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THE PUBLIC HEALTH RISK FROM PASSIVE SMOKING: WHY OUR LEGISLATORS SHOULD ACT NOW

In October 1998's *Health Care Risk Report*, Stephanie Pywell demonstrated the piecemeal state of English law on smoking in public and argued that unifying legislation was necessary to protect public health. In this article she contends that such regulation is both feasible and desirable.

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The public health risk from passive smoking has now been established by the Government's Scientific Committee on Tobacco and Health¹. Public opinion has favoured regulation of smoking in public places for some years, and media reports suggest that anti-smoking feeling is stronger now than ever before. This article reviews such evidence as is available of UK political attitudes to anti-smoking legislation. It also demonstrates that EC law is apparently supportive of legislation to regulate smoking in public places, and considers the success of such measures in other jurisdictions. Why, therefore, do our usually enthusiastic legislators refuse to grasp this obnoxious nettle?

Public Opinion

The **Department of the Environment** commissioned **National Opinion Poll Social and Political** to conduct investigations into smoking in public places in 1993 (NOP1)² and 1996 (NOP2)³. Public opinion was canvassed only in the former, which showed majorities of 66% to 98% in favour of banning or restricting smoking, with the higher results relating to "places visited out of necessity or to receive a service", such as shops and health centres. Even in places where smoking is currently extremely common, freely permitted smoking is favoured by minorities: 40% for betting shops and 22% for pubs, clubs and bars.

67% of respondents felt that the government should do more to reduce involuntary exposure to environmental tobacco smoke (ETS): favoured suggestions included encouragement of smoke-free areas (23%) and legislation banning smoking in all public places (19%).

¹ *Department of Health; Department of Health and Social Services, Northern Ireland; The Scottish Office Department of Health; The Welsh Office: Report of the Scientific Committee on Tobacco and Health, Chairman Professor David Poswillo, London, The Stationery Office 1998*

² *NOP Social and Political for the Department of the Environment: Smoking in Public Places Survey Report, London HMSO 1993*

³ *NOP Social and Political for the Department of the Environment: Smoking in Public Places Second Survey Report, London HMSO 1996*

This weight of public opinion in favour of banning or restricting smoking in public places may seem surprising in view of the lack of widely disseminated evidence relating to the harm caused by passive smoking at the time the survey was conducted. This discrepancy may be explained by two factors: the desire of many smokers to give up smoking, which can be assisted by statutory restrictions, and the harmless but unpopular effects of ETS such as smarting eyes, an enduring smell on clothes, skin and hair, and the altered taste of food and drink. It seems likely that the recent medical findings about the risks of passive smoking would strengthen such anti-smoking feeling.

The response to those libertarians who cry that regulation of smoking infringes personal freedom must be that unregulated smoking infringes others' right to breathe smoke-free air and hence their right to an environment which will not damage their health.

The Attitude of the UK Government 1992 - 1997

The last **UK Government** formally accepted, in its 1991 Code of Practice "Smoking in Public Places" (CP), the conclusion of the 1988 **Froggatt Report** that non-smoking should be the norm in enclosed public places. Claiming commitment "to creating a non-smoking environment, with facilities where appropriate for those who wish to smoke", it hoped that **CP** would contribute to the implementation of EC Resolution 89/C189/01⁴. **CP** accepts that most people comply with sensible smoking policies, and says that smoking should be banned completely where the public attends out of necessity or to receive a service. In places attended voluntarily the Government "expects efforts to be made to cater for the interests of the non-smoker".

The **Department of the Environment's** latest submission to the EU⁵ in response to Resolution 89/C189/01 stressed the previous Government's preference for a voluntary approach, and cited data from **NOP1** showing that 66% of relevant establishments had a smoking policy⁶. The Tory Government therefore sent letters drawing attention to **CP** to 34,000 owners of public transport, restaurants and pubs, "urging them to introduce smoke free environments".

It is intriguing that the last UK Government did not support its avowed aims with legislation. **Hutton** (1995)⁷ describes Conservative affection for *laissez-faire* and "the teachings of neo-liberal economics, with the emphasis that the general good can only result from the free interplay of supply and demand", and this free market ideology may explain the apparent discrepancy in attitude.

⁴ See below in the section entitled *EC Law*

⁵ A copy of the undated submission was sent to the author on 19 August 1996.

⁶ The Introduction to **NOP2** alludes to the Government's target of such policies existing in 80% of public places by the end of 1994; this is not mentioned in the submission to the EU

⁷ *Hutton W: The State We're In*, Jonathan Cape, London 1995

New Labour's Stance

In 1993 **George Foulkes MP** introduced a bill to make workplace smoking illegal, including provision for staff who disliked tobacco smoke to refuse to work in areas affected by ETS. It did not receive a second reading.

Tessa Jowell MP's Tobacco Smoking (Public Places) Bill received its first reading on 14 December 1994. It did not receive a second reading due to lack of Parliamentary time. The Bill would have banned smoking in all enclosed public places, including workplaces, except in designated smoking areas.

In office, however, Labour has been more reticent. Ms Jowell, in her rôle as Minister for Public Health, has described the findings of recent meta-analytical studies on the effects of ETS⁸ as "shocking", yet has stated that the Government is merely "considering action" to promote voluntary smoking restrictions in public places⁹. The change in Ms Jowell's attitude since 1994 is difficult to explain, particularly since the prohibition of smoking in public places would not appear to involve significant expenditure.

One reason for both the present and former governments' reluctance to legislate against smoking may be the revenue which is received from tobacco: £8 billion annually, which is equivalent to a sixpenny increase in the basic rate of Income Tax¹⁰. This political issue cannot be explored within this article.

EC Law

Various EC and EU instruments have indicated a desire to protect the public from ETS. The Council published on 7 July 1986 a **Resolution**¹¹ on an anti-cancer programme whose first priority was to limit and reduce the use of tobacco, via methods including the enforcement of no-smoking rules and the extension of no-smoking areas. This **Resolution**, before knowledge about the risks of passive smoking was widespread, suggests that the Council was keen to take a lead in this area, but a Resolution has no binding legal effect .

Directive 89/654¹² requires employers to introduce into workers' rest rooms "appropriate measures ... for the protection of non-smokers against discomfort caused by tobacco

⁸ Cited in Pywell Stephanie: *The Public Health Risk from Passive Smoking: An Inadequate Patchwork of Protection from English Law*, [PLEASE INCLUDE REFERENCE TO EARLIER HCRR ARTICLE!!!!]

⁹ "The Guardian", 18 October 1997

¹⁰ "The Guardian", 11 February 1997

¹¹ Official Journal C184, 23/07/86, p 0021

¹² Important corrigendum in Official Journal L393, 30/12/89 p 0001

smoke." If no rest rooms are provided, but work is frequently interrupted, workers must have access to rooms where similar conditions apply. The effect of a Directive is to impose upon each Member State (MS) a duty to achieve the specified end by whatever legislative means that MS's legislature deems appropriate.

On 18 July 1989 the Council published **Resolution 89/C189/01**¹³ "on banning smoking in places open to the public". The Preamble alludes to the potential encouragement to smoke which exists in the absence of a ban, the nuisance smoke causes to non-smokers, and the risk of respiratory illnesses for those involuntarily exposed to tobacco smoke. MSs are invited to ban smoking in a wide class of enclosed public premises, extend the ban to public transport and provide clearly defined smoking areas "where necessary". Where there is conflict, "the right to health of non-smokers prevails over the right of smokers to smoke". It is regrettable that this laudable aim was part of a non-binding Resolution; one UK submission in response to it has been discussed above.

The European Parliament and Council published a **Decision** on 29 March 1996¹⁴ which included "[e]ncouraging projects with a European dimension relating to the prevention of tobacco consumption in public places, particularly on public transport and in education establishments." Unfortunately a Decision, like a Resolution, has no binding legal effect in MSs.

The Council's apparent belief in the necessity of anti-smoking measures is curiously at odds with its reluctance to force MSs to enact appropriate legislation, yet fully in accord with the reticent attitude of present and recent UK governments. It does seem, however, that any anti-smoking measures adopted by MSs would meet with the Council's approval.

Other Jurisdictions

Roemer (1993)¹⁵ regards legislation as a necessary but not sufficient condition in the effective control of tobacco, and cites a study¹⁶ concluding that legislative programmes were more successful than voluntary agreements in containing and reducing smoking levels¹⁷. The purposes of such control include accepting non-smoking as the social norm and protecting non-smokers' health and right to breathe clean air. Restrictive legislation inevitably involves constraints on smokers' liberty, as discussed above; **Roemer** considers such considerations to be outweighed by governments' responsibility for the welfare of whole societies.

¹³ *Official Journal C189*, 26 July 1989, p 0001

¹⁴ *Official Journal L095*, 16/04/96, p 0009

¹⁵ *Roemer R: Legislative Action to Combat the World Tobacco Epidemic*, World Health Organisation, Geneva 1993

¹⁶ *Cox and Smith*, 1984

¹⁷ *This study did not relate only to the regulation of smoking in public places*

Within Europe, smoking is now banned in all or most enclosed public places in thirteen countries. The UK uniquely has no statutory restrictions applying to any complete category of public place; four countries restrict smoking in only one or two categories¹⁸. This failure to conform to what are becoming legislative norms clearly cannot be attributed to the UK's island status, nor to our desire to retain the Queen's head on our currency.

Beyond Europe, smoking in public places is now banned or restricted in *inter alia* Canada¹⁹, New Zealand²⁰, some Latin American countries and 43 States in the USA, where the trend began in Minnesota²¹. It is true that some jurisdictions' anti-smoking laws are largely ignored in places such as bars, but **NOP2** concludes that in the UK there is 94% compliance with smoking restrictions, although sometimes they need to be pointed out to smokers. This suggests that widespread disregard of hypothetical UK legislation would not be a major problem.

Roemer (1993)²² notes the importance of supporting anti-smoking legislation with publicity, and linking legislation with information and health education. It is noteworthy that only 18% of respondents to **NOP1** were aware of **CP**, and only 4% had seen **CP**. Correction of this prevalent ignorance cannot be beyond the wit of a government committed to “education, education, and education” as well as a healthier nation.

Conclusions

This article has demonstrated that the coherent legislation necessary to eliminate the public health risks posed by passive smoking would be supported in principle by public opinion and the EU, and would probably be widely obeyed. Other jurisdictions within and without Europe have left the UK behind on this issue. We can only wonder what will be necessary to change the government's emphasis from reliance upon unenforceable voluntary measures to the unambiguous and wide-ranging statutes they proposed whilst in opposition.

¹⁸ Roemer, 1993, *op cit*

¹⁹ 1988 - *Non-smokers' Health Act, eliminating ETS from workplaces and transport under federal control*

²⁰ 1990 - *Smoke-free Environments Act, restricting smoking in public transport and some public places, and requiring employers to implement smoking policies*

²¹ *Clean Indoor Air Law, 1975*

²² *Op cit*