

National response to passive smoking in enclosed public places and workplaces

Smoke-free Public Places Legislation: Examples of Core Provisions

National Public Health Partnership

Legislation Reform Working Group

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National response to passive smoking:
Example Core Provisions

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General approach and key issues

The proposed legislative framework highlights key areas for consideration in a legislative approach to environmental tobacco smoke (ETS) in enclosed and confined public places. Workplaces which are open to or accessible by non-employees are also covered by this approach.

This legislative framework is intended to reflect the 'Guiding principles for smoke-free public places and workplaces legislation' which have also been developed as part of the national response to the passive smoking issue. These principles and provisions are provided as a guide to decision-makers and others wishing to develop new or review existing legislative approaches to passive smoking.

Key issues addressed in the examples of core legislative provisions include:

1. Public places and workplaces

The emphasis of the legislative framework described here is on establishing systematic ETS protection for customers, patrons and other users of enclosed public places. Because some public places are also workplaces, smoking restrictions in these premises will result in employees' ETS exposure also being reduced or eliminated. ETS protection provided to employees in non-public workplaces may be subject to arrangements developed pursuant to occupational health and safety legislation and guidelines.

2. Environmental tobacco smoke exposure in a variety of premises

Exposure to environmental tobacco smoke (ETS) may occur in a variety of settings. Therefore, a comprehensive public health perspective is best reflected in legislation which incorporates a broad approach rather than one which relates only to certain types of businesses or premises. Legislative requirements should be flexible enough to take account of the varying uses of different types of premises, while still being consistent with the legislation's overall aim or object.

3. Shared obligations of occupiers and individuals

The proposed legislative approach involves obligations on the part of both occupiers and individuals who smoke. This is consistent with other public health legislation and means that successful compliance depends on both groups meeting their responsibilities.

4. Minimum standards

A general provision prohibits smoking in premises except where it is specifically not prohibited. To the extent that legislation does not prohibit smoking in some indoor and confined environments, the requirements should be regarded as minimum standards. There should be no impediment to any area of a public place or workplace being designated as smoking-prohibited at any time beyond what may be required by the legislation (taking into account consultation frameworks for industrial relations and occupational health and safety matters).

Outline of core provisions

1. Object

The legislation should include a clear statement of overall purpose or object, which should be a realistic reflection of what can be achieved by the legislation. For example, unless the legislation requires arrangements which completely prevent people's exposure to ETS, an objective of 'eliminating people's exposure to ETS' is not achievable. The object should be one which is consistent with and is supported by each provision of the legislation.

There may be advantages in legislation which is free-standing. However, where legislation takes the form of amendments or regulations to existing legislation, clear statements of purpose should be included in the explanatory memorandum and the second reading speech.

Sample object:

'The object of this Act is to promote public health by reducing exposure to environmental tobacco smoke.'

2. Definitions

a. Words and phrases which may need to be defined in legislation

enclosed
licensed premises
restaurant
public area
public place
tobacco product
dining area
confined public place
environmental tobacco smoke
bar or lounge area
occupier
separately ventilated event

b. Specifying the premises to which the legislation applies

Some areas may be 'enclosed' at some times but not at other times. The legislation may also take a different approach towards limiting smoking in different types of premises (normally defined by the primary activity) and some areas may be used primarily for different things at different times. Some premises and parts of premises may be 'public' at some times but not at other times.

Therefore, the definitions should make clear whether the legislation applies to a public place:

- at any given time, or
- only at such times that it is used for a specified activity.

c. Confined areas

While legislation may refer to 'enclosed' public places, it may also include provisions which restrict or prohibit smoking in areas which are entirely or substantially outdoors but where people gather in a confined area, such as a spectator seating area of an outdoor sports or entertainment venue. Such an area may be identified as a place or part of a place where, during an event to which members of the public are invited or permitted to attend, persons sit or stand in immediate proximity to each other. Careful consideration should be given to the definition of 'confined public places' and the potential scope of this type of provision, for example by reference to the types of events and places contemplated.

Although people's ETS exposure in venues which are substantially or entirely unenclosed will normally be less than in enclosed spaces, tobacco smoke exposure in these circumstances can produce symptoms of ill health and can be a particular concern for vulnerable individuals such as young children, pregnant women and people who suffer from allergies and pre-existing respiratory or cardiovascular conditions.

d. Other outdoor areas

It is recommended that building managers discourage smoking from around entrances and exits and pay due regard to people's need to pass through certain areas in order to enter or leave the building. Building managers may also be responsible for taking steps to prohibit smoking in outdoor areas in response to 'smokefree grounds' policies introduced by businesses and organisations. Such policies and requirements may already be supported by existing legislation.

Note that, in the proposed legislative model, occupiers – which may include building managers – are responsible for taking reasonable steps to ensure that tobacco smoke from outdoor areas does not enter nonsmoking areas of the building (see section 6).

3. Not smoking in an enclosed public place

a. General provision

To give effect to the objective of establishing nonsmoking as normal practice, legislation will contain a general provision which prohibits smoking except where it is specifically not prohibited. In other words, nonsmoking becomes ‘the norm’ and smoking is limited to specified areas or circumstances, which will generally be those for which nonsmokers’ exposure to tobacco smoke is eliminated or significantly minimised.

Sample general provision

‘Smoking is prohibited in a public place [an enclosed or confined public place].’

b. Exceeding minimum requirements

For places where smoking is not prohibited at given times or in given circumstances, the smoking restrictions mandated in the legislation should be regarded as a minimum, not a maximum. Nothing in the legislation should be taken to prevent the adoption and enforcement of nonsmoking areas which go beyond the prescribed restrictions contained in the legislation.

The legislation may therefore include provisions which protect and clarify the right of occupiers to designate nonsmoking areas and which ensure that other relevant provisions of the legislation, such as those pertaining to signage and offences by occupiers and individuals should apply equally to any such areas.¹

However, consideration will need to be given to whether the legislative provisions can be applied to ‘extended’ nonsmoking areas in the same manner as the ‘mandated’ areas, so as not to misrepresent their basis or effect.²

1 Although nonsmoking areas which exceed the law’s requirements need not strictly be permanently designated, practical considerations (such as those relating to signage, customer awareness and the need to take reasonable steps to prevent smoke from penetrating nonsmoking areas) are likely to mean that it will be in an occupier’s interest to establish any additional nonsmoking areas on a clear and consistent basis.

2 It is recommended that, where smoking is not completely prohibited, non-smoking areas which exceed the legislated minimum requirement are also regarded as non-smoking areas with the full support of the law.

4. Signage to discourage smoking in smoking-prohibited areas

a. Display of signs required

Letting people know where smoking is and is not restricted or prohibited is a key element in encouraging compliance. Legislation should therefore provide for the *clear, conspicuous and sufficient* display of no-smoking signs which are visible at public entrances to a place and within a place where smoking is prohibited or restricted (whether the restriction or prohibition arises from legislative requirement or from occupier discretion).

An occupier of a place where smoking is restricted or prohibited should be responsible for displaying the prescribed signs in the prescribed manner. (A provision creating an offence for removing, defacing or obscuring such signs may not be necessary if occupiers are responsible for ensuring that the required signs are displayed.)

However, in relation to ‘extended’ nonsmoking areas designated by the occupier, care should be taken to ensure that signage does not misrepresent the legal basis or consequences of the prohibition or restriction in those ‘extended’ areas.³

b. Prescribed signs and manner of display

A prescribed sign is a sign that contains words or symbols that indicate clearly that smoking is not permitted in that place. The signs should be displayed in such numbers and in positions of such prominence that a sign is likely to be seen by a person at a public entrance to, and by a person within, the place. These signs may be supplemented by smaller signs on tables, service counters, etc. Signs need not be permanently fixed if smoking and nonsmoking arrangements vary from time to time within the premises.

The intention is that a requirement for signs to be *clearly, conspicuously and sufficiently* displayed will avoid the need to prescribe the details of signage characteristics and locations. However, the legislation may include guidance on key issues such as examples of permissible words and symbols.

3 Caution is required to avoid ‘false or misleading’ signage design and display in relation to ‘extended’ areas – see footnotes 2 and 5.

Sample signage description

A prescribed sign is a sign that contains (a) the phrase 'no smoking,' 'smoking prohibited' or 'smoke-free zone' in letters that are at least 20mm in height; (b) the international smoking-prohibited symbol with a diameter of at least 70mm; or (c) other words or symbols that indicate clearly that smoking is prohibited; and (d) indicates clearly where smoking is prohibited.

c. Where signs may not be required

No-smoking signs need not be required in places where people could reasonably be expected to know, by custom or long-standing practice, that smoking is not permitted in the place, and smoking does not usually occur in the place. Examples may include doctors' surgeries and churches and similar premises. If smoking does occur within these premises (ie, those which are considered by the proprietor to fall into the 'signage not required' category), then this should be taken as an indication that the premises do not, in fact, fall into this category.

d. Designation of smoking permitted

Legislation may or may not require the display of 'smoking permitted' or 'smoking area' signs ('no smoking' signs are normally sufficient to designate separate areas), but occupiers should not be prevented from displaying signs which indicate areas in which smoking is not prohibited.⁴

5. Offences for smoking where smoking is prohibited

a. Occupiers

It is important to establish the clear responsibilities of occupiers where smoking is restricted or prohibited within their premises. The legislation should provide that an occupier is guilty of an offence if someone smokes in a nonsmoking area (subject to the defences below).

Because an occupier may designate nonsmoking areas which exceed the law's minimum requirements, anomalies and impracticalities would arise if 'extended' nonsmoking areas were treated differently than 'mandated' nonsmoking areas. To ensure consistency and to minimise the risk of confusion, no distinction should be made between legislated and additional nonsmoking areas in terms of an occupier's (or an individual's) obligations.⁵

The legislation may provide that an occupier charged with such an offence may cite certain defences, generally those which show that s/he did nothing to encourage smoking in a smoking-prohibited areas. Examples of such defences are that:

- (a) the occupier did not provide an ashtray, matches, lighter or any other item designed to facilitate smoking in that area;
- (b) the occupier asked the person to stop smoking and informed the person that he/she was committing an offence; or
- (c) the occupier could not have reasonably have been expected to be aware that smoking was occurring in that area.

b. Individuals

The legislation should specify that it is an offence for a person to smoke in an enclosed public place if smoking in that place is prohibited.⁶ There would normally be no defences available to individuals in relation to this provision.

An individual who smokes in a nonsmoking area (whether or not such an area is nonsmoking as a result of the legislation or as a result of action by the occupier⁷) should be required to comply with a direction by an enforcement officer or by the occupier or the occupier's employee or agent. It should be an offence to hinder or obstruct an enforcement officer in the performance of his/her duties.

⁴ As 'smoking permitted' may be taken to imply approval or endorsement of smoking occurring, phrases such as 'areas in which smoking is not prohibited by this legislation' are preferred in legislation. For this reason, government agencies may wish to seek advice concerning the issuing of 'smoking permitted' signs.

⁵ However, consideration will need to be given to whether the legislative provisions can be applied to 'extended' nonsmoking areas in the same manner as the 'mandated' areas, so as not to misrepresent their basis or effect – see footnote 2.

⁶ While inadvertent offences by individuals may occur, these are normally dealt with by occupiers; in practice, consistent violations by individuals are uncommon where occupiers' obligations are met.

⁷ See footnotes 2 and 5.

6. Preventing tobacco smoke from entering smoking-prohibited areas

Where smoking is not prohibited, an occupier must take all reasonable steps⁸ to prevent tobacco smoke from penetrating:⁹

- a part of the premises where smoking is prohibited and
- other premises where smoking is prohibited

This requirement may be addressed in one of two ways:

- (1) by making it an offence to fail to take all reasonable steps to prevent tobacco smoke from penetrating smoking-prohibited areas or premises; or
- (2) by providing that, unless all reasonable steps are taken to prevent tobacco smoke from penetrating smoking-prohibited areas or premises, smoking must be prohibited in that place.

Option (1) would be enforceable by taking legal action through the courts and may result in the imposition of a fine but would not necessarily result in the situation being remedied.

Option (2) would be a matter for administrative decision, with the right of review and appeal through an appropriate body. Rather than the occupier being subject to prosecution and a fine, this option would focus on the need to ensure that tobacco smoke penetration did not occur. It should be noted, however, that this option may also (ultimately) involve court action, and that administrative review and appeals processes may require legislative authority.

Consequences of failure to prevent tobacco smoke penetration into smoking-prohibited areas

There may be some premises where, even after all reasonable steps are taken, tobacco smoke still penetrates smoking-prohibited areas. It may be considered appropriate, therefore, to include a legislative provision which requires that smoking be prohibited if, despite the taking of 'all reasonable steps', tobacco smoke still penetrates smoking-prohibited areas.

Example of Option 1: If smoking restrictions are introduced in stages, and smoking is prohibited in dining areas before it is prohibited in adjacent bar areas, then

⁸ Jurisdictions may wish to consider how 'reasonableness' should be determined by administrative decision-makers, noting that the question of 'reasonableness' is ultimately a matter for a Court to decide.

⁹ These considerations include circumstances in which tobacco smoke may enter smoking-prohibited areas from places which are not subject to the legislative requirements, such as areas within and adjacent to the premises.

occupiers must take all reasonable steps to prevent smoke from bar areas from penetrating dining areas. If such steps are not taken, then the occupier may be prosecuted.

Example of Option 2: If smoking restrictions are introduced in stages, and smoking is prohibited in dining areas before it is prohibited in adjacent bar areas, then smoking could continue in the adjacent bar areas only if all reasonable steps were taken to prevent smoke from penetrating the dining areas.

Example of Option 2, with additional 'no smoke' provision: As described above, with the additional provision that if the taking of all reasonable steps is not sufficient to prevent smoke penetration, then smoking should be prohibited in the bar areas.

A provision which states that all reasonable steps must be taken to prevent smoke penetration also serves to avoid the necessity of specifying detailed characteristics and configurations of smoking and nonsmoking areas. For example, such a provision would mean that it may not be necessary to state that in one-room premises a smoking area should be limited to a single, contiguous area, since other arrangements would be unlikely to be considered 'reasonable'.

7. Phasing-in

a. Timing and degrees of smoking restrictions

Provisions to prohibit or restrict smoking may be 'phased in'. Types of 'phasing in' include:

- commencing the smoking restrictions or prohibitions at different times for different types of premises, and/or
- incrementally increasing, over a specified time period, the size of the area to which smoking restrictions apply within given types of premises.

Approaches which involve phased restrictions can maximise the likelihood of achieving high levels of compliance by utilising community support and changes in social norms.

b. Timetable

A phased approach should set out a clear timetable for action and should include a clear statement of the steps to be taken within this timetable by various types of premises.

c. Priority premises

Legislation should normally provide for smoking to be prohibited in a range of public places within a reasonable time (2 months from the date of gazettal may be appropriate for most premises). These would include places which constitute mainstream settings for community life,

as well as places which are open to or are normally accessed by children. Because many of these places may be partially or entirely smoke-free by virtue of the organisation's own policy or because of long-standing custom, the introduction of a legislative framework for these arrangements is generally consistent with community expectations and norms. Examples of priority premises include:

- shopping centres, malls and plazas
- professional, trade, commercial and other business premises offering goods or services to the public
- educational facilities
- community centres, halls and other places of public assembly
- theatres, cinemas, libraries and galleries
- buses, taxis and other public transport vehicles
- sporting and recreational facilities
- social and special interest club premises

d. Entertainment and dining areas

Areas which are used primarily as entertainment venues and as dining areas should be among those places in which smoking is prohibited at an early stage.¹⁰

Licensed premises

Requirements restricting smoking in licensed premises may take longer to implement than those applying to other types of premises. Where less restrictive requirements are felt to be appropriate for licensed premises then these should apply only to the public areas of licensed premises used primarily for gaming or the consumption of alcohol.

Licensed premises which are used primarily for activities such as dining, sport, recreation, education, entertainment or other purposes should be treated no differently than are unlicensed premises used for these purposes.

A phased approach for licensed premises may include:

- as a first phase, prohibiting smoking in public areas such as reception areas, waiting areas, lobbies, stairways and corridors and in employee service areas;
- as a second phase, restricting smoking to designated areas in those parts of the premises which are used primarily for gaming or for the consumption of alcohol; and
- as a final phase, prohibiting smoking in gaming and alcohol areas (and see Section 8b).

¹⁰ While consideration may be given to allowing designated smoking and nonsmoking arrangements as an interim arrangement for dining areas, experience indicates that such arrangements may not be necessary and are likely to result in increased administrative difficulties and customer confusion and dissatisfaction.

Such an approach may also incorporate requirements to prohibit smoking within a certain distance of a place where an employee is engaged to work.

8. Exclusions and exemptions¹¹

a. Exclusions (or 'automatic exemptions')

The legislation may specify that certain types or categories of places may be excluded from the premises to which the no-smoking requirements apply. The easiest way for exclusions to apply is for occupiers to designate their premises as falling with a defined category which is excluded from specified legislative provisions. Exclusions may be in effect permanently, until a specified date, or at certain times or in certain circumstances.

Examples may include:

- a stage or performance area during a performance,
- a lounge or similar area of multiple-unit residential premises (which are not licensed premises, if there are separate provisions for licensed premises), if a similar area of a comparable standard in which smoking is not permitted is provided; and
- during phasing-in periods, premises which are able to designate themselves as falling within a specified category of premises to which certain provisions may not yet apply.

b. Exemptions

The legislation may also specify that there are places to which the no-smoking requirement may not apply, subject to certain conditions being met ('exemptions').

The costs of administering, monitoring and enforcing an exemption system should be met by fees paid by applicants and by annual fees paid by exempt premises.

As the granting of exemptions to premises which meet certain requirements or standards has the effect of significantly altering what would otherwise be a 'level playing field', the implications of such exemption provisions should be carefully considered. Exemption criteria which seek to reduce ETS exposure (such as through the use of separately enclosed areas and/or ventilation and air conditioning systems) are likely to involve significant financial costs and/or the need for physical alterations to the premises which may not be possible for some businesses.

¹¹ Generally speaking, the public areas of prisons, remand centres, psychiatric facilities, nursing homes, etc. should be treated no differently than the public areas of other multi-unit residential facilities. Occupational health and safety issues concerning smoking in non-public areas are likely to necessitate a plan which identifies steps to be taken to eliminate or minimise worker exposure to ETS.

There may also be implications for national competition policy.

If legislation is to incorporate exemption arrangements, it should do so with the understanding that there is no agreed national or international standard for a level of ETS exposure below which detrimental effects to health do not occur. Short-term ETS exposure may have a detrimental impact on the health of people with pre-existing ailments or conditions, and various detrimental health effects have been associated with repeated exposures over time, as well as with long-term exposure.

If exemptions are to be considered, they should be limited to those premises in which social or cultural norms present serious obstacles to the introduction of a nonsmoking environment. This would generally relate to areas of licensed premises used primarily for gaming and for the consumption of alcohol. The principle of 'nonsmoking as the norm' will mean that any area in which smoking is not prohibited will be smaller than the smoking-prohibited area. In relation to exempt premises, the legislation should specify the minimum proportion of the public area in which smoking is prohibited.

Consideration should be given to including legislative provisions which allow for the imposition, through administrative arrangements, of a suspension or revocation of an exemption as a result of breaches of exemption conditions. (Occupiers of exempt premises who breach other provisions of the legislation would be liable for prosecution in the same way as would other non-compliant occupiers.)

Exemption conditions should be consistent with the objective of reducing exposure to ETS. Criteria based on compliance with engineering or design standards may attract high costs while delivering insufficient health protection. The following criteria are recommended where exemptions are contemplated:

Smoking should be limited to areas which:

- are separately enclosed from nonsmoking areas;
- have a separate ventilation system from nonsmoking areas;
- have negative air pressure so that tobacco smoke does not flow out of the area;
- do not exceed more than a specified proportion of the total public area used for that activity, and
- no employees are required to perform work-related activities in those areas.

Exemptions and exemption conditions may be transitional rather than permanent, with a phase-out date specified in legislation or with provisions subject to a 'sunset' clause which requires them to be reviewed by a specified date. In any case, exclusions and exemptions should be reviewed regularly so that changing social norms and expectations may be taken into account in decisions to introduce further nonsmoking provision.

c. Appeals

Where exemption applications can be denied and/or where exemptions can be suspended or revoked by administrative arrangements, the legislation should, where practicable, provide for the review and appeal of such decisions by an administrative review body.¹²

9. Enforcement

Enforcement responsibilities should be clearly addressed in the legislation. Provision should be made for the appointment of persons to be inspectors or authorised officers, with powers similar to those held by public health officers.

In practice, the approach taken to enforcing the legislation should be consistent with the approach used for achieving compliance with other public health laws. This means that, while the law should provide for legal action to be taken in respect of an alleged breach, enforcement protocols should be designed and applied in such a way as to provide opportunities to emphasise compliance rather than punitive action. Official enforcement measures should normally be taken only after attempts to achieve compliance through other means have failed.

As compliance by occupiers has been found to increase the likelihood of compliance by individuals, an enforcement system which places an emphasis on dealing effectively with non-compliance by occupiers is recommended.

Although legislation should include enforcement provisions, it is not necessarily the case that a program of proactive enforcement will be required for all types of premises; compliance monitoring, the provision of information and assistance, and responding to complaints may be sufficient in premises where compliance is supported by clear signage, community norms, and customer and staff awareness.

¹² In considering the nature and extent of appeal rights under the legislative provisions, jurisdictions will need to consider the types of decisions which will be appellable, and the practicability of providing review processes in relation to such decisions.

The two main approaches to enforcement are those based on prosecutions and those based on the issuing of infringement notices or 'on the spot fines'. An infringement notice or 'on the spot fine' system may:

- provide an immediate deterrent to the continuation of the conduct (although this would depend on the severity of the penalty and possibly the presence of additional sanctions, such as adverse publicity),
- avoid placing demands on the resources of the Director of Public Prosecutions, and
- avoid the difficulties of proving offences in a court of law.

Infringement notices may be a useful way of addressing breaches of signage provisions but may be considered inappropriate and confrontational for other offences by individuals and occupiers. Jurisdictions may therefore wish to consider, either alone or in combination with administrative sanctions, a prosecution-based enforcement system which may:

- avoid problems of inconsistency arising from different standards and styles being applied by different local authorities and is therefore more likely to result in a consistent approach throughout a State,¹³
- place a greater emphasis on achieving compliance with public health goals rather than on what may be perceived as a punitive approach or one concerned with revenue-raising or with 'catching people out', especially where there may be a perception of resources being directed to this rather than to other more 'important' alcohol and drug issues,
- avoid the spectre of the 'smoke police' issuing fines for smoking,
- avoid the reluctance of some jurisdictions to adopt an on-the-spot fine system for offences for which defences may apply,
- avoid placing health officers in direct confrontation with individuals and proprietors,
- avoid the risk of 'trivialising' the issue by placing noncompliance with smoking requirements in the same category as parking fines,
- be used only after all other measures (information/ advice, warning letter, etc.) have failed, and
- convey the message that compliance with public health legislation is a serious matter for both individuals and occupiers.

10. Binding the Crown

A provision which 'binds the Crown' ensures that the legislation applies to Government-owned buildings which may be used for purposes which fall within those covered by the legislation. Other issues in relation to binding the Crown should be fully explored.

¹³ While some jurisdictions may wish to stipulate that no prosecution proceed without approval from the health department, this may constitute a significant constraint on other parties who may wish to initiate legal action in relation to alleged contraventions of the legislation.