

Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill

The Law Society of Scotland

Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interest of solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Society's Health and Medical Law Sub-committee (the committee) welcomes the opportunity to consider and respond to the Health and Sport Committee's call for written evidence on the Smoking Prohibition (Children in Motor Vehicles)(Scotland) Bill. The committee responded to Jim Hume's earlier public consultation in 2013¹ and met with the introducing member in January 2014 to discuss the proposals further. The committee has the following comments to put forward:

General Comments

We are pleased to note that a number of our concerns with the original proposals, and which we set out in our previous response, have been taken into account and addressed by the provisions of the Bill as introduced. In particular, the change of a definition of a child from 16 years of age to 18 and the increase in the age of the offending adult to 18 years of age.

Our original proposals also noted that , in relation to choice or consent of the child, the focus in the bill is based on the fact that a child may be too young to understand the dangers of passive smoking or that it is simply too much and too impractical to expect a child to refuse to travel in a car with a parent who smokes. We agree that these concerns are valid, but what of others who are vulnerable or unable to consent or refuse consent to travelling in a car where someone is smoking?

We suggested that a more comprehensive alternative may be that rather than having age as the determinant, instead consider the vulnerability and the capacity of an individual to give or refuse their consent to traveling in a vehicle where someone is smoking.

¹http://www.lawscot.org.uk/media/229424/health_proposed_smoking_children_in_vehicles_scotland_bill_law_society_of_scotland.pdf

Specific Comments

1. Do you support the general aim of the proposed Bill? Please provide reasons for your position.

Yes, we support the general aim of the proposed Bill and agree with the policy intent and objective behind this. The harmful effects of tobacco and smoking are undisputed and statistics speak for themselves in relation to deaths caused by smoking and smoking related disease, including the health of those who breathe in users' smoke, particularly children.² We recognise and agree that the proposals have the potential to address health and wellbeing concerns and issues by potentially reducing the risk of harm caused by second (SHS) and third hand smoke (THS)³.

2. Do you think the Bill (if enacted) would achieve its aim of protecting children from the effects of second-hand smoke and their health? Please provide an explanation for your answer.

We agree that any policy and decision making that helps towards enhancement of the wellbeing of children in Scotland is paramount and forms one of the key tenets of European Health Policy.⁴ However, we acknowledge the opportunity that a stage 1 consideration will provide in ascertaining whether the type of legislation proposed is either necessary or appropriate and will fulfill the aims and objectives that are being sought. We made three points in our initial submission⁵ which we summarise briefly again.

First, there have been some suggestions that within the UK, voluntary measures in relation to smoking cessation are not always effective⁶, however, there was little debate about whether criminalising such behaviour was the best approach. Evidence has shown that prohibiting smoking in certain public places has been effective in helping individuals to give up smoking and has reduced deaths from heart disease and stroke. In addition, there were unexpected but positive results following the introduction of the *Smoking, Health and Social Care (Scotland) Act 2005*, 2005 Act; compliance was much better than anticipated with both non-smokers and smokers in favour of the legislation. We suggest, that from this, it can be inferred that the Scottish public does agree that SHS is an intrusion and places unreasonable risk on

² McNeill, A *et al.* (2012), Tobacco control in Europe: A Deadly Lack of Progress, *European Journal of Public Health*, **22** Supp. 1 p1-3. Department of Health and Committee on the Medical effects of Air Pollutants. *Handbook on air pollution and health*. London: The Stationery Office, 1997. Scientific Committee on Tobacco and Health. *Update of evidence of health effects of second hand smoke*. London: Department of Health, 2004.

³ Bearer CF. (1995) *Environmental health hazards: how children are different from adults*. The Future of Children, 11–26

⁴ WHO- Europe. European strategy for child and adolescent health and development. (2005) report Number: EUR/05/5048378

⁵ http://www.lawscot.org.uk/media/229424/health_proposed_smoking_children_in_vehicles_scotland_bill_law_society_of_scotland.pdf

⁶ Faculty of Public Health of the Royal colleges of Physicians of the United Kingdom, *Response from the Faculty of Public Health to the European Commission's Green Paper Towards a Europe Free from Tobacco Smoke: Policy Options at EU Level*. http://www.fph.org.uk/uploads/EU_Smokefree_strategy_010507.pdf [Accessed] 17/8/2013.

another person's health and wellbeing and it is this that provides the justification and support for legislation.⁷

Second, we note that the current proposals do not propose methods to tie in with education and prevention of smoking. We believe that a combined approach is generally regarded as more effective and provides a targeted response in changing patterns of smoking behaviour and promoting tobacco control.⁸ Examples of pragmatic methods of preventing smoking are to be found within the policies of the General Dental Council (GDC) and the General Medical Council (GMC) and the General Pharmaceutical Council. Their policies provide that their members offer smoking cessation advice as mandatory to any patients who present themselves as smokers (with failure to do so potentially, in combination with other issues, a fitness to practice issue). We believe that combining, legislative provision and a mechanism for addressing the issue of smoking at the source, will have a positive impact of the effects of second hand smoke (SHS) in locations such as the home or private vehicle. Finally, recent studies have shown⁹ that the impact of any legislation which aims to reduce the effects of SHS and child health should be continuously monitored.

Third, we note that the issue of third-hand smoke (the remnants of cigarette chemicals left after smoking) is identified in the introduction to the proposed Bill but is not considered further. If a parent smokes in the car when the child is not present (e.g. on the way to picking up the child from school), the child will still be exposed once it is in the vehicle, to the environment in the vehicle, the upholstery, the air, parents clothing etc. As this has been raised in the consultation document, we suggest that further consideration be given.

3. Is there anything in the Bill you would change? If yes, please provide more details.

Please refer to our general comments above and to our response to question 6 below.

4. Who do you think should have responsibility for enforcing the proposed legislation and why?

A person who does not comply with the law would be committing a criminal offence. We therefore envisage that enforcement will be largely taken forward by local police officers in conjunction with their wider functions on road safety. Under existing powers, police officers would be able to request that a vehicle

⁷ Ferguson, P.,(2010) Smoke gets in your eyes ...the criminalisation of smoking in enclosed public places, the harm, principle and the limits of criminal sanction, *Legal Studies* **31** 2 p259-278 at p 264

⁸ Hunt, P.,(2012) Health and wellbeing: The role of government., *Public Health*, **126** s 19-23.

⁹ Moore, G F *et al* (2015), Prevalence of smoking restrictions and child exposure to second hand smoke in *cars and homes: a repeated cross-sectional survey of children aged 10–11 years in Wales*. *BMJ Open*. Available from: <http://bmjopen.bmj.com/content/5/1/e006914.full> [Accessed May 19 2015]

stops if they suspect that an offence is being committed. However this may not be without its challenges. As we understand, there is limited data currently available which evaluates the enforcement of smoking bans in private vehicles where children are present¹⁰ and many studies use indirect reference to the wearing of seatbelts or using a mobile phone whilst driving. We believe that these comparators will only take the argument so far. One can envisage that there will be challenges in enforcing a ban under some of these circumstances, for example, when the car is moving, conditions of very heavy traffic or when more than one person is smoking in the car. In all of these examples, the enforcing officers would need to see both the offence taking place and ascertain the age of any child or children present.

We would also expect that local authorities would also be able to enforce the proposed regulations, by authorising appropriate officers, but would not have the powers to stop moving vehicles. We see an important role for both local authority regulatory officers, who enforce existing smoke free legislation, in working jointly with police on local enforcement activities, as well as continuing their efforts to build compliance for smoke free legislation generally.

5. What type of vehicles do you think should be exempt from the legislation and why?

For some people, their vehicle may also act as a home, for example a caravan or a motorhome (or motor caravan). We support the exemption provided in Section 1 (2) of the proposed Bill and agree that it should apply to such vehicles when they are used as a home or living accommodation.

6. What is your view on the Bill's provision for a defence that the person smoking could not have reasonably known that the other occupants of the vehicle were under 18?

We take the view that it would be more logical that the driver bears the responsibility to ensure no person smokes in the vehicle, where a child is present. This would be in line with other legislation which seeks to protect the wellbeing and safety of children travelling in vehicles, such as section 15(1) *Road Traffic Act 1988*, where a driver has the responsibility to ensure that a child under the age of 14 is wearing a seatbelt.¹¹ A statutory defence could then be included to the effect that 'the driver took all reasonable steps to ensure that the offence was not committed by any passenger in the vehicle'. We note that the United Kingdom Parliament recently approved regulations which will make smoking in cars carrying children illegal¹² following an

¹⁰ Wong G., *et al*.,(2011) Policy guidance on threats to legislative interventions in public health: a realist synthesis., *Public Health* 11 222 p.1-11.

¹¹ Road Traffic Act 1988 section 15 Restriction on carrying children not wearing seat belts in motor vehicles.

15(1)Except as provided by regulations, where a child under the age of fourteen years is in the front of a motor vehicle, a person must not without reasonable excuse drive the vehicle on a road unless the child is wearing a seat belt in conformity with regulations.

¹² <https://www.gov.uk/government/news/smoking-in-cars-is-now-illegal>

amendment to the Children and Families Act 2014¹³. We further note that under the regulations, the person committing an offence of failing to prevent smoking in a private vehicle which is smokefree, would be the driver.

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¹³ <http://www.legislation.gov.uk/ukpga/2014/6/section/95/enacted>