined that harmful effects linger for longer than 5 days. An order extending the period cannot be made until the Parliament has approved a draft of the order by resolution (this procedure is commonly known as the affirmative procedure – see section 9(3)(a)).

12. Subsection (2) aims to prevent smoke from drifting into the eating space. This is achieved by requiring an enclosed buffer area between areas where smoking takes place and eating areas. This buffer area will be any enclosed space directly connected to the regulated area in which food is, or at the end of the prescribed period is to be, supplied and consumed. These spaces are referred to in the Bill as “connecting spaces” which, in terms of subsection (2) are also regulated areas. A space will not be a connecting space if it is not connected to the enclosed public space by an opening. Additionally, for a space to be a “connecting space” it and the enclosed public space must be under the same ownership or control (see subsection (5)).

13. Subsection (3) introduces schedule 1 to the Bill. Schedule 1 lists spaces which are exempt from the provisions of the Bill. Paragraph 1 of schedule 1 provides that the Bill will not apply to vehicles used as a method of transportation by the public at a cost to them. This includes but is not limited to, buses, trains, aircraft, hovercraft, ships and other vessels.

14. Paragraph 2 of schedule 1 exempts premises where a section of the public may be compelled to reside for periods of time. This is to avoid restrictions on people who are unable to exercise a choice with regard to the environment in which they eat. The exemption only applies to the areas where the people residing in the premises eat and not to areas such as staff or public restaurants. This exemption covers places such as hospitals (psychiatric and general), residential care establishments, prisons, remand centres, detention centres and similar establishments.

Section 2: Power to amend meaning of “regulated area”

15. Section 2 gives powers to the Scottish Ministers to amend the meaning of “regulated area” by order made by statutory instrument. This power is however restricted to extending the
areas covered by the Bill and cannot be used to remove areas. Any such order cannot be made until the Parliament has approved a draft.

16. Subsection (2) requires Scottish Ministers to consult before making any such order.

**Section 3: Offence to smoke in regulated area**

17. This section makes it an offence for anyone to smoke in a regulated area. It will be a defence against any charge for accused persons to prove that they did not know, and could not reasonably have known, that they were in a regulated area. This could arise in instances where for example signs (see section 5) had been removed or not displayed. The onus is however on the accused to prove this.

**Section 4: Offence to permit smoking in regulated area**

18. Section 4(1) makes it an offence for those in charge of regulated areas to knowingly permit smoking. The persons liable are specified in subsection (2).

19. During the period while food is being supplied and consumed persons liable are the owner, occupier, manager or any other person for the time being in charge of the regulated area (subsection (2)(a)(i)) and the owner, manager or any other person for the time being in charge of the food operation in the regulated area (subsection (2)(a)(ii)). Food operation is defined in section 10 as any business undertaking, event or activity where food is supplied and consumed, and thus applies to outside caterers and others supplying food for consumption in the regulated area.

20. During the 5 day period before food is supplied and consumed the owner, occupier, manager, or any other person for the time being in charge of the regulated area will be liable (subsection (2)(b)). Therefore to avoid committing the offence the 5 day smoking free period must be allowed to elapse before food is supplied and consumed.

21. Subsection (3) provides that accused persons under section 4 are liable if they, or anyone working for them or representing them, knew or ought reasonably to have known that smoking was taking place. It will therefore not be a defence for accused persons to argue simply that they did not know smoking was taking place.

22. Subsection (4) provides a defence for anyone accused of the offence in subsection (1). That defence is that they or anyone working for them or representing them had taken all reasonable precautions and had tried to the best of their ability to avoid committing the offence. It is considered that this will require the taking of positive measures such as asking the person to stop smoking, asking them to leave the premises or calling the police, and training staff to keep vigilant and to take similar action.

**Section 5: Offence to fail to display signs**

23. Section 5 requires ‘no smoking’ signs to be displayed inside and outside the regulated area. The owner, occupier, manager and any other person in charge of the regulated area and the
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owner, manager or any other person in charge of the food operation are liable for failure to display such signs. Failure to display signs is an offence.

24. Subsection (1) requires signs to be clearly displayed so that they are visible both inside and outside the regulated area.

25. By subsection (2) the responsibility for ensuring signs are in place, and therefore the liability for failure, rests with the same persons who are liable for the permitting smoking offence during a period when food is being supplied and consumed (see paragraphs 18 to 22 above).

26. Under subsection (3) it is defence for anyone accused of failing to display signs to prove that they or anyone working for them or representing them as agent took all reasonable precautions to ensure that signs were in place as required.

27. Subsection (4) gives Scottish Ministers power by regulations to prescribe the requirements of signage. This power is to prescribe the number, type and style required as well as their size and content. They could also prescribe the manner in which signs must be displayed.

28. In making regulations for signs, the Scottish Ministers could, for example, complement the requirements for prohibitive signs provided for under the Health and Safety (Safety Signs and Signals) Regulations 1996 (SI 1996/341).

29. Before making regulations subsection (5) requires Scottish Ministers to consult certain bodies closely connected with the licensed and restaurant trade, being the Scottish Licensed Trade Association, the Scottish Tourist Forum, the Brewers’ and Licensed Retailers’ Association of Scotland and the British Hospitality Society. Ministers shall also consult with such other bodies that they consider appropriate.

Section 6: Penalty

30. Section 6 sets the penalties on summary conviction for the offences in sections 3, 4 and 5 as the maximum of level 3 on the standard scale (currently £1000). Summary criminal proceedings take place before the district or sheriff court (without a jury).

Section 7: Bodies corporate etc.

31. A number of places where food is supplied and consumed will be owned and managed by corporate and similar bodies. Section 7 applies the offences in sections 4 and 5 to these bodies corporate and to individuals, who exercise control within an organisation.

32. The bodies to which section 7 applies are:
   - bodies corporate (other than local authorities);
   - local authorities;
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- Scottish partnerships; and
- unincorporated associations.

33. In certain circumstances a director, partner, officer or employee (or any other person specified) of one of the above organisations will be guilty of an offence as well as the organisation itself. This arises when they consent to, or connive in, the commission of an offence by the organisation, or if their negligence results in the commission of an offence by the organisation.

Section 8: Crown application

34. Many public spaces where food is supplied and consumed will be operated and controlled by the Crown.

35. Section 8(1) applies the provisions of the Bill, including any orders or regulations made under it, to places operated by the Crown.

36. However under subsection (2) the Crown itself cannot be held criminally liable for committing an offence under the provisions of this Bill. A public body or office holder who has responsibility for enforcing any of the provisions in the Bill can make an application to the Court of Session, to declare that any specific breach of the provisions of the Bill by the Crown is unlawful.

37. Although the Crown itself cannot be prosecuted, subsection (3) ensures that the provisions in the Bill apply to people in the public service of the Crown. Thus Crown servants can be prosecuted for offences under sections 4, 5 and 6.

Section 9: Orders and regulations

38. Section 9 sets out the procedure which must follow at Parliament before any Regulations made by Scottish Ministers come into force.

39. Subsection (1) provides that the powers given to the Scottish Ministers under the Bill are exercisable by statutory instrument.

40. Subsection (2) allows orders and regulations to make different provisions for different cases. This provides a flexible approach should for example different types or sizes of premises require different orders.

41. Subsection (3)(a) provides that any statutory instrument containing an order under section 1(4) (prescribed period) or 2(1) (definition of regulated area) cannot be made until Parliament has approved a draft of the order by resolution (commonly known as affirmative procedure).
42. Subsection (3)(b) provides that any regulations made under section 5(4) (regulations in respect of signs) comes into force unless the Parliament passes a resolution to annul them (commonly known as negative resolution procedure).

Section 10: Interpretation

43. ‘Food’ is defined as having the same meaning as in section 1 of the Food Safety Act 1990 (c.16). However to allow bars and public houses etc to allow smoking while continuing to sell bar snacks the definition of food in this Bill does not include drink or biscuits, nuts, crisps, confectionery and the like.

44. ‘Smoke’ is defined widely to ensure that it includes a person holding or having control over a lighted cigarette, pipe, etc (see following paragraph) even if they were not actually inhaling.

45. ‘Smoking product’ is defined as tobacco or any product that is intended to be smoked. This ensures that smoke from smoking products other than tobacco is included, for example herbal cigarettes. It also ensures that cigars and pipe smoking are included.

46. “Supplied” is defined to include food provided free such as a buffet, or given free when a drink is purchased, or provided as an enticement to stay in the premises. Food which has been sold is also included in this definition of supplied.

Section 11: Short title and commencement

47. Various provisions commence the day after Royal Assent to allow preparatory work to take place for full commencement 6 months later.

FINANCIAL MEMORANDUM

INTRODUCTION

48. Costs from the provisions of this Bill will fall on owners / proprietors of premises where food is supplied and consumed. There will also be costs on the Courts and the Procurator Fiscal Service. In each case costs are not large and for businesses are likely to be more than offset by savings in other areas.

COSTS ON THE SCOTTISH ADMINISTRATION

Estimating compliance with the provisions

49. It is difficult to accurately predict how many businesses will comply with the provisions in the Bill. Therefore to estimate the rate of compliance it is useful to look at the compliance rate in other jurisdictions. In New York, it was found that in the first six months of the Smoke-
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Free Air Act 2002, the compliance rate was 98%. There are similarities with the enforcement regime in New York to that proposed for this Bill, in each jurisdiction proprietors are liable to prosecution when smoking occurs in designated areas.

50. Information from the Food Standards Agency in Scotland estimates that there are approximately 32,000 premises in Scotland where food is supplied and consumed. Taking a direct comparison with the New York figure that 2% of premises will not comply gives a figure of 640 who may not initially comply in Scotland.

51. The Bill makes it an offence to permit smoking in regulated areas as well as creating the offence of smoking in such areas. It can therefore be reasonably anticipated that compliance rates will be high. The implications for owners/proprietors of non-compliance could lead, in licensed premises, to licenses being revoked or not renewed.

Estimating the number of prosecutions for owners/proprietors committing and offence.

52. It is likely that enforcement will be carried out in a comparable way to that of certain Road Traffic Offences, for example drivers and passengers who do not wear a seat belt. Such offences generally come to light when other offences are committed as opposed to being routinely targeted for direct enforcement action.

53. Information from the Driver and Vehicle Licensing Agency (DVLA) indicates that 71% of adults (over 18s) in the United Kingdom hold a driving licence. For Scotland this percentage provides a figure of 2,813,834 people.

54. A survey carried out in 1998 by the Scottish Executive found that 86% of vehicle occupants comply with the requirement to wear seat belts. Using this figure we can estimate that 14% of drivers in Scotland do not comply with the requirements. This gives us a figure of 393,936 for non compliance.

55. The average number of prosecutions in respect of seat belt offences between 1995 and 2000 was 30,234. Comparing this figure with the earlier numbers who do not comply suggests that prosecution rates are around 7.6%.

56. Using the non-compliance total of 640 from paragraph 50 and applying the prosecution rate of 7.6% gives a figure of 49 prosecutions of proprietors/owners. It can be anticipated that there will be at least a similar number of individuals prosecuted given the requirements in the Bill.

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1 Testimony of Nancy Miller, Assistant Commissioner for Tobacco Control, NYC Department of Health and Mental Hygiene, 16 September 2003
2 Local Laws of The City of New York 2002 No.47
3 DVLA Today, Issue 24, 2003
Estimated cost of prosecutions

57. A prosecution may not necessarily involve court action given the availability of fiscal warnings and fines although court action is an option. The court involved for a summary prosecution could be either the District Court or Sheriff Court with the former perhaps more likely. It is estimated that the time involved in each prosecution would average ½ hour.

58. Based on information supplied for other Bills by the Scottish Court Service and the Procurator Fiscal Service each hearing costs £220. In addition to this there will be a cost of approximately £40 on the Procurator Fiscal Service for the preparation of papers for the hearing.

59. This gives a total of £260 per hearing. Given the low numbers anticipated it can be reasonably expected that these costs can be subsumed within existing running costs. No new staff members would be expected to be required for such a low volume of cases.

Current expenditure by Scottish Executive

60. NHS Health Scotland is allocated £1.5 million a year in order to target smoking prevention activity (including passive smoking). Prevention activities to date include mass media campaigns, such as Club Smoking and Stinx, school based initiatives and community based programmes. 96% of schools in Scotland now provide education on tobacco. In the period 2003-2004 the amount being spent on raising public awareness of the issues surrounding passive smoking is expected to be around £200,000.

COSTS ON LOCAL AUTHORITIES

61. Environmental Health Officers employed by Local Authorities are given no specific role in enforcement although they are likely to mention breaches in reports they make following visits and also to report other cases to the Police. These actions do not represent any significant addition to their workload; no additional visits are required of them under the Bill.

62. It is not anticipated that the provisions should impose any direct costs on local authorities other than in their capacity as owners/proprietors of premises where food is supplied and consumed. Those costs are detailed in the following section of this memorandum.

COSTS ON INDIVIDUALS, COMPANIES AND OTHER BODIES

Costs on owners/proprietors

63. Costs will fall on people who run establishments that have to comply with the new law. However it is expected that these costs will be minimal and relate entirely to signage. The costs of signage should be more than offset by savings arising from reduced cleaning, decoration and other similar type costs. There will no longer be any need to supply ash trays. There might also be reductions in insurance premiums arising from reduced fire risks in non-smoking premises.

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5 Written Answer given by Mr Tom McCabe (15 December 2003) S2W-4693
64. Many premises already use signs to designate existing no-smoking areas. It can be anticipated that designating entire rooms could reduce the overall costs of signage given that individual table signs would no longer be necessary as they are replaced by more general signage.

65. The Bill does not require a set number of signs and the number in each area will vary depending upon such factors as size and layout. Costs will therefore vary but taking a need for 5 signs for an average sized room as the norm, businesses might incur costs of £25 - £50. However as indicated these are not wholly additional costs and are likely to be more than offset by other savings.

66. There is also clear evidence from other jurisdictions that there will be no loss of trade costs to businesses. Further details about this can be found in the policy memorandum at paragraphs 29 to 37.

Ventilation costs

67. The Scottish Voluntary Charter on Smoking in Public Places (the Charter) encourages premises to consider staff and customer comfort and to improve air quality. One way of achieving this encouraged by the Charter is by way of ventilation systems. Two of the Charter smoking policies apply to venues that have ventilation that meets the Charter Standard.

68. The cost of installing a ventilation system sufficient to meet the Charter Standards will vary depending upon such factors as size of rooms, age of building and location. To fit a ducted system which will entitle premises to display the ventilation related Charter signage can cost £2000 to £50,000 and require regular maintenance for optimal performance.6

69. In addition to the cost of installation and maintenance, ventilation systems increase heat loss from premises and there will be a consequential rise in heating bills.

70. Ventilation costs in this regard will no longer need to be incurred by premises which supply or allow consumption of food following enactment of the Bill.

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

71. On 2 February 2004, the Presiding Officer (George Reid) made the following statement:

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6 Figures from information supplied by Parliamentary Office of Science and Technology, October 2003, Number 206
“In my view, the provisions of the Prohibition of Smoking in Regulated Areas (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”