

# SMOKING, HEALTH AND SOCIAL CARE (SCOTLAND) ACT 2005

## Implications for Voluntary Sector Social Care Service Providers

## Legal requirements

The Smoking, Health and Social Care (Scotland) Act 2005 came into force on 26 March 2006. The legislation bans smoking in the majority of enclosed public spaces, protecting people from exposure to second hand smoke. The legislation does not extend to people's own homes, and makes provision for smoking in adult care homes under particular circumstances. This throws up issues for social care providers around whether/how to facilitate smoking in care homes and how to deal with the provision of care in the homes of people who smoke.

In recognition of the difficulties faced by providers in balancing their duty to protect staff and service users from passive smoking against the rights of service users to smoke, CCPS convened two meetings of interested members to discuss these issues. The group worked together to produce this guidance for members. CCPS is extremely grateful to those individuals who gave their time to be involved in this process; all responsibility for any errors in this paper, however, is held by CCPS staff alone.

As this is new legislation, there is still some uncertainty over the practical application of the principles. Until case law is established to clarify the situation, uncertainty is likely to remain.

The Scottish Executive has produced guidance for the NHS, local authorities and care providers, which details how providers could and should approach the provision of smoking areas in care homes and the protection of staff providing care in people's own homes<sup>i</sup>. Some aspects of the guidance are mandatory, while others are purely pointers on good practice. Relevant sections of the guidance are highlighted below.

In relation to protecting staff from exposure to second hand smoke, organisations should also be mindful of their obligations under health and safety legislation to protect "so far as is reasonably practicable" the health, safety and welfare at work of all employees<sup>ii</sup>. Until the boundaries of the anti-smoking legislation are set more firmly by case law, organisations may wish to consider the suggestion from the CCPS group to document all decisions taken in relation to their smoking policy, detailing what steps they are taking to protect staff and other service users from second hand smoke.

Information in this briefing may be of use to organisations in developing their own policies. As implementation of the Act is in the very early stages and the situation is evolving all the time, there is uncertainty around various aspects of the legislation. Unless specified as being prescribed by the Executive guidance, nothing in this briefing should therefore be considered definitive; suggestions are presented merely as prompts for discussion by organisations grappling with the issues.

*When drafting smoking policies, organisations may find it useful to consider the following points, which are drawn from a variety of sources:*

Employees and service users/carers should be involved as much as possible in the creation of a policy. They know what problems may arise in implementing the policy, and involvement from an early stage is likely to lessen any resentment felt by those covered by the policy.

Employees and service users/carers should be informed as fully as possible about the policy and the need for it<sup>iii</sup>. Those covered by the policy should be given as much notice as possible of its implementation.

Will the policy cover all services provided by your organisation, or will services be asked to develop their own policies?

How much local flexibility will be permitted within the organisational framework, for example where organisational policy allows designated smoking areas but care home residents decide to ban smoking altogether, or where individual staff are happy to allow service users to smoke in their own homes during visits?

Set a date for review of the policy. This is particularly important given the uncertainty around many areas at present.

## Provision of smoking areas in care homes

The main area of uncertainty in relation to smoking in care homes is how the term care home is to be understood in the context of the legislation. Correspondence from the Scottish Executive suggests that, when the legislation was being drafted, the intention was for the term care home to refer to larger multi-bedded establishments where residents have their own bedrooms and share communal areas, and not other settings registered as care homes with the Care Commission such as blocks of flats where each resident has their own flat or homes where residents have individual flatlets<sup>IV</sup>. The Care Commission has stated in correspondence with a member of CCPS that premises registered with the Care Commission as care homes must be considered as care homes for the purposes of the legislation. However, they advise that organisations will need to interpret the Scottish Executive guidance for employers sensibly and decide how to treat care homes where people have self-contained accommodation. Some CCPS members have taken legal advice on the definition of a care home; information will be passed to members who have expressed an interest in smoking issues as clarification becomes available.

Scottish Executive guidance states that designated smoking areas can be established within adult care home settings as long as certain criteria are met.

A designated room means a room which

- Has been designated by the person having the management or control of the no smoking premises in question as being a room in which smoking is permitted
- Has a ceiling and, except for doors and windows, is completely enclosed on all sides by solid floor-to-ceiling walls
- Has a ventilation system<sup>V</sup> that does not ventilate into any part of the no smoking premises in question (except any other designated rooms) and
- Is clearly marked as a room in which smoking is permitted.

Ideally, the guidance states, they would be separated from the rest of the building by a double door. Designated rooms where smoking is permitted are intended for the use of residents only, not for staff or visitors.

The guidance suggests that, where care homes have two lounges, one could be designated as a smoking area, while the other remains smoke free. In cases where the accommodation only has one lounge, there is nothing in the guidance to prohibit designating individual bedrooms as smoking areas, so long as the criteria above, including that on ventilation, can be met in these rooms. However, the following (from the Executive guidance) may affect the practicalities of this:

“Staff should not normally be required to work in these designated smoking rooms. If they have to enter them, then their time of exposure to second-hand smoke must be kept to a minimum. Staff with pre-existing conditions exacerbated by second hand smoke e.g. asthma should not be asked to enter them at all.” In addition, the CCPS group felt that costs associated with installing the necessary ventilation systems in several bedrooms may be prohibitive, and the risk of fire in allowing residents to smoke in bedrooms should be assessed.

If it is not possible to provide a designated room for smoking in line with the legislation, the guidance states that the building must be smoke free. There is no legal obligation on proprietors to provide designated areas for smoking if they do not wish to do so.

The law in this case, as with all no-smoking offences, will be enforced by Environmental Health Officers. The manager or person in control of no smoking premises could be fined a fixed penalty of £200 for allowing people to smoke in no smoking premises or failing to display warning notices in no smoking premises (individuals smoking can also be fined £50). Care Commission Officers who observe a breach of the Act have been advised to raise the issue with the service provider in the first instance. If the provider has not taken action to rectify the situation by the next visit, the CCO is advised to contact the Environmental Health department. It is not clear whether these fines will be recorded, or what may happen to those persistently breaking the law. Some providers have expressed concern that such breaches of the law may affect Care Commission registration for establishments or SSSC fit person tests for individuals, but it is impossible to say at this stage whether or not these bodies will have access to this information, or how they might deal with it.

It is possible that some residents will be resistant to requests not to smoke or only to smoke in designated areas. The Executive guidance suggests that organisations may wish to outline appropriate approaches to staff who may find themselves having to challenge someone who has refused a request to stop smoking, and the CCPS group endorsed recommendations from the Royal College of Nurses and Health and Safety Executive that staff should be confident of management backing in enforcing a smoking ban. A member of the CCPS group suggested that requests that residents desist from smoking which are ignored could be logged, to demonstrate that staff have taken reasonable steps to enforce the ban. In (extreme) cases where residents may react violently to requests to stop smoking, group members felt that the balance of risk to staff in asking them to desist should be assessed.

## Sheltered housing

Communal areas in sheltered housing complexes must be smoke free. Residents are free to smoke in their own homes.

## Shared houses

The guidance seems to suggest that shared houses would come under the same exemption as care homes: “for organisations with residents for whom the premises are considered to be their home, an exemption applies under the legislation, such that arrangements can be made to designate specific rooms in which residents can smoke.” However, early experience has shown that different organisations have interpreted this in different ways, and that in some

cases local authorities and housing association require **shared houses to be entirely smoke free.**

**Organisations which have approached the Scottish Executive for clarification of this issue have received apparently contradictory responses. It seems as if the distinction may be whether or not those living in the house are supported, and if they are for how long. This is far from certain, however, and CCPS suggests that members take guidance on the situation from local environmental health departments.**

## Working in people’s own homes

The new legislation does not affect people’s right to smoke in their own homes. Organisations still have an obligation, however, to protect staff “so far as is reasonably practicable” from exposure to second hand smoke.

While organisations are not in a position to stop people from smoking in their own homes, anecdotal evidence, including pilot projects by the Royal College of Nursing, suggests that many service users react favourably to requests to desist from smoking during appointments, for a set period in advance of a care worker entering their home, or in one particular room. The Executive guidance suggests that such requests should be made in writing, and the CCPS group considered the possibility of mentioning such arrangement in individuals’ care plans.

In some cases, however, service users, or other people living in the house, will continue to smoke before or during visits. In these circumstances, organisations may wish to consider:

*Organisations providing care homes may find it useful to consider the following questions, which are drawn from a variety of sources, in developing their organisations’ smoking policies:*

Will smoking rooms be designated?  
How will these be set up (ventilation, double doors...)?

Will smoking rooms be staffed? How will this be organised?

What happens if service users persist in smoking in prohibited areas?

Where smoking areas are not provided, where are smokers likely to go to smoke? What are the implications of this, including for the rights of service users?

- What the respective roles of front line staff and of managers are in tackling people who continue to smoke when asked not to?
- What to do if staff refuse to enter a particular home because the service user smokes?
- What provisions can be made for service users (and staff) to smoke where 24 hour care/sleepovers are provided?
- How to deal with the issue of smoking where visits are not always scheduled in advance?

The Scottish Executive guidance suggests that members of staff with pre-existing conditions which would be exacerbated by exposure to second hand smoke in particular should have their exposure to second hand smoke minimised. The guidance also suggests that no staff should be expected to make consecutive visits or a sequence of visits to houses in which they are likely to be exposed to smoke. CCPS contacted the Care Commission about this, as this seems to be contradictory to national care at home standard 4.6 and the 21st Century Social Work Review, which both highlight the importance of continuity of care; the Care Commission replied that “the tensions between continuity and the Health and Safety risks will need to be managed and there are no easy answers.”<sup>vi</sup>

## Next steps

After legislation has had time to bed in, and the practical changes are brought about, the Scottish Executive anticipates that society’s attitudes to smoking will change. Some clarification of the confusion surrounding the Act and the guidance is also likely to come about as people get a feel for how the ban is being enforced and, eventually, as the first test cases are taken through the courts. CCPS will continue to monitor developments, and will update members of its email group on smoking issues; to join this group, please contact the CCPS office.

In addition, CCPS will undertake a survey of local authorities, to find out what policies they are putting in place to protect their care home and care at home staff from exposure to second hand smoke. Responses will be available on the members’ section of the CCPS website.

*Organisations may find it useful to consider some of the following actions, which are drawn from a variety of sources, in developing smoking policies:*

Undertake an audit of how many people who use your services actually smoke and maintain a register of smokers. This helps in understanding the scale of the problem to be tackled, and can help in assigning staff with pre-existing health conditions to non-smokers where possible if desired.

Screen staff for pre-existing health conditions which may be exacerbated by passive smoking e.g. asthma. Guidance suggests that extra care should be taken to ensure that these staff are not exposed to second hand smoke.

Make new staff aware at interview that they may be exposed to second hand smoke; some organisations ask staff to sign a document stating that they know they may be exposed to smoke, although the legal grounding for this is as yet unclear. Introduce information on the dangers of second hand smoke and how to implement the smoking policy to induction and other training.

Some organisations assist staff and service users to stop smoking. This can range from pointing them towards NHS cessation services such as Smokeline to providing nicotine replacement patches and giving time of work to attend cessation clinics.<sup>vii</sup>

At least one CCPS member is looking into development of a passive smoking risk assessment. Any other organisations working on similar measures should contact the CCPS office.

Changes made to smoking policies, for example allowing service users to smoke in bedrooms where this was previously prohibited, may affect fire insurance cover.

## Appendix A – outline of possible leaflet to inform staff about changes to organisational smoking policies.

### SMOKING, HEALTH AND SOCIAL CARE (SCOTLAND) ACT 2005

What it means for [your organisation here] and you

The Smoking, Health and Social Care (Scotland) Act 2005 came into force on 26 March 2006. The Act bans smoking in the majority of enclosed public spaces, protecting people from exposure to second hand smoke. For this reason, smoking is now prohibited in all [your organisation] offices, vehicles and [other examples particular to your organisation].

[your organisation] takes seriously its obligation to protect staff from the dangers of passive smoking. We also accept, however, that some staff who smoke will have to adapt to changes brought about by the Act.

If you wish to smoke while you are working [your policy here e.g. you should use the shelters we have provided]

If you wish to stop smoking as a result of the smoking ban, we can help by/you could try [your smoking cessation measures]

The Act allows residents to smoke in care homes if particular physical measures can be put in place. Smoking rooms are only for the use of residents though, and staff in care homes will still have to observe the no smoking policy or else you, and we, would be breaking the law and could be fined.

As people will still be allowed to smoke in their own homes, some staff providing [x service] might have to go into the homes of people who smoke.

We are doing all that we can to minimise the amount of time staff are exposed to second hand smoke in all of our work. However, we also have to respect the fact that many of the people we work with still have the right to smoke. You can find out more detail about our smoking policy from [named employee]. Please ask your line manager if you are unsure about how this affects you.

As the Act is new, we are going to look at what other organisations are doing to deal with these issues and other relevant information, and review our policy in [x months]. We are keen to hear from you about how the changes affect you, and any ideas you have for how we could make things work better; please contact [named individual] if you have any comments or suggestions.

## Notes and references

<sup>i</sup> Smoke-free Scotland: Guidance on smoking policies for the NHS, local authorities and care service providers, The Scottish Executive, 2005

<sup>ii</sup> Health and Safety at Work Act 1974

<sup>iii</sup> In response to a request from members, CCPS has produced the outline of a leaflet which could be used to inform staff about organisations' smoking policies – this is included as an appendix to this briefing.

<sup>iv</sup> While the appropriateness of such establishments being registered as care homes with the Care Commission is a matter of some debate, these are examples of real cases highlighted by CCPS members.

<sup>v</sup> It is worth noting that the value of ventilation systems in removing harmful particles from the area is yet to be proven. The Executive guidance states that “Ventilation systems may make the air appear cleaner, by diluting the larger particles found in tobacco smoke, but ventilation cannot protect people from the health risks associated with second-hand smoke.”

<sup>vi</sup> Personal correspondence

<sup>vii</sup> Not all providers will see this as part of their role and/or have the resources to implement this option

## Further information

The following sources may be useful to those looking for further information on developing no-smoking policies:

Smoking, Health and Social Care (Scotland) Act 2005

<http://www.opsi.gov.uk/legislation/scotland/acts2005/20050013.htm>

Smoke-free Scotland: Guidance on smoking policies for the NHS, local authorities and care service providers, The Scottish Executive

<http://www.scotland.gov.uk/Publications/2005/12/21153341/33417>

Clearing the Air, Scottish Executive website with information on the implications of the Act

<http://www.clearingtheairscotland.com/>

'Smoking Policies - A Simple Guide', Scotland's Health at Work

[http://www.shaw.uk.com/downloads/1/Simple\\_guide\\_to\\_smoking\\_policies\\_corr\\_Feb06.doc](http://www.shaw.uk.com/downloads/1/Simple_guide_to_smoking_policies_corr_Feb06.doc)

'Second Hand Tobacco Smoke Exposure in Residential Care Homes: Controlling the Risk', Health and Safety Laboratory

[http://www.hse.gov.uk/research/hsl\\_pdf/2005/hsl0514.pdf](http://www.hse.gov.uk/research/hsl_pdf/2005/hsl0514.pdf)

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