



Chartered
Institute of
Environmental
Health

Merchant Shipping (Prohibition of Smoking on Ships) Regulations

Department for Transport consultation on draft
regulations

Response submitted on behalf of the Chartered Institute
of Environmental Health and the Association of Port
Health Authorities

9th October 2009

The Chartered Institute of Environmental Health

As a **professional body**, we set standards and accredit courses and qualifications for the education of our professional members and other environmental health practitioners.

As a **knowledge centre**, we provide information, evidence and policy advice to local and national government, environmental and public health practitioners, industry and other stakeholders. We publish books and magazines, run educational events and commission research.

As an **awarding body**, we provide qualifications, events, and trainer and candidate support materials on topics relevant to health, wellbeing and safety to develop workplace skills and best practice in volunteers, employees, business managers and business owners.

As a **campaigning organisation**, we work to push environmental health further up the public agenda and to promote improvements in environmental and public health policy.

We are a **registered charity** with over 10,500 members across England, Wales and Northern Ireland.

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The Association of Port Health Authorities

The Association of Port Health Authorities is the only UK wide organisation representing the interests of Local Authorities and Port Health Authorities with responsibilities for health controls at sea and airports.

Port health authorities are constituted with the primary objective of preventing the introduction into the country of dangerous epidemic, contagious and infectious diseases and ensuring the wholesomeness of imported food.

The Association also plays an important role in protecting public health through liaison with government departments and agencies, local authorities and internationally through the EU, the World Health Organisation and trade bodies. It contributes significantly to national and international policy development and keeps its members up to date with changes in legislation and guidance.

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Introduction

The Chartered Institute of Environmental Health (CIEH) welcomes this opportunity to respond to the Department for Transport consultation on the proposed restriction of smoking on sea-going and inland waterway vessels and the Association of Port Health Authorities (APHA) joins with us in making this response to the consultation.

We have constructed our response in three parts:

Part 1 is concerned with our policy on smoking in workplaces and public places and our experience of developing and supporting compliance with smokefree legislation.

Part 2 contains details of general points which we feel it necessary to make as these are concerned with fundamental issues that, in our opinion, will determine the extent to which this proposed legislation can be successfully introduced and acceptable levels of compliance secured and maintained.

Part 3 contains our specific comments on the proposed individual regulations.

The appendix contains an example of an individual representation on the issue of enforcement authorities

We fully appreciate that the effect of these regulations, if enacted, will be to confine smoking on board ships to open decks and designated cabins, subject to specific requirements. This represents a major improvement and will contribute to international recognition of the UK as having comprehensive smokefree legislation which is seen as setting a standard for other countries.

We also recognise that many ships have already adopted and implemented their own measures for minimising both the fire hazards presented by smoking on ships and the exposure of employees and passengers to secondhand smoke.

However, we have based our submission on our expert knowledge and experience in developing and delivering compliance with smokefree legislation and we need to state at the outset that it is our belief that the weaknesses we have detailed in the text that follows, if not remedied, will give rise to serious and extensive breaches of compliance with the proposed regulations and make effective enforcement extremely difficult, if not impossible.

Part 1

CIEH policy on smoking in workplaces and public places

1.1 Background

- 1.1.1 The Government's stated objective in proposing its smokefree legislation has been to:
- Reduce the risk to health from exposure to secondhand smoke
 - Recognise a person's right to be protected from harm and to enjoy smokefree air
 - Increase the benefits of smokefree enclosed public places and workplaces for people trying to give up smoking, so that they can succeed in an environment where social pressures to smoke are reduced
 - Save thousands of lives over the next decade by reducing overall smoking rates
- 1.1.2 One of the specific areas of questioning in the original government consultation *Choosing Health? A consultation on action to improve people's health* was the issue that: "One person's choice may spoil the chances of good health for others." This is a basic principle of the public health legislation that environmental health practitioners address. The Government has accepted that the case has been made that secondhand smoke damages the health of workers. It therefore follows that the proposed protective measures should be extended to **all** workers. To expect environmental health practitioners and other public health practitioners to do anything less would be against the principles of professional practice and could be said to be unethical.
- 1.1.3 The need to address inequalities in health has been a prominent feature of many of the important government measures to improve public health. To that end, health improvement initiatives usually include the need to identify vulnerable groups and those who are in the greatest need and, if necessary, to implement special measures in order to meet those needs. In relation to these proposals, we are concerned that the needs of vulnerable groups and individuals should be properly addressed: people working or travelling on ships who have asthma and respiratory illness and women who are pregnant, or are planning pregnancy, will rightly expect protection under the law equal to that of the hospitality, office and factory worker.
- 1.1.4 "*Amicus humani generis*" is the motto of CIEH which translates as "Friend of the Human Race" and our members support the entitlement of all people to equality of health protection. In relation to the smokefree legislation, a serious ethical issue has been previously raised by our members as to whether it would be professionally acceptable to participate in the enforcement of a law which unjustifiably failed to protect vulnerable people and could be open to subsequent challenges under Human Rights Legislation.

1.2 Position of CIEH

- 1.2.1 We observe that the scientific evidence that secondhand tobacco smoke damages the health of third parties is incontrovertible. In recent years this has been confirmed by the Government's Chief Medical Officer for England, Sir Liam Donaldson, (July 2003) as well as by the heads of all Britain's thirteen Royal Colleges of Medicine (November 2003).

1.2.2 For more than twenty years we have been reflecting our members' concerns about the issue of 'passive smoking'. We acknowledge the rights of employees not to have to work in smoky environments and we support the adoption of smokefree workplaces and public places.

1.2.3 To that end the General Council of CIEH adopted the following policy in 1999:

The Chartered Institute of Environmental Health believes that:

- *there is a significant risk to health from exposure to secondhand tobacco smoke*
- *unless by their own choice, no-one should be exposed to secondhand tobacco smoke*
- *all places where people work should be free from secondhand tobacco smoke, and*
- *ventilation is not a suitable alternative to a no-smoking policy.*

1.2.4 Whilst we recognise that action based on co-operation and consensus is always preferable, on the issue of smoking in enclosed workplaces and public places, CIEH believes that only a complete prohibition will result in the level of health protection required. CIEH has therefore been supporting its members working to ensure high levels of workplace health and safety using existing risk reduction strategies, but we have also been pressing for improvements to the national prohibition on smoking in all enclosed workplaces and public places.

Part 2

General concerns

2.1. Enforcement agencies

2.1.1 The Association of Port Health Authorities and the CIEH consider that the enforcement responsibility for the smokefree provisions should be shared between the MCA and port health/local authorities.

2.1.2 APHA and the CIEH have both received numerous representations on this issue. In the Appendix we have provided the content of one such representation which fully reflects the strength of feeling on this matter. It is significant we believe that our members see their role as more than simply securing compliance with smokefree legislation, but extending to their public health role in supporting the Government's high profile policies in informing people about the dangers of smoking and supporting measures to reduce prevalence.

2.1.3 MCA and port health authorities/local authorities share a long history of close collaboration and both have strong backgrounds in enforcement of legislation in relation to sea-going vessels and those on inland waters. The port health authorities also have existing responsibilities for the smokefree legislation (and other important public health legislation) within shore-based premises within port areas.

2.1.4 The officers of the port health authorities/local authorities have already received training in preparing for the introduction of the smokefree requirements of the Health Act and also for the practical measures to secure compliance with the requirements that came into force on 1 July 2007 in England, including the enforcement measures. This training was developed and delivered by the CIEH and was fully funded by the Department of Health. It reflected the Government's intention to create an environment where people are encouraged to comply with the legislation and where owners of businesses will take the appropriate steps to ensure the smokefree provisions are complied with. The aims of the training were as follows:

- To equip local authority officers who have regulatory responsibilities for the smokefree legislation with the necessary knowledge and skills and
- To develop competencies to secure maximum and consistent compliance with the legislation through effective and efficient actions

2.1.5 The training was constructed around the guidance issued by LACoRS (LACoRS Guidance: Implementation of smokefree legislation in England, 2007). That document set out the following recommended approach to enforcement:

'Initially an educational, advisory and non-confrontational approach should be taken, both before and for a period of time after the legislation comes into force. Where non-compliance is due to misunderstandings or a lack of diligence, then further information, advice and guidance can be provided. However, where it is evident that serious efforts are not being made to comply, or the attitude is un-cooperative or antagonistic, then a decision to take enforcement measures should be considered.'

- 2.1.6 This approach was entirely in accordance with the Government's intention that enforcement authorities should raise awareness through education, support and advice on the smokefree provisions, the need to comply with them and that enforcement action should be considered only when the seriousness of the situation actually warrants it.
- 2.1.7 It would therefore be both inconsistent and wasteful of public resources to prevent the Port Health Authority officers being authorised to give advice and take action where necessary to secure compliance with the intended legislation.
- 2.1.8 We recommend that the Port Health Authorities should be identified as an additional enforcement authority. As an alternative, the MCA should be required to authorize Port Health Authority officers. (Note: this would be consistent with the powers contained in the Health Act 2006, section 10(5)).

2.2 Need for adoption of risk-based approach

- 2.2.1 The proposed regulations contain requirements which are framed so as to apply to the entire range of ships from small pleasure craft, through to large cruise ships with hundreds of passengers and crew, to freight carriers with limited crew accommodation and those carrying hazardous cargo.
- 2.2.2 In our opinion this approach is inappropriate in that it cannot adequately cater for the variety of situations in which secondhand smoke creates a hazard to health.
- 2.2.3 For example, it is perfectly acceptable that the master should be able to designate all or any part of the deck which is not enclosed or substantially enclosed. However, this general provision will also allow the master to designate all such deck areas on any ship. The designation of all deck areas might be appropriate on a small freight carrier or working ship where the deck area is small and internal accommodation is limited. However, on larger ships and particularly passenger carrying ships, where the deck areas comprise part of the amenity space of the ship, then it would be inappropriate and against the spirit of the legislation. It can also be maintained that smoking on decks should not be allowed on ships limited to making short fixed passages such as ferries, where employees are likely to be in close proximity to each other and passengers for the duration of the journey e.g. standing or seated on deck areas.
- 2.2.4 A similar difficulty arises in relation to the designation of the single enclosed cabin for employees to smoke in. The proposed regulations state that this can be any cabin other than a cabin which is set apart exclusively for sleeping accommodation. This clearly implies that it can be a cabin which is used for sleeping accommodation. It is our view that this is the worst place to permit smoking and should only be allowed as a last resort for example when there is only one cabin available for such use. Long after the visible smoke has dispersed, the chemical products of smoking will persist within the fabric of the cabin. Ideally people should vacate and ventilate the designated smoking cabin when not actually using it and this is not even a possibility if the cabin is used for sleeping. For similar reasons we also do not accept that a mess or common recreation or rest area is suitable to be designated for smoking since, in addition to the associated health risks, its designation would deny the use of such a facility to those persons who choose or need to avoid exposure to secondhand smoke, although in reality they might well have no ability to exercise such choice. We

also do not understand why the master is limited to designating a single cabin, even when additional suitable accommodation may be available.

- 2.2.5 In our opinion, there needs to be an ability to apply the requirements of the regulations differentially between ships of different type and construction and this should be carried out on a risk assessment basis. If it is not possible or desirable to incorporate the risk assessment criteria within the legislation then it could be contained in guidance.
- 2.2.6 We need to emphasise that, as they stand, these regulations do not ensure that the best available means will be required in all situations to minimise the exposure of employees on ships to the harmful effects of secondhand smoke. It will be open to the master to make the easiest and least costly choice in deciding which cabin to designate and this may not be the most appropriate decision for protecting health.
- 2.2.7 It is an established principle of smokefree legislation that all persons should be afforded the same highest achievable level of protection against exposure to secondhand smoke unless a different level of exposure is unavoidable and justifiable. In the case of the proposed legislation we do not believe that this will be the case. In our view this is a situation which cannot be justified and might not therefore withstand legal challenge against the requirements of the Human Rights legislation.

2.3 Signage of designated areas

- 2.3.1 We are especially concerned that there are no requirements for appropriate signage of "designated areas", meaning those areas designated by the master under proposed regulations 6(2) or 7(2). We wish to draw attention to The Smoke-free (Exemptions and Vehicles) Regulations 2007 where the requirement in Regulation 10 (2), in relation to a designated room, is for the room to be "clearly marked as a room in which smoking is permitted".
- 2.3.2 It is our view that the failure to require effective means of differentiating between the "designated areas" and the "smoke-free places" is a fundamental flaw and weakness in this legislation. For effective compliance with smokefree requirements, it is essential that employees and members of the public are readily able to identify where people can and cannot smoke – anything less will create confusion and opportunities for unintentional as well as deliberate non-compliance.
- 2.3.3 The logical principle must surely be that smoking is not permitted anywhere on any ship unless the area has been designated by the master as an area in which smoking is permitted, in which case it will be clearly identified as such in signage. The message to all employees and passengers is then a simple one – if you cannot see a sign permitting smoking then it will be against the law for anyone to do so.
- 2.3.4 To that end, we believe that the means by which an area is designated should be carefully defined and that this should require, in all cases, the following:
 - 2.3.4.1 Designation in writing by the master, and a requirement for the record of designation to be retained and made available for inspection upon request by an authorized officer,
 - 2.3.4.2 Standardized signage prominently displayed so as to clearly indicate:

- in the case of a cabin, that it is designated as an area in which smoking is permitted and by whom i.e. passengers or employees.
- in the case of a designated deck or an area of a deck, that the deck or the area of the deck is an area in which smoking is permitted and the signage should clearly indicate the limits of the designated deck or deck area.

2.3.5 It is the experience of our members who have considered and undertaken many enforcement procedures in relation to smokefree offences, that successful prosecutions are greatly facilitated by the presence of statutory signs which, in themselves, remove all doubt that a prohibition on smoking applies. That being the case, and with the benefit of our experience of the successful introduction on the smokefree legislation under the Health Act 2006 we strongly recommend the inclusion in these regulations of requirements for effective signage.

2.4 Inconsistency in application

Advice from the Department of Health has previously indicated that permanently moored vessels without means of propulsion fall under the requirements of the Health Act 2006 and enforcement responsibilities for those vessels already lie with the port health authority/local authority. These proposed regulations will conflict directly with the requirements made under the Health Act 2006 and create an unfair trading environment in that it will be possible for patrons of temporarily moored craft with means of propulsion to permit smoking in cabins, for example river cruise vessels.

Part 3

Specific comments on the proposed regulations

3.1 Regulation 1 - Citation and commencement

3.1.1 We support the introduction of these regulations at a fixed and predetermined time for all ships to which it will apply.

3.2 Regulation 2 - Interpretation

We have carefully considered the interpretations and definitions contained in this proposed regulations and we wish to make the following responses:

3.2.1 **“Employee”**

We support the definition of “employee” and its inclusion of volunteers.

3.2.2 **“Passenger”**

We support the definition of “passenger”. We understand that the inclusion within this definition of children under one year of age is an international agreement. However, we would point out that any guidance should point out that the accepted evidence demonstrates that children generally, and especially those under one year, can experience particularly harmful health effects from secondhand smoke.

3.2.3 **“Designated area”**

In relation to “designated area”, meaning an area designated by the master under regulation 6(2) or 7(2), we believe that the means by which an area is designated should be defined and that this should require, in all cases, the following:

- Designation in writing, and the record of designation to be retained for inspection
- Signage prominently displayed so as to clearly indicate the designated area, including the limits of the designated area where this forms part of an open deck.

(Please see our detailed advice contained as a General Concern in paragraph 2.3 above.)

3.2.4 **“Roof”**

In relation to the definition of “roof” we support the inclusion of any fixed or moveable structure or device which is capable of covering all or part of the area as a roof, including, for example, a canvas awning.

3.2.5 **“Smoke-free place”**

In relation to “smoke-free place”, meaning an area on a ship that has not been designated under regulation 6(2) or 7(2), we believe that this wording will create a perverse situation in that the assumption will be that smoking can take place anywhere on the vessel other than where it is expressly prohibited. This situation will arise as a direct result to the omission for “smoking areas” to be designated by signage. (Please see our detailed advice contained as a General Concern in paragraph 2.3 above.) It therefore follows that this potential difficulty can be eliminated if our recommendations for all “smoking areas” to be designated by signage are adopted.

3.2.6 **“Smoking” and “Smoke”**

We support the definition of smoking, which is substantially the same as that contained within the Health Act 2006. However, we believe that for the avoidance of any doubt there should be specific reference to the inclusion of water pipes.

3.2.7 **“Enclosed area”**

It is firstly stated, in Regulation 2(2)(a) that an area is enclosed if it –

- (i) has a deckhead or roof, and
- (ii) except for doors, windows and passageways, is wholly enclosed either permanently or temporarily,

We assume from this definition that any deck area which is positioned above any other deck area will necessarily constitute a roof over that lower deck area, including where it forms a projection over an otherwise open deck area and regardless of its height above such a lower deck area.

3.2.8 **“Substantially enclosed area”**

It is next stated, in Regulation 2(2)(b) that an area is substantially enclosed if it has a deckhead or roof but –

- (i) there is an opening in a bulkhead which is, or
- (ii) the aggregate area of the openings in one or more of its bulkheads is, less than half of the area of the bulkhead or bulkheads, including other structures that serve the purpose of a bulkhead and constitute the perimeter of the area.

Use of the term “bulkhead”

There is no definition of the term bulkhead but the common use of the term is a permanent structural feature of the vessel. If this is accepted to be the case then the term bulkhead is not an appropriate term to include temporary structures, such as temporary partitions and awnings, which also need to be taken into account in calculating whether an area is substantially enclosed

We note that temporary structures are specifically identified within the definition of roof which includes fixed and movable structures. It is therefore appropriate to take into account not only openings in bulkheads but also openings in any temporary structures whether fixed or permanent. If this is what is meant by ‘serve the purpose of a bulkhead’ then this should be clearly stated.

Location of the “perimeter of the area”

There is no indication of how the perimeter of the area will be determined. It appears to us to be obvious that the perimeter will lie vertically beneath the edges of the roof, however if there is any different interpretation being put on this term then this should be clearly stated.

We are unable to comprehend how the required calculations will be expected to be made in relation to the designation of a part of a deck area. For example, if an area of deck situated between bulkheads is to be designated then there is a need to determine how far away from the bulkheads the boundaries, or perimeter of the area, are to be set. Furthermore, it would not be acceptable, and within the spirit of the legislation, to designate such an area if it is not physically separated from the remainder of the deck, since it will clearly be ventilated directly along the length of the deck areas which are not included in the designated area. Nevertheless, these

areas will be polluted with secondhand smoke whenever the designated area is in use by smokers.

3.3 Regulation 3 - Meaning of pleasure vessel

- 3.3.1 We support the intention of this regulation in applying the requirements of the regulations to pleasure vessels when they also constitute a place of employment.

3.4 Regulation 4 - Application

- 3.4.1 We support the requirement for there to be present on board one fare paying passenger, or one employee and that the regulations should apply to all United Kingdom ships which are in United Kingdom waters and any other ship in United Kingdom waters unless it is exercising the right of innocent passage or the right of transit passage through straits used for international navigation.
- 3.4.2 However, we are concerned that the protection that smokefree legislation provides should extend to those persons who board a non United Kingdom ship for the purpose of ensuring its safety or the health and safety of those on board, or assisting with the safe passage of the vessel e.g. pilots, medical, health and rescue service personnel, as well as those concerned with enforcement of UK laws e.g. Police officers and HMRC officers. This would mean that the master of the vessel should be under a duty to ensure that appropriate restrictions on smoking are put in place in the working areas of such persons whilst they are on board to carry out their duties. If it is not possible to impose such a restriction as a legal requirement, then guidance should include advice on the need for such persons to request restrictions on smoking in the enclosed and substantially enclosed area where they need to work.

3.5 Regulation 5 - Exemptions

- 3.5.1 It is stated that these regulations do not apply to a pleasure vessel, other than one carrying an employee who is not a volunteer.
- 3.5.2 We consider that there will be circumstances where it will be very difficult to establish whether a person, who is also an employee, has "volunteered" for what is still a work activity. There could also be situations where an employee is put under duress to volunteer, or at least to identify themselves as such.
- 3.5.3 Furthermore, this regulation appears to be in direct conflict with the definition of employee in regulation 2(1) where the term employee includes any person engaged in any capacity on board the ship on the business of that ship, and includes a volunteer. In our opinion this would certainly include situations where a trained member of crew is placed aboard the pleasure vessel to ensure its safety and proper use.

3.6 Regulation 6 - Prohibition of smoking by employees

- 3.6.1 This regulation states that smoking by an employee on a ship is prohibited unless the employee smokes in a designated area and that the master may designate any of the following areas as an area in which smoking by an employee is permitted.

3.6.2 Designation of decks

Firstly the master may designate all or any part of the deck which is not enclosed or substantially enclosed.

We have stated our concerns regarding the method and appropriateness of designating a part of a deck as well as our detailed advice on this matter as a General Concern in paragraph 2.3 above.

We have also stated our concerns regarding the need for recording and signage of designated areas as well as our detailed advice on this matter as a General Concern in paragraph 2.3 above.

3.6.3 Designation of cabins

Secondly, the master may designate one cabin, other than a cabin which is set apart exclusively for sleeping accommodation, which is adequately ventilated and not ventilated into a smoke-free place.

3.6.3.1 **Cabin other than a cabin 'set apart exclusively for sleeping accommodation'**

In our opinion the term cabin 'set apart exclusively for sleeping accommodation' is not sufficiently clear. We are concerned that the presence of a chair or table or washing facility could make the use of the cabin more than exclusively sleeping accommodation. In any case we do not accept that a cabin used for sleeping at any time is an appropriate place to be designated as the sole designated enclosed place for anyone on the vessel to smoke. The term cabin has not been defined and so we also need to state that we do not accept that a mess or common recreation area is suitable to be designated for smoking. The reason is that allowing smoking in such a facility may deny its use to those persons who choose or need to avoid exposure to secondhand smoke.

3.6.3.2 **Relationship to residential accommodation**

In the Department of Transport letter accompanying the consultation there is reference to the Health Act 2006 having recognized that smoking can continue where a person has their home, or is residing, whether permanently or temporarily.

The requirement in relation to shared residential accommodation contained in The Smoke-free (Exemptions and Vehicles) Regulations 2007, is that a room designated for smoking can only be used for that sole purpose. This has been applied to care homes and similar establishments on the basis that the room is used for smoking and no other purpose (e.g. storage) and that no other activities, work related or recreational, can take place there. If this requirement were applied to ships then it would mean that the designated cabin for the use of employees would be exclusively for smoking and for no other purpose.

3.6.3.3 **Adequately ventilated**

We do not understand how the requirement for the cabin to be "adequately ventilated" would be determined in the absence of any agreed standards. Furthermore, if reliance on natural ventilation is to be permitted then we do not understand how this could be maintained during periods of foul weather.

The requirement that applies in relation to designated cabins for passengers is that “except for doors and windows, (the cabin) is completely enclosed on all sides by solid, floor to ceiling bulkheads”. We do not understand why this requirement has not been included for the employees’ cabin. If this requirement is not included then there is the possibility that the area designated for smoking will not be completely physically separated from other enclosed areas of the ship and that as a result smoke will egress into those areas. The effect of this will be to completely undermine the intention of the proposed regulation which is surely that smoking and the related secondhand smoke is contained in a single cabin.

3.6.3.4 **Designation in writing**

Finally, the cabin should be designated in writing, as the designated passenger’s cabins are required to be, and provided with signage to indicate that it is a designated smoking cabin exclusively for use by employees.

3.7 Regulation 7 - Prohibition of smoking by passengers

3.7.1 This regulation states that smoking by a passenger on a ship is prohibited unless the passenger smokes in a designated area and that the master may designate any of the following areas as an area in which smoking by an employee is permitted.

3.7.2 **Designation of decks**

Firstly the master may designate all or any part of the deck which is not enclosed or substantially enclosed.

We have stated our concerns regarding the method and appropriateness of designating a part of a deck as well as our detailed advice on this matter as a General Concern in paragraph 2.3 above.

We have also stated our concerns regarding the need for recording and signage of designated areas as well as our detailed advice on this matter as a General Concern in paragraph 2.3 above.

3.7.3 **Designation of cabins**

Secondly, the master may designate, in writing, a cabin which is

- (a) set apart exclusively for sleeping accommodation,
- (b) except for doors and windows, is completely enclosed on all sides by solid, floor to ceiling bulkheads,
- (c) does not have a ventilation system that ventilates into any other part of the ship (except another cabin which is a designated area),
- (d) does not have any door that opens onto any part of the ship which is a smoke-free place unless that door is mechanically closed immediately after use, and
- (e) is clearly marked as a cabin in which smoking is permitted.

3.7.4 **Cabin ‘set apart exclusively for sleeping accommodation’**

In our opinion the term cabin “set apart exclusively for sleeping accommodation” will be difficult to determine or enforce. We are concerned that the presence of a chair or table or washing facility could make the use of the cabin more than ‘exclusively sleeping accommodation’.

What is important in our view is that the master should not designate cabins which are for shared use unless the occupants are in agreement that they are willing to occupy such accommodation. The reason is that allowing smoking in a shared cabin against the wishes of all of the occupants may deny its use to those persons who choose or need to avoid exposure to secondhand smoke.

3.7.5 **Prohibition of smoking in all communal facilities**

We agree that, although the term cabin has not been defined, the requirement that it is for sleeping purposes rules out the use of all public eating, recreational and hospitality areas which are enclosed or substantially enclosed.

3.7.6 **Adequately ventilated**

There is no requirement for the cabin to be adequately ventilated as there is in relation to designated cabins for employees. It is understood that in some circumstances cabin doors are utilised as ventilation openings regardless of whether self-closing mechanisms are fitted or not. We also consider that the use of doors with ventilation openings such as louvers will not be permitted under this regulation.

3.8 Regulation 8 - No-smoking signs on United Kingdom ships

We support the requirements for the provision of statutory signage at each point of embarkation to the ship, and every exit from a car deck on the ship. We also support the description of the offence and the level of fine that can be imposed.

3.8.1 **Requirements on the owner and not the master**

We can see no reason why the duties of this regulation are not placed upon the master, as opposed to the owner. Clearly the owner will frequently be absent from the ship and may well claim in defence that they were not aware that the required signage was not being displayed at a particular time and place.

These regulations are similarly public health measures and compliance with public health legislation on ships has always been the duty of the master of the vessel. Under the Health Act 2006, section 6(1), it is the duty of any person who occupies or is concerned in the management of smoke-free premises to make sure that no-smoking signs complying with the requirements of this section are displayed in those premises in accordance with the requirements of this section.

3.8.2 **Wording of statutory signs**

We would prefer the wording of the signs to state:

"NO SMOKING

It is against the law to smoke on this ship, except in designated areas."

(Please also see our detailed advice on the need for signage contained as a General Concern in paragraph 2.3 above.)

3.9 Regulation 9 - No-smoking signs on ships other than United Kingdom ships

We support the requirements for the provision of statutory signage and we also support the description of the offence and the level of fine that can be imposed.

3.9.1 **Nature of statutory signage**

The proposed requirement is for no-smoking signs to be displayed in prominent positions in areas of the ship where smoking is prohibited by regulation 6 or 7.

In reality, the areas of the ship required to be signed amount to potentially the entire ship, and certainly the major parts of the enclosed and substantially enclosed areas. The correct placement of this signage would be a major task to be undertaken on a ship intending to enter a UK port. For these reasons we wish to challenge whether this is really an effective measure to ensure compliance.

More practical measures could include the requirement for signage containing explanatory statements of the UK requirements to be circulated and displayed and for public announcements to be made. To ensure that people who do wish to smoke do so in the correct places (which is really what compliance consists of) there is the same need for signage of the designated areas for smoking as we have already set out in detail elsewhere in this response for UK ships.

(Please also see our detailed advice on the need for signage contained as a General Concern in paragraph 2.3 above.)

3.9.2 **Requirements on the owner and not the master**

Again we can see no reason why the duties of this regulation are not placed upon the master, as opposed to the owner. Indeed, in the case of non-UK registered ships it is even more likely that the owner will be absent from the ship and will wish to claim in defence that they were not aware that the required signage was not being displayed at a particular time and place.

Again we would state that these regulations are similarly public health measures and compliance with public health legislation on ships has always been the duty of the master of the vessel. Under the Health Act 2006, section 6(1), it is the duty of any person who occupies or is concerned in the management of smoke-free premises to make sure that no-smoking signs complying with the requirements of this section are displayed in those premises in accordance with the requirements of this section.

3.10 Regulation 10 - Offence of smoking in a smoke-free place

3.10.1 **Offences and fines**

We support the description of the offences by employees and passengers and the level of fines that can be imposed.

3.10.2 **Use of defences**

It is stated in Regulation 10(3) that it is a defence for a person charged with an offence to show that he did not know, and could not reasonably have been expected to know, that it was a smoke-free place.

It is further stated in Regulation 10(4) that if a person charged with an offence under this section relies on the defence in paragraph (3), and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is established, unless the prosecution proves beyond reasonable doubt that it is not.

It is our view that the absence of the requirement for signage of each and every designated area for smoking will pose real difficulties for the prosecution in:

- demonstrating that the person charged should have known where he could and could not smoke,
- rebutting assertions by the defendant that in the absence of signs it was not reasonable for him to know where smoking was permitted or prohibited.

3.11 Regulation 11 - Offence of failing to prevent smoking in a smoke-free place

We support the requirement to cause people to stop smoking in a smoke-free place. We also support the description of the offence and the level of fine that can be imposed.

3.11.1 **Duty to stop people smoking**

The regulations impose the duty, to stop people smoking in a smokefree place, on the master and any person authorised by the master,

This duty in relation to smokefree premises is much wider and the Health Act 2006 states in Section 8(1) that it is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking.

We do not believe that it is necessary for the master to have authorized people to take action in these circumstances.

We believe that it should be the duty of any person with responsibility for the safety of the ship and the good conduct of the crew and any passengers.

3.11.2 **Use of defences**

It is stated in Regulation 11(3) (as it is also stated in regulation 10) that it is a defence for a person charged with an offence to show that he did not know, and could not reasonably have been expected to know, that it was a smoke-free place.

It is further stated in Regulation 11(4) that if a person charged with an offence under this section relies on the defence in paragraph (3), and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is established, unless the prosecution proves beyond reasonable doubt that it is not.

It is again our view that the absence of the requirement for signage of each and every designated area for smoking will pose real difficulties for the prosecution in:

- demonstrating that the person charged should have known that people were smoking in a smoke-free area
- rebutting assertions by the defendant that in the absence of signs it was not reasonable for him to know where smoking was permitted or prohibited.

3.12 Regulation 12 - Fixed penalties

We support the provisions for penalty notice procedures offering a person the opportunity to discharge any liability to conviction for the offence to which the notice relates by paying a penalty in accordance with these Regulations.

3.12.1 **Extention of penalty notice procedures to signage offences**

We do not understand why the penalty notice procedure has been restricted to offences under regulation 10(1) or 10(2) and we believe that the same penalty notice procedures could be effectively utilized for offences under Regulation 7 and Regulation 8, particularly if, as we have recommended, the master of the vessel is required to ensure compliance.

It is thought most unlikely that legal proceedings will be undertaken or pursued in relation to Regulation 7 and Regulation 8 offences especially against an owner who is beyond the jurisdiction of the UK courts.

3.13 Enforcement measures

3.13.1 **Explicit duty to enforce**

We are concerned that there is no explicit duty to enforce.

In the Health Act 2006, section 10(3), it is stated that it is the duty of an enforcement authority to enforce, as respects the premises, places and vehicles in relation to which it has enforcement functions, the provisions of this Chapter and regulations made under it.

3.13.2 **Ability to share enforcement powers**

We are concerned that there is no ability for the MCA to share enforcement powers.

In the Health Act 2006, section 10(4), it is stated that the appropriate national authority may direct, in relation to cases of a particular description or a particular case, that any duty imposed on an enforcement authority is to be discharged instead by the appropriate national authority.

3.13.3 **Ability for MCA to authorize other officers**

We are concerned that there is no ability for the MCA to authorize other officers, for example Port Health Authority officers.

In the Health Act 2006, section 10(5), it is stated that "authorised officer", in relation to an enforcement authority, means any person (whether or not an officer of the authority) who is authorised by it in writing, either generally or specially, to act in matters arising under this Chapter.

Appendix

Communication regarding enforcement agencies

Dear Ian,

I have become aware of the draft Merchant Shipping (Prohibition of Smoking on Ships) Regulations. Although I am obviously pleased that progress has been made I am very disappointed to find that as things stand the MCA surveyors will have sole responsibility for enforcement. This makes no sense at all and I have made my feelings known to the Association of Port Health Authorities who will, I am assured, make a collective response in due course.

I feel that there is not much more to add to the original CIEH/APHA response to the original consultation but I would like to reiterate that Port Health Officers, as EHPs have an extensive "public health" background and expertise. In contrast the MCA surveyors mainly deal with crew safety issues on ships. By its very nature the Smoke free campaign is surely a major public health initiative and should not be confused with safety matters, especially aboard passenger vessels.

Port Health officers have legal responsibility, with powers of entry, for other public health matters on ships, including food hygiene, imported food control, ship sanitation certification, infectious disease control, pest control and certain pollution controls. Surely we are best placed to promote, monitor and enforce the new legislation as applicable to ships as a logical extension of the work we already do locally, and very successfully, in the ports. This has always been acknowledged as a very cost-effective method.

It should also be noted that we work extremely well with our partners at the MCA, indeed we have a longstanding MoU with them to reflect the shared nature of some aspects of the job. But, with no disrespect, they are not EHPs.

I am therefore puzzled and somewhat dismayed by the suggested approach and would urge the Department for Transport to reconsider and amend the draft regulations to enable Port Health Authorities to be responsible for enforcement.

Regards,
Laurence

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