

Paper 5

Sub Committees on The Smoke-free Premises etc.
(Wales) (Amendment) Regulations 2012

Response from The Chartered Institute of
Environmental Health

The Smoke-free Premises etc. (Wales) (Amendment) Regulations 2012

Response to the Welsh Government Enterprise and
Business Sub Committee and the Health and Social Care
Sub Committee



Sefydliad Siartredig Iechyd yr Amgylchedd

Fel **corff proffesiynol**, rydym yn gosod safonau ac yn achredu cyrsiau a chymwysterau ar gyfer addysg ein haelodau proffesiynol ac ymarferwyr iechyd yr amgylchedd eraill.

Fel **canolfan wybodaeth**, rydym yn darparu gwybodaeth, tystiolaeth a chynghor ar bolisiau i lywodraethau lleol a chenedlaethol, ymarferwyr iechyd yr amgylchedd ac iechyd y cyhoedd, diwydiant a rhanddeiliaid eraill. Rydym yn cyhoeddi llyfrau a chylchgronau, yn cynnal digwyddiadau addysgol ac yn comisiynu ymchwil.

Fel **corff dyfarnu**, rydym yn darparu cymwysterau, digwyddiadau a deunyddiau cefnogol i hyfforddwyr ac ymgeiswyr am bynciau sy'n berthnasol i iechyd, lles a diogelwch er mwyn datblygu arfer gorau a sgiliau yn y gweithle ar gyfer gwirfoddolwyr, gweithwyr, rheolwyr busnesau a pherchnogion busnesau.

Fel **mudiad ymgyrchu**, rydym yn gweithio i wthio iechyd yr amgylchedd yn uwch ar yr agenda cyhoeddus a hyrwyddo gwelliannau mewn polisi iechyd yr amgylchedd ac iechyd y cyhoedd.

Rydym yn **elusen gofrestredig** gyda dros 10,500 o aelodau ledled Cymru, Lloegr a Gogledd Iwerddon.

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.

The Chartered Institute of Environmental Health (CIEH) welcomes this consultation by the Enterprise and Business Sub Committee and the Health and Social Care Sub Committee on The Smoke-free Premises etc. (Wales) (Amendment) Regulations 2012 . We provided a response to the consultation in March 2012 on the same subject, a copy of which is appended as Appendix 1. We very much welcome the fact that Welsh Government is reconsidering this issue and the proposed amendment in detail as, for the reasons we outline we are strongly opposed to the proposed Amendment Regulations.

We answer the questions asked in the order of raising and thereafter make further comments which we trust will be of assistance to both committees in their consideration of this issue.

1. Will this amendment achieve its aim of supporting the television and film industry in Wales?

In the view of the CIEH there is no proven evidence that this amendment will achieve its stated ambition. Where film companies and television companies have given costing purporting to show the cost of transferring production from Wales to England or elsewhere to film scenes depicting smoking all of the costings are speculative, and are not based in fact. Whilst there is no doubt were they to have to transfer production there would be some cost, and that the proposed amendment would assist in them not having to incur the costs and therefore support the industry, there is no evidence that they have done so, nor that they intend to do so.

We argue to the contrary. Wales has been the location of choice for film and television programme makers, notwithstanding the fact that smoking in film sets and television studios is prohibited. The BBC has invested a reported £25 million in new studios at Roath Lock, has transferred filming of major series such as Casualty and has made major series such as Upstairs Downstairs and Dr Who in Wales since the ban has been in place. There is no suggestion it was deterred from doing so or that its ambitions will be in anyway curtailed by the ban on smoking on the film and television sets.

It is relevant to note that in its report 'The Economic Impact of the UK Film Industry' in September 2012 produced for the British Film Industry Oxford Economics' uses as a case study the developing film industry in Northern Ireland, where the same prohibition on smoking on film sets and television studios exists as is in Wales. The report highlights increased investment, aggressive marketing and government support as being factors that are seeing driving continued growth, with return on investment of £6 for every £1 invested, but does not suggest that the prohibition on smoking is in any way damaging to the success

or prospect of continued growth. We suggest that there is no reason to believe that the firm and television industry in Wales cannot enjoy the same success in the same circumstances and that the proposed amendment is not necessary to secure it.

There may be speculative and unproven claims that the television and film industries would benefit from the proposed amendment but it is the view of the CIEH that such benefits would be minimal and that there is no necessity, neither would it be proportional for Wales to compromise its health ambitions in support of such unproven claims.

2. Is there sufficient clarity about the circumstances in which the exemption applies?

CIEH believes that the circumstances in which the exemption applies are not at all certain. Whilst the wording of the exception is clear, in that it will apply *'where the artistic integrity of the performance make it appropriate for a person who is taking part in a performance to smoke ...'* those circumstances will vary from production to production, and the question of whether the artistic integrity of the performance requires a person to smoke will be highly subjective and may vary from Director to Director.

It is also the case that the Explanatory Memorandum to the proposed legislation suggests that smoking will only be allowed in the final 'take' of any film or television production, but it is impossible for a director or producer to be able to say with any degree of confidence that anyone take is the final version that will be used, and he or she may only make that decision after viewing a number of takes of the same scene in which case smoking would have to take place in all of the takes. It is also the case that the same scene has to be shot from a number of different angles, such that a relatively short piece of footage may take a long time to film, and for continuity purposes smoking would have to be consistent throughout the whole of the filming.

We believe that there is insufficient clarity about the circumstances in which the exemption would apply, that it would be easy to circumvent the protection that claimed in the Explanatory Memorandum and that the subjective nature of decisions around artistic integrity and the appropriateness or otherwise of smoking in a performance would have the effect of meaning that the exemption would be a virtual *carte blanche* for smoking during filming.

3. Do the conditions offer adequate protection to other performers, production staff and members of the public?

No. For the reasons outlined in our response to Q2 above we believe that smoking could continue throughout the making of a film or television production. That being the case any other performers, production staff, members of studio audience including children would be exposed to tobacco smoke and are afforded no protection other than in the case of audience members to leave.

4. Might there be any unintended consequences of introducing this exemption?

The CIEH considers that there are a number of potential unintended consequences, some of which have considerable financial implications.

Enforcement of the legislation lies with local authorities. Given the highly subjective nature of decisions as to whether smoking is necessary for the artistic integrity of a performance it will be impossible to build up any guidance as to the circumstances in which smoking is permitted, and where there is a dispute between the enforcing authority and the producer of production it will be for the Magistrates Court to determine whether the smoking was a lawful or unlawful activity. Film companies will be in a significantly stronger position financially than local authorities which may have the effect of discouraging enforcement and thereby putting the health of performers, production crew and audiences at risk.

It is also the case that Magistrates will have no expertise as to whether a performance is such that smoking is required and will have to rely on expert evidence. We can foresee a circus of 'experts' in theatre and television performances springing up and being used in the courts to argue the question of necessity. This will be expensive and time consuming and

given that each production is different and each Producer will have his own ideas will not even contribute to establishing a series of precedents which enforcers and producers could look to for guidance in future productions.

All of the foregoing presupposes that local authorities would have the available resource to police the production of television and films productions for smoking on set, which in the current economic climate we suggest is unlikely. This would mean that the television and film industry would be free to use the exemption in a largely unregulated way, and in doing so would compromise the health of people working in the industry in a way that is not permitted in any other industry.

5. What health policy considerations are relevant to this amendment?

This amendment is directly contrary to the Welsh Governments' identified key theme in Our Healthy Future to further reduce the number of people who are exposed to second-hand smoke in Wales. It also undermines one of the 4 key areas in the Tobacco Control Action Plan, being to reduce exposure to second hand tobacco smoke.

Other key planks of the Tobacco Control Action plan are to reduce uptake of smoking particularly among young people and children and to reduce the number of people who smoke. We have argued, and continue to argue that depiction of smoking in film and television productions had the effect of normalising smoking and making it socially acceptable, and therefore object to its depiction onscreen. We recognise however that this is not an argument against the proposed amendment since it is possible to effectively simulate smoking using props or computer simulation both of which can be done without compromising the health of those surrounding the 'smoker'.

The CIEH strongly opposes the proposed amendment to the legislation as being unnecessary, disproportionate and impossible to enforce. We urge both Welsh Government committees to recommend that the amendment be withdrawn or to recommend that it be opposed.

We would be happy to provide such further evidence or comment as the Committees would consider helpful and would be happy to give oral evidence should that be required.

Julie Barratt

Cyfarwyddwr yng Nghymru
Sefydliad Siartredig Iechyd yr Amgylchedd

Ffôn symudol 07919 212664

E-bost j.barratt@cieh.org

Cwrt Glanllyn

Parc Llantarnam

Cwmbran NP44 3GA

Ffôn 01633 865533 **Ffacs** 01633 485193

www.cieh-cymruwales.org

Julie Barratt

Director of CIEH Wales
Chartered Institute of Environmental Health

Mobile 07919 212664

Email j.barratt@cieh.org

Lakeside Court

Llantarnam Park

Cwmbran NP44 3GA

Telephone 01633 865533 **Fax** 01633 485 193

www.cieh-cymruwales.org

Consultation response form

Your name: Julie Barratt

Organisation (if applicable): Chartered Institute of Environmental Health

e-mail/telephone number: j.barratt@cieh.org 01633 865533

Your address: CIEH Wales Directorate, Lakeside House, Lakeside Court, Llantarnam Parkway, Cwmbran, NP44 3GA

Responses should be returned by 16 March 2012 to:

**Life Course Branch
Welsh Government
4th Floor
Cathays Park 2
Cardiff
CF10 3NQ**

or completed electronically and sent to:

e-mail: TobaccoPolicyBranch@Wales.gsi.gov.uk

Responses to consultations may be made public – on the internet or in a report. If you would prefer your response to be kept confidential, please tick here:

Questions

► Question 1: Should the Smoke-Free Premises etc. (Wales) Regulations 2007 be amended to permit smoking by performers where the artistic integrity of the performance makes it appropriate for the performer to smoke? **No**

Are the proposed Regulations adequate enough to avoid misuse of the exemption?

No. The regulations state that 'where the artistic integrity of the performance make it appropriate for a person who is taking part in a performance to smoke ...etc

There is no definition of artistic integrity which is a subjective judgement. In the view of CIEH the concept of artistic integrity of the performance is likely to be the cause of disagreement between enforcers and film and television producers which will lead to legal challenge and action.

In the Explanatory Memorandum there is a suggestion that smoking will not be permitted during rehearsals, only during the final performance. We wonder how it will be possible for a director to determine which 'take' will be the final version – very often a considerable number of takes are required from a number of angles before the final version of the scene or part of it is selected. This means that there are potential opportunities for the legislative restriction to be circumvented.

► Question 2: Are the conditions required by this exemption sufficient to minimise the risk of exposing others to second-hand smoke?

No. Following on from our response to Q1, it will be for the director of programmes to decide whether it is necessary for the 'artistic integrity' of a programme for the characters in it to smoke, therefore the degree to which others on and around the set are exposed will be a matter for him/her, and could, subject to his/ her interpretation of the artistic needs of the production be significant.

► Question 3: Are the provisions to protect children from exposure to second-hand smoke within the proposed Regulations sufficient?

No. There regulations will only apply during the smoking of the tobacco product, but can be present immediately afterwards, where elevated particulate levels may still affect them.

We further take the view that the proposed regulations would be seen as the thin edge of a wedge and that the Welsh Government will be called on to make further amendments to legislation to allow children to be seen around characters who are smoking or even to be seen smoking where the 'artistic integrity of the performance' is deemed to demand it.

► Question 4: Will the provisions in the proposed Regulations be able to be enforced effectively?

No, due to the fact that 'artistic integrity of the performance' is incapable of definition other than in a highly subjective way.

► **Question 5: The Welsh Government will provide Guidance to support the implementation of the proposed exemption: will this support be sufficient to assist with the interpretation of the conditions of the exemption (for example, the requirement for ‘artistic integrity’)?**

No. Irrespective of the content of Guidance it is guidance only and whilst all parties may have regard to it the question of when smoking is required will be a decision at first instance for the director of a performance. If this decision is challenged it will be for the local authority to establish in a court of law that smoking was not necessary for the performance and to do so to the necessary criminal standard of proof.

In our view film companies and their financial backers will be in a position to financial such actions, whilst local authorities have not got the financial resources to take on potentially expensive litigation. It is also the case that each case would have to be determined on its own merits and the requirements of ‘artistic integrity’ would fall to be determined in every case. We can anticipate a very expensive circus of ‘expert witnesses’ as to what are and what are not the requirements of artistic integrity springing up, which would be undesirable.

► **Question 6: Does the draft Regulatory Impact Assessment accurately reflect the costs and benefits of the proposed Regulations? If not, please provide additional information to support your answer.**

No. We do not accept that there is a *necessity* to transfer filming of schemes to England as suggested, rather there is a choice to do so and costings are provided based in film producers choosing to do so. We point to our comments made in our response to the last question of this consultation.

► **Question 7: Do you think there would be any negative impact on individuals or communities within Wales on the grounds of: disability; race; gender or gender reassignment; age; religion and belief and non-belief; sexual orientation; pregnancy and maternity; marriage and civil partnerships; or Human Rights as a result of the proposed Regulations?**

No

We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them:

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There is no justification for the *reason* for these regulations. It cannot be argued

that the film and television industry in Wales, which is capable of producing films and television programmes of the highest standard, involving scenes of injuries and disasters is incapable of replicating the smoking of a cigarette or a pipe.

It is not correct to suggest that the only way for a character in a film or television programme to be shown smoking is to allow them to smoke as is suggested in para 1.6 of the Explanatory Memorandum. There is no suggestion that where a character is seen being stabbed or shot that the artistic integrity of the performance requires that they should be stabbed or shot, or that for artistic integrity purposes a character shown taking drugs intravenously should actually be doing so, such activities are capable of being acted using props and special effects. There is no reason why smoking tobacco cannot be replicated in the same way.

We are also concerned that allowing this exemption will encourage a creeping need for further exemptions, for example in live performance. It is not difficult to see an argument being made to the effect that if the artistic integrity of a performance of a play produced for television requires the performers to smoke that same position would appertain if the play was to be performed live in front of an audience.

To suggest as justification for these regulations that if Wales does not go down this route film and television production will transfer to England where the protection afforded by regulations in force is less than currently in Wales is to put us in a position where, irrespective of the initial view of the Welsh government about the needs of Wales, we will fall in with the position in England should sufficient pressure be brought to bear on Welsh Government. The restriction on smoking in performances was introduced on solid health grounds and there is no health evidence to support any amendment to or dilution of the restriction.