

Submission

No 45

INQUIRY INTO TOBACCO SMOKING IN NEW SOUTH WALES

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Summary

Submission to the NSW Parliament Joint Select Committee on Tobacco Smoking

Inquiry into tobacco smoking in New South Wales

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1. Introduction

The Public Interest Advocacy Centre (**PIAC**) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works cooperatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

PIAC has engaged in public interest matters relating to health and health care services since its inception. In 1994 and 1995, PIAC developed the draft Australian Consumers' Charter as a consultant to the Federal Government. Since then PIAC's work on health issues has focussed on campaigning for legally protected rights for privacy and access to personal health records, and consumer participation in health care decision making.

In recent years, PIAC has provided advice and assistance to the NSW Cancer Council and Action on Smoking and Health (**ASH**) Australia in order to promote positive public policy initiatives to minimise the public's exposure to environmental tobacco smoke (**ETS**) and passive smoking and to expose deficiencies in legislative regimes implemented to address these issues.

It is in the context of this ongoing work that PIAC is making a submission to the inquiry into tobacco smoking in NSW (**the Inquiry**), and PIAC welcomes the opportunity to share its views with the Parliament Joint Select Committee on Tobacco Smoking on the important subject of passive smoking and public health.

This submission addresses the following terms of reference:

- c) the effect of smoke-free indoor venues on the initiation and maintenance of the smoking habit;
- d) factors affecting initiatives for smoke-free indoor areas.

In addressing these issues, this submission focuses on the impacts of the *Smoke-free Environment Amendment (Enclosed Places) Regulation 2006* (NSW) (**the Regulation**) under the *Smoke-free Environment Act 2000* (NSW) (**the Act**).

PIAC considers that it is in the public interest that the health and safety of the people of NSW should not be compromised through exposure to ETS and passive smoking in enclosed or partially enclosed public places. PIAC is concerned that the Regulation effectively sanctions continued

exposure of the public to the harmful effects of ETS and passive smoking in licensed premises. This is inconsistent with the purported aims of the Act and also with NSW Government health policy in this area.

2. The community impacts of smoking

It is well known that tobacco smoking is the leading cause of premature death in NSW.

Smoking takes an enormous social and economic toll on the people of NSW. In 2002, there were over 6,608 deaths in NSW caused by tobacco smoking.¹ It has been reported that, in 1998-1999, tobacco smoking cost the NSW health system 254 million dollars.²

It is also well known that not only smokers themselves suffer from the health consequences of tobacco smoking; ETS contains approximately 4,000 chemicals, of which at least 60 are known to cause cancer.³ ETS presents a significant risk of harm to members of the public exposed to ETS, especially those employees who are exposed on a regular basis in their work environment. Estimates suggest that between 73 and 97 deaths are caused annually as a result of workers' exposure to ETS in the NSW hospitality industry.⁴

Passive smoking can have harmful effects on those exposed to it, especially over prolonged periods. This strengthens the case for limiting the places and situations in which smoking is permitted, especially in places of employment.

As was pointed out in the Medical Journal of Australia 10 years ago:

“Vulnerable groups in society -- infants, children and adults with asthma and other respiratory conditions, and individuals with established cardiac disease -- are most affected by exposure to ETS. Workplaces where smoking is still allowed, including hotels and restaurants, are also a special case because the passive smoking by employees in these enterprises is often involuntary.

*What is now the appropriate public policy response to more than two decades of careful scientific research into the risks associated with passive smoking?”*⁵

3. The effect of smoke-free indoor venues on the initiation and maintenance of the smoking habit

In PIAC's view, measures that effectively ban smoking in enclosed and partially enclosed public places are an effective strategy for reducing tobacco use and the impacts of passive smoking. These

¹ Public Health Division, *The health of the people of New South Wales: Report of the Chief Health Officer* (2004), <http://www.health.nsw.gov.au/public-health/chorep/toc/choindex.htm>. Accessed 18.4.06

² D J Collins and H M Lapsley, *Counting the costs of tobacco and the benefits of reducing smoking prevalence in NSW* (2005) pg. 8

³ NSW Parliament, *Parliamentary Debates*, Legislative Council, 17 November 2004, (Henry Tsang MLC).

⁴ J L Repace, *Estimated mortality from secondhand smoke among club, pub, tavern, and bar workers in NSW* (2004) pg 3

⁵ Woodward A, & Jamrozic K, *Passive smoking: what are the limits to liberty?* Medical Journal of Australia 1996 164:260

initiatives discourage people from smoking, and also make it less convenient to maintain the smoking habit. For example, a total ban in pubs and clubs would mean that social smokers would be less likely to initiate smoking. If cigarettes are less accessible and less acceptable in a social environment, fewer people will engage in social smoking, and therefore fewer people will take up smoking on a more regular basis.

PIAC supports the creation of smoke-free indoor venues through legislation that bans or phases out smoking in such venues. PIAC welcomes the initiatives that have been taken in NSW to implement bans on smoking in many indoor venues, including shopping centre, theatres, cinemas and on public transport. However, PIAC such initiatives are yet to be fully and effectively implemented in licensed premises, including pubs and clubs.

4. Factors affecting initiatives for smoke-free indoor areas

4.1 The *Smoke-free Environment Act 2000* (NSW) and subsequent amendments.

The main initiative in NSW to implement smoke-free indoor areas has been the *Smoke-free Environment Act 2000* (NSW). The object of this Act (as set out in section 3 of the Act) is to promote public health by reducing exposure to tobacco and other smoke in enclosed public places.

A further initiative was taken in 2004, with the introduction of the *Smoke-free Environment Amendment Act 2004*. According to the Second Reading Speech the purpose of this Act was to amend the *Smoke Free Environment Act 2000* to phase in a prohibition on smoking in enclosed public spaces in licensed premises.⁶

Parliamentary debate at the time focused on the assumption that, from July 2007, the Bill proposed to ban smoking inside all clubs, hotels, night clubs, casinos and licensed premises. The ban was to be phased in from the commencement of the legislation, culminating in a complete ban by 2 July 2007.

Many parliamentarians and members of the community enthusiastically embraced this plan.

The Hon Henry Tsang, a member of the NSW Upper House and a NSW Government Parliamentary Secretary, had the following to say about the Government's position in relation to introducing this ban:

The Government is concerned about the health risks to workers and patrons of licensed premises who are exposed to ETS. The consultative and phased in approach taken by the Government has studied these health risks and also considered the concerns of business proprietors who own or operate business in licensed premises or enclosed public spaces...

Everyone in the community would be aware of the incremental steps that have led up to the proposed ban.

From July 2007, smoking will not be permitted in any enclosed public space in licensed premises.

⁶ *Smoke-Free Environment Amendment Bill*, Second Reading Speech, NSW Legislative Council Hansard, 17 November 2004, page 13004

Most importantly, it is a vital public health initiative that will save lives by reducing the exposure of workers and the public to environmental tobacco smoke. I am pleased to announce that the implementation of the legislation will be accompanied by an extensive advertising campaign. Not only will this advise people about the provisions of the legislation, but it will encourage them to give up smoking.

Support for the Quitline, media campaigns to induce quitting behaviour, and the promotion of pubs and clubs as smoke free work and recreation places, is a key strategy to reduce smoking related harm in the NSW community.⁷

Opposition members responded to the debate with comments such as the following from Don Harwin MLC:

There are a few problems with this bill, but it is a great step forward. One of its problems is that the definition for ‘outdoor area’ was not included in the bill. It has not been, and I am concerned that the health benefits that are expected to flow from this legislation may be watered down by the definition of an ‘outdoor area’ in the regulations. I am sure we have all sat in a coffee shop or restaurant that has a bi-fold door opening on to the pavement, separating smoking patrons outside and non-smoking patrons inside. The patrons inside, in what is supposedly a smoke-free environment, are forced to suffer when the wind carries the cigarette smoke inside. It makes a mockery of the whole idea of a smoke-free environment.

I have absolutely no doubt that most people strongly support smoke-free environments, and in passing this bill tonight we are not only doing something that the latest surveys indicate has the support of 70 per cent of people in the community, we are also doing something that is right, and that is important too. Total indoor smoking bans are certainly supported by the majority of hospitality workers, including musicians and entertainers. Thank goodness they do; they would be mad if they did not. A report to the Cancer Council in April 2004 by Professor James Repace estimates that between 73 and 97 deaths from heart disease and cancer can be attributed to smoky workplaces in New South Wales every year—and 59 of those people are non-smokers.⁸

4.2 *The Smoke-free Environment Amendment (Enclosed Places) Regulation 2006*

As was highlighted in the above speech of Don Harwin MLC, in 2004 the Government was still yet to define ‘outdoor areas’ for the purposes of the legislation. Recent developments have shown that Mr Harwin’s concerns about the lack of a definition of ‘outdoor’ area in the bill were justified.

Earlier this year, the NSW Government introduced the *Smoke-free Environment Amendment (Enclosed Places) Regulation 2006* (NSW). The Regulation prescribes guidelines in relation to determining what is an enclosed public place and when a covered outside area is considered to be “substantially enclosed” for the purposes of the Act.

Here, the distinction between an ‘indoor area’ and an ‘outdoor area’ gets somewhat murky. Most consumers appreciate the distinction between an outdoor and an indoor area in relation to where you may or may not be able to smoke. However, the Regulation will allow smoking in an ‘enclosed space’, or if you like, an ‘indoor/outdoor’ area. This means that as long as an area is not more than 75% enclosed, smoking will be allowed in that area. In PIAC’s view, if a room is only 25% open to the outside air, this is insufficient to protect workers and consumers from the dangers of passive smoking.

⁷ NSW Parliament, *Parliamentary Debates*, Legislative Council, 17 November 2004, (Henry Tsang MLC).

⁸ NSW Parliament, *Parliamentary Debates*, Legislative Council, 17 November 2004, (Don Harwin MLC).

A key factor affecting the definition of an enclosed space seems to be the pressure that has been brought to bear by the pubs and clubs industry, because industry members are concerned with the potential impact on business if a total ban is put in place.

The issue of passive smoking in bars and clubs has been the subject of much debate for many years.

Throughout this debate, many organisations have argued for a complete ban on smoking in bars and clubs, including the Australian Medical Association, and unions representing bar workers, as well as the anti-smoking lobby.

PIAC is concerned that the Regulation is problematic in a number of respects, and that in its current form it will undermine the overall effectiveness of the Act. PIAC's specific concerns regarding the Regulation are that it is:

- inconsistent with the Act;
- lacking in clarity;
- unworkable;
- likely to lead to increased litigation.

These concerns are discussed below.

- ***The Regulation is inconsistent with the Act***

It is clear from the Second Reading Speech to the *Smoke Free Environment Amendment Act* that Parliament intended that the Act reduce the prevalence of tobacco smoke in the environment, thereby protecting employees and the broader community from the impacts of passive smoking. According to Mr Frank Sartor, MP:

“[The Act] is a vital public health measure that will save lives by reducing the exposure of workers and the public to environmental tobacco smoke.⁹”

Section 21 of the Act makes it clear that in NSW there is no right to smoke in an enclosed public place. Indeed, it goes on to state that ‘nothing in this Act is to be construed as creating or preserving a right of a person to smoke in an enclosed public place’.

The practical effect of the Regulation is that smoking will be allowed to continue in outdoor areas that are, in effect, mostly enclosed. This will mean that workers (including bar staff, musicians, entertainers and gaming machine technicians) and patrons will continue to be exposed to second hand smoke in those areas. There is also a risk that smoke from such areas will also be able to penetrate into indoor non-smoking areas. This would appear to be at odds with the intention and purpose of the Act.

- ***The Regulation is unclear***

The wording of the Regulation is cumbersome and overly technical in nature. PIAC submits that it is not clear, from the Regulation, what will, and what will not be, an ‘enclosed space’ under the legislation. Unfortunately, the ‘explanatory note’ accompanying the regulation also fails to provide a very clear explanation of how the ‘enclosed space’ will be determined. It states:

A public place is considered to be substantially enclosed if the total area of the ceiling and wall surfaces of the public place is more than 75% of its total notional ceiling and wall area. In

⁹ Smoke-free Environment Amendment Bill, Second Reading Speech, *Hansard*, page 12095.

determining the total area of the ceiling and wall surfaces, any door, window or moveable structure that is, or is part of, a ceiling or wall is taken to be closed whether or not the door, window or structure is open unless (in the case of a door or window) it is locked fully open and the total area of all such doors and windows do not make up more than 15% of the total notional ceiling and wall area.¹⁰

In PIAC's view, the explanation of how an enclosed space will be determined is verbose, unclear and difficult to interpret. For example:

- 1) What is the 'total notional ceiling and wall area'? How is it determined?
- 2) Are doors and windows included in the total area?
- 3) How is the 15% of the total notional ceiling and wall area determined if doors and windows are not fully locked open?

The definitional uncertainty in the Regulation will make it very difficult for proprietors to determine whether or not they comply with the legislation. In practical terms it will also be virtually impossible for patrons and employees to determine whether or not there has been non-compliance, and, if so, to challenge such non-compliance.

- ***The Regulation is unworkable***

PIAC is concerned that the Regulation, aside from the fact that it contradicts the overarching intention of the Act, will be unworkable.

How will the 75% enclosed rule be implemented and monitored? How does Parliament expect consumers and employers alike to accurately measure and apply this test?

Given that protecting one's health from the impacts of passive smoking is an important issue for many consumers, this Regulation will only confuse, rather than empower, consumers to challenge proprietors in relation to determining what should be a 'smoke-free' area.

- ***The Regulation will result in costly and time-consuming litigation***

PIAC submits that this regulation will, as a direct result of the lack of specificity in determining an 'enclosed place', result in further test-case litigation. The fact that patrons and employees will still not be adequately protected from the impacts of passive smoke will invite challenges to the law.

Logic dictates that if a person smokes in an area that is 75% enclosed that the people around them will still be exposed to ETS. This is clearly not in the interests of the health and well being of employees and members of the public who frequent pubs and clubs in NSW. This is not an insignificant proportion of the population.

Passive smoking cases have played an important role in raising public awareness of the risks of passive smoking and also of the duty of care owed by employers to their staff. An important case in this respect was the *Sharp v Port Kembla Hotel and RSL Club*¹¹ where Marlene Sharp was awarded close to half a million dollars after developing throat cancer after a decade of employment in a smoky environment.

In PIAC's view, because this regulation is unclear, and because it will not protect employees and patrons from the impacts of passive smoking, test case litigation will continue to plague the owners of pubs and clubs. In particular, it is likely that challenges will arise under discrimination and occupational health and safety laws.

¹⁰ *Smoke-free Environment Amendment (Enclosed Places) Regulation 2006*

¹¹ *Sharp v Stephen Guinery t/as Port Kembla Hotel and Port Kembla RSL Club* [2001] NSW SC 336.

Potential discrimination actions

In 1997, *Meeuwissen v Hilton Hotels of Australia Pty Ltd*¹² represented an important passive smoking case under disability discrimination law. The plaintiff asserted that she was required to leave a smoky nightclub after the onset of an asthma attack that was attributed to environmental tobacco smoke. The Human Rights and Equal Opportunity Commission found that by not providing smoke free areas, the Hilton was guilty of unlawful discrimination under the *Disability Discrimination Act 1992* (Cth), and concluded that the only practical way to prevent discrimination was to prohibit smoking in the venue.

Many people who suffer from heart disease and conditions such as asthma, cystic fibrosis or Type 2 Diabetes are unable to tolerate second-hand smoke. These people will effectively be precluded from working in licensed premises in NSW and/or from accessing the goods and services provided by such venues. In PIAC's view, the Regulation will still leave open opportunities for people to make complaints about unlawful disability discrimination under the *Anti-Discrimination Act 1977* (NSW) or the *Disability Discrimination Act 1992* (Cth).

Occupational health and safety (OH&S)

It is highly likely that the Regulation will also leave clubs and pubs exposed to legal challenge for the failure to provide a safe and health work environment, especially if the terms of the Regulation are not strictly followed.

Under the *Occupational Health & Safety Act 2000* (NSW) employers have an obligation to ensure that employees and persons visiting premises are not exposed to risks to their health or safety. This duty includes ensuring that any premises controlled by the employer are safe and without risk to health. According to the National Occupational Health and Safety Commission's *Guidance Note on the Elimination of Environmental Tobacco Smoke in the Workplace*, there is no safe level of second-hand smoke and smoking should only be permitted in areas where there is full open air and natural ventilation. This is at odds with the Regulation, which will effectively allow smoking to continue in areas that are as little as 25% open to the outdoors.

In the absence of unambiguous and easily measured requirements it will be extremely difficult for WorkCover NSW to effectively carry out its function of ensuring compliance with the provisions of the Act. PIAC is concerned that this will undermine the authority and credibility of WorkCover as a regulatory body. On behalf of its clients, PIAC has previously expressed concern to the Minister for Industrial Relations about the failure of WorkCover to respond adequately or appropriately to complaints by employees and patrons in licensed premises about exposure to environmental tobacco smoke on those premises.

5. Benefits of a total ban on smoking

5.1 A total ban will provide clarity and certainty

The only way to achieve certainty from a legal perspective, and also from a community perspective, is to ban smoking in all enclosed (partially or otherwise) public places. Other jurisdictions have managed to implement total bans, and PIAC is of the view that it is in the public interest for NSW to follow suit.

¹² *Meeuwissen v Hilton Hotels of Australia Pty Ltd* [1997] Human Rights and Equal Opportunity Commission, Complaint No.s H97/50 & H97/51 September 25 1997

5.2 Research shows that a total ban will not detrimentally impact on business

The pubs and clubs industry has expressed concern that a total ban on smoking in pubs and clubs will impact on business, and this is a concern that has been articulated throughout the world whenever total bans have been discussed and debated.

Much research has been conducted on this subject. A review of 98 studies conducted around the world on the impact of smoking bans confirmed that the profits of the hospitality industry are not harmed by these initiatives. Indeed, studies show that such bans may even improve profits in the industry.¹³

5.3 NSW could be taking a position of leadership

Some other states in Australia, such as Tasmania and Queensland, have chosen to implement total bans; Tasmania's ban is already in force and Queensland's ban comes into force in July this year.

Many countries around the world have chosen to implement total bans, such as New Zealand, Ireland, Norway and the United Kingdom. Numerous states in the United States of America and provinces in Canada have implemented total bans. It is disappointing, given that NSW was once a world leader in relation to initiatives against smoking in public places, that we have now lagged behind.

5.4 A total ban has majority community support

The Centre for Chronic Disease Prevention and Health Advancement in the NSW Health Department recently conducted a study to assess community opinions on banning smoking in NSW licensed venues.

To complete the study, a series of surveys were conducted throughout 2003, 2004 and 2005, with telephone numbers randomly selected from the NSW electronic white pages.

The study found that a majority of the NSW population supported a total smoking ban in pubs and clubs. The support for smoking bans in clubs increased from 59% in 2003, to 62% in 2004, and 66% in 2005. Similar trends were evident in support for smoking bans in hotels/pubs (54%; 58% and 60%) and bars/nightclubs (54%; 61% and 63%)¹⁴

When asked whether a total smoking ban in all areas of hotels, pubs, bars, nightclubs and registered clubs would make any difference to the number of times they would visit those venues, almost 90% (88% in 2003; 89% in 2004 and 88% in 2005) of respondents said they would visit those venues more often or as often as currently after July 2007.¹⁵

The study concluded that the NSW Government's original policy plan to ban smoking in licensed venues was supported by the majority of the NSW population. The study also concluded that it appeared unlikely that the new policy would have a negative impact on the number of visits to these venues. The study concluded that these results were consistent with the outcomes of other national and NSW surveys on support for smoking bans in licensed premises.¹⁶

¹³ M Scollo *et al*, *Review of the quality of studies on the economic effects of smoke free policies on the hospitality industry* (2003) <<http://press.psprings.co.uk/tc/march/tc022154.pdf>>.

¹⁴ Ming Lin, Margaret Thomas and Julie Mitchell, 'Public support for NSW Government policy banning smoking in licensed venues' (Abstract presentation for the 3rd Australian Tobacco Control Conference) <<http://www.tobaccocontrol2005.com/abstract/66.htm>>.

¹⁵ Ibid.

¹⁶ Ibid.

5.5 Anything less than a total ban undermines public health initiatives

In November 2005, NSW Health released its Tobacco Action Plan for 2005-2009.

The foreword to the Tobacco Action Plan reads as follows:

The World Health Organisation has identified tobacco as the second major cause of death in the world and the fourth most common risk factor for disease worldwide. Remarkable achievements in the reduction of tobacco smoking rates in NSW have taken place over the past 25 years, however tobacco smoking remains the leading single cause of mortality and morbidity in NSW. It is the main or significant cause of many diseases including many cancers and cardiovascular disease. Of all behavioural risk factors, tobacco use (including passive smoking) is responsible for the greatest burden of premature death and disability in NSW...

The goal of the NSW Tobacco Action Plan 2005-2009 is to:

Improve the health of the people of NSW and to eliminate or reduce their exposure to tobacco in all its forms.¹⁷

If the aim of NSW Health is to eliminate or reduce exposure to tobacco in all its forms, the Government has contradicted this aim with the introduction of the Regulation. The Regulation will allow members of the community and employees to remain exposed to passive smoking in enclosed public places in licensed premises. The Regulation will actively work against NSW Health's key aim for the NSW Tobacco Action Plan 2005-2009.

6. Conclusions & recommendations

The Public Interest Advocacy Centre calls for clarity in this area of the law, and for a total ban on smoking in pubs and clubs, in all public indoor areas and all partially enclosed places. The current definition of 'enclosed place' will still expose workers and members of the public to significant health risks through passive smoking.

Anything less than a total ban compromises the health and safety of the general public, as well as the employees of pubs and clubs. The Public Interest Advocacy Centre is of the opinion that a total ban on smoking in pubs and clubs is in the public interest.

PIAC calls on the NSW Parliament Joint Select Committee on Tobacco Smoking to support the following recommendation:

RECOMMENDATION

That the *Smoke-free Environment Amendment (Enclosed Places) Regulation 2006* be repealed and replaced by a regulation that more appropriately protects the NSW public from the effects of passive smoking, as well as providing greater clarity for industry. A total ban on smoking in all enclosed, or partially enclosed public places would be the appropriate level of ban.

¹⁷ NSW Health, *NSW Tobacco Action Plan – A Vision for the Future* (2005) pg 3