

DELEGATED POWERS AND LAW REFORM COMMITTEE

**20th Meeting, 2022 (Session 6)
Tuesday, 21 June 2022**

Instrument Responses

Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (Supplementary Provision) Regulations 2022 (SSI 2022/Draft)

On 10 June 2022, the Committee asked the Scottish Government:

The instrument is made under the ancillary power in section 35 of the 2016 Act. Section 35(1) provides that “The Scottish Ministers may by regulations make such incidental, *supplementary*, consequential, transitional, transitory or saving provision *as they consider necessary or expedient for the purposes of, or in connection with, any provision made by or under this Act*” [emphasis added in italics]. Such regulations may modify any enactment, including the 2016 Act itself (section 35(2)).

We note the purpose of the instrument is to enable an authorised officer of a Council to issue fixed penalty notices (FPN) in respect of offences under sections 4B and 4C(5) of the Smoking, Health and Social Care (Scotland) Act 2005. Those offences are smoking outside hospital buildings (section 4B) and failing to comply with signage requirements at entrances to hospital buildings (section 4C(5)), regarding the no-smoking area outside those buildings. These sections of the 2005 Act have been inserted under section 20 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016. The Prohibition of Smoking Outside Hospital Buildings (Scotland) Regulations 2022 (coming into force on 5th September 2022) establishes no-smoking areas outside of hospital buildings and makes provision further to sections 4A to 4D of the 2005 Act. The 2022 Regulations were made under specified provisions of the 2005 Act.

As noted in the accompanying policy note to this instrument sections 20(8)(a) to (c) of the 2016 Act amend Schedule 1 of the 2005 Act to make provision regarding who can issue FPNs in respect of the two aforementioned offences and in addition in respect of the offence under section 4A of the 2005 Act (permitting others to smoke in the no smoking area outside of hospital buildings). The effect of these amendments under the 2016 Act is that an authorised council officer may issue a FPN, in respect of an offence under section 4A and that only a police constable may issue an FPN in respect of the offences in sections 4A, 4B or 4C(5).

We note the Policy Note explains that it was the *intention* that authorised council officers (it refers specifically to environmental health officers) would lead on the enforcement of no-smoking areas outside hospital buildings. However, it is not clear why this provision, regarding section 4B and 4C(5), was not included in the aforementioned amendments to the 2005 Act made under the 2016 Act. The Policy

Note further states that *“During the passage through Parliament of the 2022 Regulations earlier this year, MSPs and Ministers alike stated that the effective enforcement of this ban was key to its success. To ensure that we meet this aim of effective enforcement, this instrument uses the ancillary power in section 35 of the 2016 Act to amend schedule 1 of the 2005 Act, to provide that EHOs can issue fixed penalty notices in respect of all three of the new offences.”*

1. In the context that provision enabling FPNs to be issued by authorised Council officers in respect of certain offences appears to be a significant use of the ancillary power, please explain why it is considered that these regulations fall within the scope of that power. In particular:
 - a. Given that no powers were provided in the 2016 Act to enable authorised council officers to issue FPNs in respect of the offences in sections 4B and 4C(5) of the 2005 Act (as amended by the 2016 Act), please demonstrate with reference to evidence from the passage of the Bill for the 2016 Act that it was intended that authorised council officers should have this power.
 - b. Please explain whether and why the provision made by these regulations is considered to be necessary or expedient.
 - c. Given the reference to the 2022 Regulations in the Policy Note, which is made under specified provisions of the 2005 Act (inserted by the 2016 Act), please explain whether and why the provision made by the instrument is for the purposes of, or in connection with, any provisions made either (i) by, or (ii) under, the 2016 Act.

On 14 June 2022, the Scottish Government responded:

1. These Regulations (extending the powers to issue fixed penalty notices to local authority officers in respect of offences committed under sections 4B and 4C of the 2005 Act) fall within the scope of the ancillary power on the basis that the extension of such powers is required in order to ensure effective enforcement of the offences under sections 4B and 4C(5) of the 2005 Act, as introduced by the amendments made by section 20 of the 2016 Act. It is the Government’s view that the amendments made by these Regulations are therefore expedient for the purposes of, or in connection with, section 20 of the 2016 Act in order to give full effect to those provisions.

The success of the provisions relating to the prohibition of smoking around hospital buildings under the 2005 Act (as amended by the 2016 Act) will be contingent on effective enforcement of the policy when it first comes into force. As set out in the Policy Note, it is anticipated that, like the indoor smoking ban, the prohibition will become self-governing to a certain extent as the public becomes used to the fact that smoking is simply not permitted near hospital buildings. Environmental Health

Officers (EHOs) led on enforcement of the indoor smoking ban and, with the power to issue fixed penalty notices, there have only been a handful of prosecutions under that legislation.

Whilst Police Scotland has the power to issue FPNs in respect of all three offences relating to the new prohibition on smoking outside of hospital buildings, they have indicated that it would be operationally difficult for them to be solely responsible for enforcement (whether through the use of FPNs or referral to COPFS).

We therefore consider that the ability of EHOs to issue FPNs in respect of the new offences, and consequently the use of the power in section 35 of the 2016 Act, is expedient for the purposes of and in connection with the provision made by section 20 of the 2016 Act. Those purposes include the robust enforcement of the new offences, or at least the ability to robustly enforce them, to ensure its operational delivery. It is apparent that there is a real risk that the absence of such powers vesting in EHOs could mean operational difficulties with enforcement. That would have significant consequences for the effectiveness of the legislation. These Regulations supplement provision already made by the 2016 Act, to ensure that the new offences in relation to smoking outside of hospital buildings can be effectively enforced and is therefore successful in achieving its aims.

In response to the further specific questions:–

(a) As referenced in the Policy Note, it was agreed during the Bill's passage in Parliament that the effective enforcement of this ban was key to its success. It is submitted that it was also envisaged that local authority enforcement would be generally applicable. We refer the Committee to the Stage 1 report ⁽¹⁾ for the Bill for the 2016 Act, specifically to the section on enforcement (paragraphs 121 to 131). The Committee will see that reference is made to enforcement by local authorities and EHOs. In particular, at paragraph 128, reference is made to enforcement of the offence under section 4B: *“the local authority's role is to provide an enforcement mechanism for those who persistently smoke within the legally enforceable no-smoking areas in hospital grounds.”* Unfortunately, the Bill did not fully reflect that EHOs could issue FPNs. In order to enable FPNs to be issued for the purposes of such enforcement the amendments made by these supplementary Regulations are therefore considered expedient. This oversight was identified only after the 2022 Regulations were made and is the reason that the supplementary Regulations have been laid at this time.

(b) We refer the Committee to the comments above. These Regulations are expedient for the purposes of, or in connection with, provision made by section 20 of the 2016 Act.

(c) Section 20 of the 2016 Act makes provision about new offences and requirements, and the enforcement of these, in relation to the prohibition of smoking around hospital buildings. These Regulations make supplementary provision in relation to the enforcement of the new offences which is considered to be expedient for the purposes of, or in connection with, the amendments made by section 20 of the 2016 Act. (Although the Prohibition of Smoking Outside Hospital Buildings (Scotland) Regulations 2022 establish no-smoking areas outside of hospital buildings, the provision made by the supplementary Regulations is not contingent on the 2022 Regulations or any other provision made under the 2005 Act.)

⁽¹⁾ [HSS042015R14.pdf \(parliament.scot\)](#)