

Smoking in prisons Consultation Responses

We want your views on draft Regulations to amend the Smoke-free Premises etc. (Wales) Regulations 2007 to allow those in charge of prisons in Wales to designate cells in prisons in Wales from the smoking ban for a time-limited period so that prisons can be supported to become smoke-free in a safe and secure way during the period of the exemption.

Your views are important. We believe the new legislation is necessary to protect the health and wellbeing of offenders and prison staff. This proposal is open for public consultation and we welcome your comments. The consultation will close at midnight on 12 November 2015.

This form provides all the consultation questions included in the consultation paper. To help us record and analyse the responses, please structure your comments around these questions. You do not need to comment on all questions nor do you need to use this form to respond to the consultation. You are welcome to submit your response in a format that suits you.

Please submit your comments to tobaccopolicybranch@wales.gsi.gov.uk by 12 November 2015. If you have any queries on this consultation, please email the address above.

Data Protection

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tick the box below. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 allows the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

If you would prefer that your details are not published, please tick here

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Are you responding as a private individual, or on behalf of an organisation?	Private individual	<input type="checkbox"/>
	Organisation	<input checked="" type="checkbox"/>
Please select one of the following:	Academic/Research bodies	<input type="checkbox"/>
	NHS Organisations	<input type="checkbox"/>
	Health related organisations	<input type="checkbox"/>
	Central Government	<input type="checkbox"/>
	Local Government	<input type="checkbox"/>
	Third Sector Organisations	<input checked="" type="checkbox"/>
	Representative Groups	<input type="checkbox"/>
	Private sector organisations	<input type="checkbox"/>
	Private individuals	<input type="checkbox"/>
	Other (groups not listed above)	<input type="checkbox"/>
<p>As a Party to the World Health Organization’s Framework Convention on Tobacco Control (FCTC), the United Kingdom has an obligation to protect the development of public health policy from the vested interests of the tobacco industry. To meet this obligation, we ask all respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. We will still carefully consider all consultation responses from the tobacco industry and from those with links to the tobacco industry and include them in the published summary of consultation responses.</p>		

ASH does not have any direct or indirect links to, or receive funding from, the tobacco industry.

Where you have particular evidence or practical experience to support your views, we would be grateful if you could furnish your response to each question with such evidence and experience.

Question 1

Do you think enclosed and substantially enclosed places in prisons should be completely smoke-free?

Yes

No

Legislation requiring enclosed public places to be smokefree, including workplaces, was introduced in Wales on April 2nd 2007, a year after the legislation in Scotland (March 26th 2006) and three months before the legislation in England (July 1st 2007). There was no exemption in the Welsh regulations for prisons.

There is now good evidence that the level of exposure to tobacco smoke in prisons both for prisoners and inmates is harmful (see below for more detail on the level of harm). Given the evidence of exposure and of the harm caused by such exposure it is clear that the date of 'guilty knowledge' under the Health and Safety at Work Act 1974 has passed. In the event of claims for compensation for health damage, employers are expected by the courts to know of the health effects of exposing employees and others to secondhand smoke and to have taken reasonable steps to eliminate it.

All prisons in the UK, not just in Wales, need to go smoke-free without further delay. We understand the need for this to be implemented in an orderly manner, therefore we support the National Offender Management Service (NOMS) decision to implement plans for smoke free prisons in the Welsh prison estate from January 2016 with an expected completion date by the end of April.

Smokefree prisons bring major benefits:

- Protecting staff and prisoners from the harm caused by secondhand smoke
- Because prisons are public institutions (either as directly run in the public sector, or through contracts between the public sector and private sector operators), the Government (in this case the Government of Wales) has a duty of care to prisoners, including a duty as far as reasonably possible to protect and improve their health.
- Protecting the prison service and public revenues from the risk of legal challenges by prisoners or prison staff exposed to other people's smoke.
- Reduced fire risk and lower insurance rates.

Evidence of Harm

Smoking rates among prisoners are much higher than the general population. In the UK, studies undertaken between 2005 and 2010 included estimates of smoking prevalence in

excess of 80% in both male and female prisoners. These high smoking prevalence rates are partly a consequence of the very high rates of mental health problems in prisons, estimated to affect around 80% of prisoners. Prisoners also tend to be from poorer, less well-educated backgrounds where smoking prevalence is higher than average. ¹

An investigation for the National Offender Management Service (NOMS) carried out by Parsons Brinckerhoff has measured exposure to secondhand smoke in six prisons in England and Wales, and reported that:

“There was clear evidence of [secondhand smoke] in smoking cells, occasionally in non-smoking cells and all prison wing samples measured. Measurements of personal exposure of prison staff also indicate exposure to [secondhand smoke] across the work-shift, with levels varying considerably between each of the six prison establishments.

In three of the six prisons the personal exposure of the majority of prison staff measured exceeded the World Health Organisation (WHO) guidance value for PM_{2.5}, (25 µg/m³).

Overall, approximately one-sixth of the time that prison staff spent at work involved exposure to PM_{2.5} at concentrations that exceeded the WHO guidance limit. Prison staff were also found to experience considerable short-term peak exposures with the highest 1-minute PM_{2.5} measurement being 1027 µg/m³.”²

The conclusions of the Parsons Brinckerhoff report is supported by another study by researchers at the UK Centre for Tobacco and Alcohol Studies, also for NOMS. The study measured air quality in four prisons and reported that:

“Levels of PM_{2.5} pollution in smoking areas of prisons are extremely high, with mean levels during the day that far exceed World Health Organisation long-term mean and short-term maximum air quality guidance limits. Smoking in prisons thus represents a significant health hazard to prisoners and staff.”³

Legal Issues

The current situation regarding smoking in prisons is not sustainable. For example, a standing HM Prison Service Instruction states that non-smokers must not be required to share a cell with a prisoner who is actively smoking. ⁴ However, in practice, this has not been enforced uniformly and non-smoking prisoners have been exposed to secondhand smoke. Some prisoners have therefore pursued legal action, arguing that being forced to breathe in tobacco smoke involuntarily is a breach of their human rights. ⁵ A legal challenge by a prisoner in the privately operated Parc prison in Wales was halted by the High Court in June 2015, on the basis of a commitment that the prison would become smokefree by 31 January 2016. ⁶

¹ Ritter, C et al. [Smoking in prisons: The need for effective and acceptable interventions](#). J Pub Health Pol 2011; 32(1): 32-45. ³ Lasnier B et al. [Implementing an indoor smoking ban in prison: Enforcement issues and effects on tobacco use, exposure to second-hand smoke and health of inmates](#). CJPH 2011;102(4): 249-5

² [Report on Secondhand Smoke in Prisons](#). Final Report, prepared for NOMS. August 2015

³ Jayes L, Ratschen E, Murray R, Dymond-White S, Britton J. [Second-hand smoke in four English prisons: an air quality monitoring study](#). UK Centre for Tobacco and Alcohol Studies. Published 29 Sept. 2015

⁴ Smoke free legislation: Prison Service Application. Prison Service Instruction 09/2007 HM Prison Service, 2007.

⁵ [Leigh Day issues legal proceedings on behalf of non-smoking prisoner](#). Press release. Leigh Day & Co. 20 June 2012

⁶ Order of the High Court, 24 June 2015.

Prison staff may also be exposed to tobacco smoke when inspecting cells, which has led the Prison Officers' Association to call for more rigorous restrictions.⁷

Mental Health Units in England (although not in Wales) have been required to be smokefree since 2008. The high security hospitals, Rampton, Broadmoor and Ashworth, are covered by the regulations requiring psychiatric premises to be smokefree. This was challenged in the courts by inmates of Rampton, but the High Court and Appeal Court judged that being allowed to smoke was not a fundamental human right under the European Convention on Human Rights. The judgement also noted the duty of care to staff, and that when a risk to staff from second hand smoke was identified, there was a duty to take *'all reasonable precautions'* to protect staff from that risk.⁸

Benefits for Prisoners

Despite the high smoking prevalence, prisoners are just as likely as other smokers to want to quit.^{9 10} Imprisonment provides an opportunity to access stop smoking advice and therapy. Studies have shown quit rates among prisoners who accessed stop smoking support to be comparable to those in the general population. A review of a series of pilot projects in England and Wales using a social marketing approach found that just as in the general population, prisoners seeking help to quit may benefit from personalised support, pharmacological aids, access to staff for advice between sessions, and more diversionary activities.¹¹ Evidence from New Zealand suggests that half of all smokers who quit while in a smokefree facility leave prison intending to remain non-smokers.¹² However, quit attempts are less likely to succeed in an environment where smoking is common and tobacco is widely available.¹³

ASH believes that ending smoking in prisons would be an important step towards achieving the stated objectives of the National Offender Management Service. The National Partnership Agreement on healthcare in prisons, between NOMS, Public Health England and NHS England, states that:

*"Prisoners should expect to experience a measurable improvement in their health and wellbeing, particularly in respect of recovery from substance misuse addiction, mental health problems, management of long-term conditions and access to public health interventions to prevent disease and illness."*¹⁴

Experience from Other Jurisdictions and Countries

Smokefree prison policies have already been introduced in several jurisdictions around the

⁷ Prison Officers Association. [Health and Safety Smokefree. Prison Circular 157](#). 14 Nov. 2011

⁸ [Court of Appeal: R \(G\) v Nottinghamshire Healthcare NHS Trust](#). 24 July 2009

⁹ Indig, D et al 2009 [NSW Inmate Health Survey: Key Findings Report](#). Justice Health. Sydney

¹⁰ [Smoking and mental health. A joint report of the Royal College of Physicians and the Royal College of Psychiatrists](#). London, RCP, 2013.

¹¹ MacAskill S. et al. [Social marketing with challenging target groups: smoking cessation in prisons in England and Wales](#). Int. J. Nonprofit Volunt. Sect. Mark. 2008; 13: 251–261

¹² New Zealand Department of Corrections. Corrections News July/August 2012

¹³ See for example [The Health Consequences of Smoking: 50 Years of Progress](#). A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

¹⁴ [National Partnership Agreement](#), NOMS, NHS England, Public Health England. First published 2013, updated for 2015/2016

UK. The Isle of Man prison became the first smokefree prison in Europe in 2008. From 1 January 2013, the use of all tobacco products has been prohibited in Guernsey's prison, and prisoners are allowed to use electronic cigarettes as a nicotine substitute.

There is also considerable experience of smokefree prisons in other countries. All 105 federal prisons in the United States are smokefree in indoor areas, and a substantial number of US states have also made their correctional facilities smokefree and tobacco-free both indoors and outdoors.¹⁵ In Canada federal prisons adopted a smokefree policy in indoor areas in 2006. All Canadian provinces now have smoking bans which apply to both indoor and outdoor areas.¹⁶ In New Zealand prisons have been smokefree (indoor and outdoor) since July 2011. In its initial report in August 2012, the NZ Corrections Department found high compliance and acceptance of the policy by prisoners and consequently good protection of both prisoners and staff from secondhand smoke.¹⁷ In Australia a number of states have implemented smokefree or tobacco-free policies. The Northern Territory was the first to implement a tobacco-free policy in July 2013, with no smoking and no tobacco allowed on site. Queensland followed suit in May 2014 and the states of New South Wales, South Australia and Tasmania have implemented policies during 2015.

¹⁵ 100% Smokefree and Tobacco-Free Correctional Facilities. Briefing by the American Nonsmokers' Rights Foundation. 2014

¹⁶ Collier, R. [Prison smoking bans: clearing the air](#). CMAJ Jul 9, 2013; 185(10): E474.

¹⁷ Collinson L et al. [New Zealand's smokefree prison policy appears to be working well: one year on](#). New Zealand Medical Journal 2012; 125: 1357.

Question 2

The draft Regulations would provide an exemption from the smoking ban, so that persons in control of prisons in Wales could designate cells where smoking can take place. Do you believe that this should happen?

Yes

No

There is no good reason to allow smoking in any cell, and to do so would simply undermine the purpose and impact of the policy and leave the prison authorities open to the risk of legal action.

Such exemptions would create a hazard from secondhand smoke, as demonstrated by the Parsons Brinckerhoff report quoted above, which states that in the surveyed prisons PM2.5 levels were found in non-smoking cells in excess of the WHO permitted level.¹⁸ Therefore they would be liable to legal challenge by both prisoners and staff, similar to the Parc prison case cited above.

As stated above, exposure to tobacco and smoking also reduces the chances of quit attempts succeeding, and is therefore a breach of the duty of care owed to prisoners and staff and contradicts the stated NOMS objective of improving prisoner health.

Comprehensive policies (covering both indoor and outdoor areas) are preferable to partial policies. The significant health benefits gained by improved air quality and reduced tobacco consumption outweigh any negative factors and provide support for prisons to be made totally smokefree. It is regrettable that the Government of Wales has suggested exemptions from smokefree policies in prisons that are not supported by other devolved administrations and the UK Government. We strongly urge that this proposal not be pursued.¹⁹

¹⁸ [Report on Secondhand Smoke in Prisons](#). Final Report, prepared for NOMS. August 2015. Paragraph 3.7.8.

¹⁹ [Letter from Prisons Minister Andrew Selous to Robert Neill MP](#), Chairman of the Justice Select Committee regarding smoking in prisons. Ministry of Justice, 29 Sept. 2015

Question 3

Do you think that any such exemption should be time-limited or permanent?

Yes

No

Question 4

If you think the exemption should be time-limited do you also think that the proposed expiry date of 5th April 2017 is sufficient time to allow prisons to implement smoke-free conditions in a safe and secure way?

Yes

No

Question 3 and 4 are not well formulated, since they do not permit of an informative yes/no answer.

However, ASH is opposed to any exemption, whether it is time limited or permanent.

As we pointed out in our answer to Question 1, given the evidence of exposure and of the harm caused by such exposure it is clear that the date of 'guilty knowledge' under the Health and Safety at Work Act 1974 has passed. In the event of claims for compensation for health damage, employers are expected by the courts to know of the health effects of exposing employees and others to secondhand smoke and to have taken reasonable steps to eliminate it. Introducing an exemption would run counter to this requirement.

All prisons in the UK, not just in Wales, need to go smokefree without further delay. We understand the need for this to be implemented in an orderly manner, therefore we support the National Offender Management Service (NOMS) decision to implement plans for smoke free prisons in England and Wales in a step by step process starting with open prisons by the end of October 2015, followed by the Welsh prison estate from January to April 2016, then prisons in the southwest of England then final roll out to all the prison estate. Given that decision there is no need for the Welsh Government to introduce an exemption to allow smoking in designated cells.

Question 5

Is there anything else that should be taken into account in relation to smoking in prisons?

Yes

No

The key justification for a comprehensive smokefree prisons policy is set out in our answer to question 1 of this consultation.

Some studies have suggested that nicotine withdrawal resulted in a number of prisoners becoming distressed when smokefree policies were implemented.²⁰

While the evidence for this is not conclusive, this provides support for the decision by NOMS that, with the exception of open prisons, all prisons will be smokefree indoors and out. To do otherwise would be difficult for prisoners, who would be subjected to the stress of withdrawal during the times they are unable to go outside to smoke.

ASH also considers suggest that minimising the risk of prisoner distress at the time of quitting could require the provision of cessation support including but not limited to the availability of nicotine replacement therapy (NRT). Evidence from Guernsey shows that allowing prisoners to purchase electronic cigarettes can also be helpful, for those who wish to carry on using nicotine and we support the decision of NOMS to do the same in prisons in England and Wales.

In addition, evidence from the United States suggests that, since prisoners' pre-release smoking intentions predict their post-release behaviour, it is important that cessation support is effective in promoting belief in improved health after a prison smoking ban. Targeted relapse prevention interventions are also indicated for prisoners re-entering the community.²¹

²⁰ Voglewede P. Noel N. Predictors of current need to smoke in inmates of a smoke-free jail. *Addictive Behaviors* 2004; 29(2): 343-348

²¹ Thibodeau L et al [Prerelease intent predicts smoking behavior postrelease following a prison smoking ban](#) , *Nicotine Tob Res.* 2010 Feb; 12(2): 152–158.

Question 6

Please provide any comments on the assumptions made, and costs and benefits provided, in the consultation phase partial RIA in order to assist with the completion of the final RIA.

We have no specific comments of the RIA document in addition to answers to questions 1 - 5.