

# Implementation of smokefree legislation in England

## Associated issues



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## **In offering this advice LACORS wishes to make it clear that:**

- legislation may change over time and the advice given is based on the information available at the time the guidance was produced – it is not necessarily comprehensive and is subject to revision in the light of the further information;
- only the courts can interpret statutory legislation with any authority; and
- this advice is not intended to be definitive guidance nor a substitute for the relevant law and independent legal advice should be sought where appropriate.

**This document provides some basic information concerning several of the associated issues that will arise as a consequence of the enforcement of the provisions relating to smoking contained within the Health Act 2006 and set of regulations relating to smokefree. It is hoped that regulatory officers will be able to use the information provided as an initial source of reference.**

**There are a number of associated issues that are likely to arise and these will be discussed over the following pages.**

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A Scottish version of this guidance was developed by REHIS in preparation for the Scottish implementation of smokefree legislation in March 2006. LACORS would like to thank REHIS for allowing us to develop similar guidance for England.

# 1 Noise

## Issues to be considered will include:

- Members of the public congregating outside buildings but remaining within the curtilage of the premises (i.e. in non substantially enclosed building constructions or structures made specifically to accommodate smokers e.g. roof patios, lean-to constructions, hut-like structures and shelters, etc).
- Members of the public congregating on public footpaths or areas outwith the curtilage of the premises. It should be borne in mind that this makes enforcement under the Environmental Protection Act 1990 difficult as the noise does not emanate from within the premises. It is likely that such scenarios will be dealt with using the Licensing Act 2003 and/or by police action.
- Owners of premises playing musical equipment or speakers (radios, speakers, CD players, TVs etc.) for the enjoyment of their customers, in non-substantially enclosed premises to accommodate smokers.

## Action taken to address any problems may involve a variety of approaches, including:

- Proactive education and information provision e.g. consider a noise education programme for establishment owners and inform them of potential problems (target known areas of probable trouble).
- Communication with planning departments and use of planning legislation to prevent the construction/erection of structures in locations conducive to the creation of noise nuisance problems.
- Communication with licensing committees and use of the Licensing Act 2003 and local bye-laws to control noise nuisance emanating from or near specific premises held responsible.

- The use of enforcement powers contained within:

- The Environmental Protection Act 1990 for service of Abatement Notices and seizure of equipment (reference for example sections 79, 80, 81(3) and 81(5)).
- The Control of Pollution Act 1974 (reference Part III sections 63-67 regarding noise abatement zones). It is highly unlikely that this piece of legislation could be applied to the circumstances likely to arise as a consequence of the smokefree legislation. The Environmental Protection Act 1990 would be better employed to control noise problems coming from the premises.
- Noise nuisance can also be tackled under the new Clean Neighbourhoods and Environment Act 2005 (covering England and Wales), Section 84, Schedule 1.

The CNEA extends the Noise Act 1996 to licensed premises. Councils' powers for dealing with night time noise nuisance are extended from domestic premises to cover licensed premises, including pubs, clubs and restaurants. Regulatory officers will be able to issue a warning notice and – if not taken into account – a fixed penalty notice to the person responsible for the noise at the premises when it exceeds the permitted level as measured from within the complainant's dwelling. The permitted level of noise for licensed premises will be specified by the Secretary of State for Environment, Food and Rural Affairs (NB: to be announced in March 2007).

The new edition of the CIEH/Defra Neighbourhood Noise Policies and Practice for Local Authorities - A Management Guide contains useful information and practical advice on how to tackle noise issues. It is available at [www.cieh.org/library/Knowledge/Environmental\\_protection/Noise/NoiseManagementGuideSeptember2006.pdf](http://www.cieh.org/library/Knowledge/Environmental_protection/Noise/NoiseManagementGuideSeptember2006.pdf) or at [www.tinyurl.com/29roo2](http://www.tinyurl.com/29roo2)

## 2 Litter

### Issues to be considered will include:

- Litter accumulation in or near entrances to buildings or non-substantially enclosed structures erected to accommodate smokers, blowing onto or impinging on public areas.
- The possible increase in cigarette butts and other litter deposited on footpaths and other public areas in the vicinity of establishments in which smoking is prohibited.

### Action taken to address any problems may involve a variety of approaches, including:

- Proactive education and information provision.
- The provision of special bins, with compartments for smoking related litter, placed at locations where problems are expected. Also, the provision of pocket ashtrays to smokers.

- The use of enforcement powers contained within:

- The Environmental Protection Act 1990 Part 4 as amended by the Clean Neighbourhoods and Environment Act 2005 provides the offence of dropping and leaving litter (section 87). Section 27 of the CNEA 2005 inserted a new section 98 (5A) into the EPA 1990 to clarify that litter includes smoking related materials such as the discarded ends of cigarettes, cigars and the discarded remains of chewing gum and bubble gum.
- Section 88 of the EPA 1990 allows authorised officers of councils to issue fixed penalty notices as an alternative to prosecution for the litter offence. The level of the fines can be set locally within a range of £50-£80.
- Sections 93 and 94 of the 1990 Act give councils the power to tackle street litter generated further to activities on adjacent premises. This enables councils to serve Street Litter Control Notices requiring businesses to clear up the litter and implement measures to prevent the land from becoming defaced again. New subsection 93(3A) as inserted by CNEA 2005 enables these notices to also be served in relation to vehicles, stalls and other moveable structures used for commercial or retail activities on the street.

DEFRA is producing guidance for councils called *Preventing cigarette litter in England*. This will be available shortly from [www.defra.gov.uk/environment/localenv/index.htm](http://www.defra.gov.uk/environment/localenv/index.htm)

# 3 Smoke infiltration

## Issues to be considered will include:

- The location of non-substantially enclosed structures erected to accommodate smokers. This could result in the infiltration of secondary smoke into residential and/or commercial properties in the close proximity of the structures, including infiltration into smokefree premises from where the smokers came.
- Smoke emitted from premises so as to be prejudicial to health or a nuisance – thought to cover very frequent BBQs at pubs, so could possibly also include smoking.

## Action taken to address any problems may involve a variety of approaches, including:

- Proactive education and information provision.
- Non-substantially enclosed structures to be erected to accommodate smokers should not be located under or near any openable windows of the same or adjoining property.
- Non-substantially enclosed structures to be erected to accommodate smokers should not be located under or near any air intake fans of the same or adjoining property.
- Non-substantially enclosed structures to be erected to accommodate smokers should not be located directly at or in front of the entry and/or exit doors to any premises.
- Such matters are likely to be considered at the planning stage of the development and thus close liaison with Planning Departments is recommended.

- The use of enforcement powers relating to:

- Odour and smoke nuisance are covered by section 79-81 of the Environmental Protection Act 1990. There is no fixed level which constitutes a nuisance, and in order for an odour to be classed as a statutory nuisance, it must be seriously affecting an individual's use or enjoyment of their property. To constitute a nuisance the odour must occur continuously for a period of time and be a frequent problem. It can therefore apply to smoking shelters adjacent to neighbours' dwellings or gardens.
- Other nuisances include light nuisance – section 102 of the CNEA adds to the description of statutory nuisances listed in section 79 (1) of the Environmental Protection Act 1990 'artificial light emitted from premises so as to be prejudicial to health or a nuisance'. Light from shelters or structures to accommodate smokers (especially if they go on and off when customers enter/leave the structure) can disturb/be a source of complaint from residents living next to the premises.

## 4 Fire safety

Under the Regulatory Reform (Fire Safety) Order 2005 (RRFSO) which came into force in October 2006, the regulation of fire safety is the sole responsibility of the Fire Authority. It is no longer a duty covered by the Licensing Act 2003. As far as LACORS is aware, the only exception to the above where smokefree regulations are likely to be relevant, is in relation to sports grounds and regulated stands at which councils now have responsibility for fire safety at all times.

Full guidance on the RRFSO has yet to be published by Communities and Local Government, but LACORS expects it to allow for the delegation of powers from councils to Fire Authorities and vice versa.

Regulatory officers who have concerns about the fire safety implications of issues arising from the smokefree regulations should draw these to the attention of the duty holder, who is responsible for producing a fire risk assessment and contact the Fire Authority, but should be aware that councils have no enforcement powers on this issue.

Environmental Health departments could consider initiating working relationships with local Fire and Rescue Services to help promote fire safety e.g. in the dissemination of fire safety literature during compliance inspections. Such arrangements could involve Fire Safety Officers in providing general advice and inspecting plans, premises, structures and heating devices which are a cause for concern.

### Areas of possible concern include:

- Non-substantially enclosed structures erected to accommodate smokers (e.g. rooftop patios) not having and/or preventing the means of escape to the safe assembly points located outside. Structures that prohibit or inhibit safe channelling to the assembly points would also be a cause for concern.
- Illicit smoking in concealed places (cigarette ends causing fires).
- The use of heating devices which are intrinsically unsafe, installed or located in an unsafe manner, and/or poorly secured will be fire safety and health and safety concerns.
- LPG storage – apart from the fire risk they pose, LPG cylinders pose an asphyxiation risk. LPG vapour is denser than air and must not therefore be stored in cellars, basements or sunken locations.

If any smoking related equipment, structure or procedure is considered, it is absolutely the remit of the Fire Authority to audit premises' risk assessments to ensure that these do not compromise means of escape and general fire safety, and suitable enforcement can and will result where any such issues cannot be resolved or effectively addressed through the Fire Risk Assessment. Please note that the new Fire Safety Regulations are supported by a suite of 11 guidance documents each relevant to a building use group. These can be found at [www.communities.gov.uk/index.asp?id=1162101](http://www.communities.gov.uk/index.asp?id=1162101)

## 5 Health and safety

### Issues to be considered will include:

- The use of heating devices which are intrinsically unsafe, installed or located in an unsafe manner, and/or poorly secured.
- Non-substantially enclosed structures erected to accommodate smokers and where the public congregate, being located close to chemical and/or gas cylinder stores.
- The intrinsic safety of some structures erected to accommodate smokers may be an issue.
- Floor construction materials and general state of repair may help facilitate slip, trip and fall accidents.
- Safe access and egress to and from the smoking areas.
- Poor lighting and/or outside areas becoming icy, wet, damp or covered in litter thereby increasing the risk of slips, trips and falls.
- Unsafe electrical systems provided for outdoor structures and heating equipment.

### Action taken to address any problems may involve a variety of approaches, including:

- Proactive education and information provision.
- The use of enforcement powers provided within:
  - The Health and Safety at Work etc. Act 1974 and associated relevant statutory provisions.

## 6 Planning and building control

### Issues to be considered will include:

- Whether planning permission is required;
- planning applications;
- material considerations;
- advertisement consent; and
- building regulations approval.

### Action taken to address any queries

#### Planning permission

Planning permission will normally **be** required for the following operations and uses:

- permanent external smoking shelter structures – whether freestanding or attached to existing buildings;
- awnings/canopies/blinds attached to buildings will almost always have a material effect on the external appearance of a building;
- pavement and forecourt tables and chairs sited on the public highway or a private forecourt;
- use of any land as a beer garden or yard, where the land does not form part of the business premises;
- construction of timber decking; and
- stub-out bins on the front of premises.

Planning permission will normally **not be** required for the following operations and uses:

- portable freestanding awnings/canopies and space heaters;
- the use of beer gardens and yards, where these are ancillary to the main pub/restaurant use and are lawfully part of the existing business;

## **Lawful development certificate or planning application**

Businesses can check the need for planning permission formally by submitting an application for a certificate of lawful proposed development, or informally by seeking advice from the Planning Service.

Detailed guidance on the submission of applications is available from Planning Services. Applications for smoking shelters should include calculations to demonstrate that the structure would not be 'substantially enclosed'.

Planning applications for smoking shelters and related structures would normally take up to eight weeks from the time a valid application is received. If the application has to go to a Planning Committee, this would delay a decision by at least four weeks.

## **Material considerations**

All planning decisions are based upon planning policies contained within the council's adopted development plan, related guidance, and any other material considerations.

When assessing a planning application for a shelter, awning or similar structure, the council will seek to ensure that the facilities are well-designed and sensitively sited in a way that:

- enhances the street scene;
- protects the safety and free flow of pavement users; and
- has no detrimental impact on the amenity of neighbouring residents.

In particular:

- Is the shelter/awning or other structure in a prominent location?

- Is the structure well designed, using appropriate materials, and in character with the existing building?
- Will the location/siting of the shelter/awning have any adverse amenity impact in terms of:
  - visual intrusion;
  - character and appearance of the area;
  - loss of outlook;
  - overlooking of adjacent residential premises;
  - light pollution;
  - siting adjacent to doors/windows/air intake systems - whether within or adjacent to the premises;
  - secondary smoke infiltration into adjacent residential or commercial premises; or
  - introduction or intensification of activity and disturbance near noise sensitive premises, particularly in the late evening?
- Will the siting of the shelter/awning result in loss of parking spaces, with associated impact on parking problems in the vicinity?
- Will the shelter/awning obstruct or block an adjacent public footpath or road to the detriment of pedestrian or traffic safety?

In general, canopies/shelters/heaters and similar structures sited on the public highway or on other public spaces are unlikely to be permitted.

Proposals affecting premises in a conservation area, or affecting a listed building, will be particularly sensitive. The design of any smoking-related structure/shelter would need to be of exceptional quality if it were not to affect the character or setting of a listed building, or the character or appearance of a conservation area.

If planning permission is granted, conditions may be imposed to restrict, for example, the transmission of music or any other amplified sound to any noise-sensitive boundary, or hours of operation (although more likely to be addressed under licensing provisions). In some cases, temporary permission may be granted to allow the review of any impact in sensitive locations.

### **Advertisement consent**

If a business is proposing to provide new external signs, for example, to direct customers to smoking shelters, the business may need to make a separate application for advertisement consent.

The main concerns in deciding whether to grant consent will be:

- highway safety – for example, would the sign cause obstruction to pedestrians or traffic; and
- amenity – would the sign be visually obtrusive, particularly in a conservation area or on a listed building, or add to advertisement clutter.

### **Building regulations approval**

The following structures are currently exempt from control under the Building Regulations:

- a small detached single-storey building with an internal floor area of not more than 30m<sup>2</sup> which contains no sleeping accommodation, and is sited at least 1m from the site boundary or constructed substantially of non-combustible material;
- a small detached single storey building with an internal floor area of not more than 15m<sup>2</sup>; and
- the extension of a building by the addition at ground level of:
  - a conservatory, porch, covered yard or covered way; or
  - a carport open on at least two sides;

where the internal floor area of that extension does not exceed 30m<sup>2</sup>, provided that in the case of a conservatory or porch which is wholly or partly glazed, the glazing satisfies the requirements of Part N (glazing – safety in relation to impact, opening and cleaning) of the Building Regulations 2000.

## 7 Licensing

### Issues to be considered will include:

- Collation of information with a view to addressing persistent non-compliance with smokefree legislation.
- Collation of information with a view to addressing all relevant, indirect issues arising as a consequence of the smokefree legislation e.g. noise and litter problems.

### Action taken to address any problems may involve a variety of approaches, including:

- Proactive education and information provision.
- Licensing Committees agree to consider representations concerning non-compliance with the smokefree legislation and all other relevant, indirect issues arising as a result of the smokefree legislation e.g. noise and litter problems.
- Communication with, liaison with, and provision of reports for the Licensing Committee to ensure that any problems are addressed.
- Representations by any responsible authority or interested party can be made under section 13 of the Licensing Act 2003. The Licensing Committee can then add conditions to the licence. Non-compliance with conditions of a licence can result in a number of enforcement scenarios including review and possible revocation of the premises licence. It is possible that persistent non-compliance with smokefree legislation will be treated seriously by Licensing Committees. However, this will be a matter for each individual licensing authority.
- It is imperative that Environmental Health Departments have good communication arrangements with their licensing counterparts in order to address direct and indirect issues arising as a consequence of the smokefree legislation.
- It is also vital that Licensing and Planning departments develop good liaison arrangements to ensure that applications for shelters do not contravene licensing conditions on use of outside areas.

## 8 Health promotion

### Issues to be considered will include:

- Do Environmental Health Departments wish to become involved in health promotion?
- What role can EHOs play in health promotion?

### Action taken to address this issue may involve a variety of approaches, including:

- Making contact with local NHS Health Promotion departments.
- Joining and being proactive in the NHS area based groups set up to address health issues such as smoking cessation.



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