



**THE LAW SOCIETY  
of SCOTLAND**  
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# Supplementary Evidence

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

**The Law Society of Scotland's supplementary response  
July 2015**

## Introduction

The Health and Medical Law and Family Law Reform sub committees of the Law Society of Scotland (the committees) have now given some consideration to the issue of the potential consequences of the legislation in relation to whether a person found to be smoking in a car with a child would lead to the raising of a child concern form that would be shared with the named person under the GIRFEC principles and the Children and Young People (Scotland) Act 2014.

Following some questions that we received during our oral submissions that the driver should bear the responsibility to ensure no person smokes in the vehicle where a child is present, we believed that it may be helpful to revisit and explain the reasons why we have reached this view and have provided some further observations below.

### 1. GIRFEC principles and the Children and Young People (Scotland) Act 2014

General considerations here centre on familiar arguments of obtaining a balance between practical enforcement and ideologies. In other words, regulatory measures which can be justified as being in the interest of the protection of a young person still have to be proportionate and measured. Within that context, the impact of second hand smoke on a young person may be perceived differently to a more immediate harm of neglect or physical abuse<sup>1</sup>.

More specifically, given that there is no reference to child concern forms in the Children and Young People (Scotland) Act 2014 Act or subsequent statutory guidance, much of what we say below is conjecture since it will depend on how GIRFEC and the Act are being implemented in practice in different local authority areas.

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<sup>1</sup> Rouch *et al* (2010) 'Public, Private and Personal: Qualitative research on policymakers' opinions on smoke-free interventions to protect children in 'private/' spaces'. *BMC Public Health* **10** 797

However one possible approach may be that a report to the Named Person would be triggered by any concern that the child is being exposed to 'significant harm'. Thus, the question is whether exposure to second hand smoke in a car rises to that level. The term is not defined in primary legislation but, given that the justification for criminalising such conduct in the first place is the harm that might result from exposure,<sup>2</sup> it may be that it would.

As a result, a conviction under the proposed legislation might well trigger a report to the Named Person. Indeed, mere belief that a child was being exposed to second hand smoke in a car might have this effect. The question then is whether such a report is a proportionate response. A further but related question is whether this will reinforce the view that Named Persons are unnecessarily interfering rather than providing a supportive role.

Consideration should be given to ensure that what is proposed does not damage, rather than enhance, the Named Person's potential for constructive contribution.

What might follow from a report? Presumably, the Named Person might feel obliged to report the concern to the social work department. It has been argued that there is something of a 'pendulum effect' in child protection, with the willingness to intervene vacillating, to some extent, depending on the timing<sup>3</sup>. That is to say, if there has been a high profile but negative aftermath of events, then there may be a reluctance to intervene. Conversely, if there has been a recent, 'failure to protect' case, then those involved may be more proactive.

### *Referral to a children's hearing*

A further question is whether these circumstances would lead to a report to the Principal Reporter, further investigation and possible referral to a children's hearing. The test there is

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<sup>2</sup> Louise Rennick, *SPICe Briefing Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill* (Scottish Parliament, 2015), 15/30, pp 4-5

<sup>3</sup> Elaine E Sutherland, 'A Knock at the Door: *Sloan v B: The Orkney Case*' in John P Grant & Elaine E Sutherland, *Scots Law Tales* (Dundee: Dundee University Press, 2010)

that ‘the child is likely to suffer unnecessarily or the health or development of the child is likely to be seriously impaired’.<sup>4</sup> Again, whether ‘serious impairment’ to health is a likely consequence of exposure to second hand smoke in a vehicle is a judgment call.

It should be remembered that before referral to a hearing will take place, it is not enough for the Principal Reporter to consider that a section 67 ground applies. He or she must also be satisfied that ‘it is necessary for a compulsory supervision order to be made in respect of the child.’<sup>5</sup> Where the Principal Reporter is satisfied that the matter can be resolved other than by a referral – for example, by a credible undertaking that there will be no recurrence of smoking in the car – then it may be that no hearing will be convened.

## 2. Challenges in enforceability

Potential challenges in enforceability have been identified in our submissions<sup>6</sup> and in other submissions to the Health and Sport Committee. This was reaffirmed by those who appeared at the oral evidence session of Tuesday 16<sup>th</sup> June 2015. We provide here more detailed considerations and since this had bearing on our submissions, refer to research which has been undertaken in jurisdictions which have passed similar legislation, including some provinces and states in Australia, Canada and the USA.

### *Effective and feasible enforcement*

We took the view that any regulation had to focus upon the purpose of the bill: to minimise the harm caused by second hand smoke to children traveling in a car where someone was smoking. Although the proposal is to address this by means of the criminal law, this is an

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<sup>4</sup> Children’s Hearings (Scotland) Act 2011, s67(2)(a)

<sup>5</sup> 2011 Act, s66(2)

<sup>6</sup> <http://www.lawscot.org.uk/media/521149/HEA-Smoking-Prohibition-Children-in-Motor-Vehicles-Scotland-Bill-Law-Society-of-Scotland.pdf> and [https://www.youtube.com/watch?v=\\_pA7kwE3E5Q&list=PL4l0q4AbG0mnhj6WazLTpoMtW63RJUoli&index=1](https://www.youtube.com/watch?v=_pA7kwE3E5Q&list=PL4l0q4AbG0mnhj6WazLTpoMtW63RJUoli&index=1)

offence relating to public health; a point also noted by the member in charge.<sup>7</sup> Our written evidence and other studies<sup>8</sup> have emphasised the importance of public support for this initiative. The ideal approach would be public support and self-regulation alone, but unfortunately, there is evidence that voluntary measures in relation to smoking cessation are not always effective<sup>9</sup>.

Whilst the Health and Sport Committee received some written submissions suggesting that smoking in vehicles should be prohibited altogether<sup>10</sup>, we note that evidence from other jurisdictions show improvement in child health and reduction in smoking when placing the responsibility and control of this upon the driver. The question then is whether the driver should be solely responsible.

#### *Consistency with rest of the UK*

The Children and Families Act 2014 will provide two penalties:

- Smoking in a smoke-free vehicle; and
- Failure to prevent smoking in a smoke-free vehicle (this would fall upon the driver in all instances subject to statutory defences).<sup>11</sup>

If the proposed bill included similar provisions then there would be the benefit of a consistency and clarity in approach throughout the UK.

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<sup>7</sup>[http://www.scottish.parliament.uk/S4\\_MembersBills/Proposed\\_Smoking\\_\(Children\\_in\\_Vehicles\)\\_Scotland\\_Bill\\_Summary.pdf](http://www.scottish.parliament.uk/S4_MembersBills/Proposed_Smoking_(Children_in_Vehicles)_Scotland_Bill_Summary.pdf)

<sup>8</sup> De Winter- Discussion Paper- Center for Global Tobacco Control, Harvard University. [Accessed June 19 2015]

<sup>9</sup> 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](http://www.fph.org.uk/uploads/EU_Smokefree_strategy_010507.pdf) [Accessed] 17/8/2013.

<sup>10</sup>[http://www.scottish.parliament.uk/S4\\_MembersBills/Proposed\\_Smoking\\_\(Children\\_in\\_Vehicles\)\\_Scotland\\_Bill\\_Summary.pdf](http://www.scottish.parliament.uk/S4_MembersBills/Proposed_Smoking_(Children_in_Vehicles)_Scotland_Bill_Summary.pdf)

<sup>11</sup> Under s 95 of the Children and Families Act 2014, Statutory defences would be: 1. That the person smoking did not know and could not reasonably be expected to know that the vehicle was meant to be smoke free. 2. The driver took reasonable steps to cause the person to stop smoking, or they could not have reasonably known that the person was smoking or some other reasonable ground for non-compliance.

### *Enforcement challenges*

For those trying to evade detection, cigarettes and who is smoking them may be difficult to observe. Drivers can be identified from front-facing cameras but getting a clear enough image of someone in the rear of a vehicle with clarity to determine their age may be less easy. There may also be evidential issues of proving beyond a reasonable doubt that there was someone under the age of 18 in the vehicle. This will be especially the case when the child is older.

### *E cigarettes*

Will it be possible to observe with sufficient accuracy that a person is smoking a cigarette rather than an e-cigarette? Police may run the risk of incorrectly stopping drivers which would have a negative impact on public perception and resources.

### *Environmental factors*

Limited but growing evidence is now available that the time of day that journey occurred, average length of the journey, consumption per smoker, weather conditions and area (e.g. motorway or urban) have all been identified as factors that will affect smoking patterns.<sup>12</sup>

We believe that placing the responsibility of failing to prevent smoking in the vehicle<sup>13</sup> upon the driver of the vehicle will help mitigate some of these challenges.

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<sup>12</sup> Hitchman *et al.* (2010) 'predictors of smoking in cars with non-smokers: Findings from the 2007 Wave of the International Tobacco Control Four Country Survey' *Nicotine Tobacco Research* 12 4 374- 380 at p 378. Patel *et al.* (2011). 'Objective measurement of awareness differences in 'private' smoking behaviour: observing smoking in vehicles'. *Tobacco Control*.

<sup>13</sup> Subject to statutory defences such as those contained in footnote 6 above.

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