



Cancer Council New South Wales: Response on Smoke-Free Environment Regulation 2016

To Whom It May Concern

Thank you for the opportunity to submit on the Draft Smoke-free Environment Regulation 2016 (the Draft Regulations)

Overview

The vision of Cancer Council NSW is *Together we will beat cancer*. A priority in achieving this vision is preventing cancer by encouraging people to lead healthy, cancer-smart lifestyles. The dangers of smoking are well known, with two out of three smokers dying of smoking related illness.¹ However, even those that don't smoke are at risk of premature death and disability from exposure to secondhand smoke (SHS).² Evidence clearly shows there is no safe level of exposure to SHS and the NSW Minister of Health emphasised this fact during the passage of the Tobacco Legislation Amendment Bill in 2012.²⁻⁴ It is therefore crucial to reduce, or where possible prevent, exposure to SHS to protect public health.

The primary objective of the Smoke-free Environment Act 2000 (the Act)⁵ and the associated Smoke-free Environment Regulation is to protect public health by reducing exposure to SHS in public places. Despite the intention of the Act and campaigning by Cancer Council NSW to ban smoking in enclosed public places and certain outdoor public areas, the definition and calculation of a 'substantially enclosed space' provided in the Smoke-free Environment Regulation 2007 is open to interpretation and this has resulted in closed, indoor spaces being considered outdoor areas where smoking is permitted. The NSW Ministry of Health (the Ministry) is currently consulting on the draft Smoke-Free Environment Regulation 2016 (the Draft Regulation) which would replace the current 2007 Regulation. Cancer Council NSW argues that the draft Regulation fails to protect the public from exposure to SHS.

The current Regulation does not work as intended, and this has been confirmed through court cases (the Blacktown Workers Club caseⁱ and the Dubbo RSL Memorial Club caseⁱⁱ). The outcome of the Blacktown Workers Club case is that it has limited the Ministry's ability to prosecute other venues under the Act due to the treatment of the guidelines in the court rulings. This is a significant issue because it effectively renders the current Regulation unenforceable due to the definition of an enclosed space. A space that is 72:25 ratio of closed to open space is not considered enclosed. In addition to the other issues caused by the obscure 75:25 definition of enclosed, which is continued in the Draft Regulation, the result is that exposure to SHS continues to impact on the health of the public and hospitality workers.

The Draft Regulation makes only minor adjustments to the existing Regulation but would largely maintain the current regulatory environment. The current Draft Regulation continues the insufficient, narrow description of 'enclosed' which means that smoking is permitted in areas that an average person would describe as 'enclosed' or inside. In these areas, smoke is

ⁱ Blacktown Workers' Club Ltd v. O'Shannessy [2011] NSWCA 265

ⁱⁱ Dubbo RSL Memorial Club Limited & Anor v. Steppat & Ors [2008] NSWSC 965]

not easily dispersed, which means people are being exposed to SHS in areas that they believe are safer (because they meet the Ministry of Health's requirements) than they actually are.

The Draft Regulation does not resolve any of the significant issues with the current Regulation. Cancer Council NSW strongly argues that a new draft Regulation is created to address these issues and take active steps to protect the public and hospitality workers from exposure to SHS.

The Ministry has released a Regulatory Impact Statement (RIS) to support the Draft Regulation. The RIS notes that legislative objective of the Regulation "should be to promote public health by reducing public exposure to environmental tobacco smoke in enclosed public places." Within this context of protecting public health, Cancer Council NSW argues that the RIS is flawed because it:

1. Overstates the value of the current Regulation in protecting public health
2. Largely discounts the view of Cancer Council NSW and the Ministry position that the current regulation does not perform as originally intended and is unenforceable
3. Undervalues the impact on public health in favour of 'consistency' and 'flexibility' for industry
4. The RIS explores benefits of the court imposing a stricter definition of an enclosed public place but ignores the benefits of using the regulation to impose a stricter definition.

The RIS is therefore of limited value for presenting the costs and benefits of potential options to replace the current Regulation. The resulting conclusion, that the status quo is the preferred option, undermines the evidence presented in the RIS that outlines the damage caused by SHS and the need for government intervention. Thus, the Government needs to do more than reword a poorly constructed and unenforceable regulation and make changes to the Draft Regulation that will reduce exposure to SHS.

This submission responds to the shortcomings of the RIS and provides alternative analysis of Options that could better meet the purpose of the Act.

LONG TERM POSITION OF CANCER COUNCIL NSW

Cancer Council NSW suggests that the Act is rewritten in the spirit of the Act to ensure that a substantially enclosed space is defined on the basis of smoke not being able to escape from such an area. As a priority, anywhere with a roof should be smokefree. However, the definition of enclosed should include places that prevent the dispersion of smoke such as a courtyard where there are high walls on all four sides.

Cancer Council NSW suggests the following changes:

- Banning smoking in any place that impedes the dispersal of smoke including, areas that have an impervious ceiling or other structure that impedes the upward dispersal of smoke or walls of a height that impedes the lateral dispersion of smoke.

- Banning smoking in areas where food and drink are consumed (whether indoor or outdoor).
- Active management of smoking areas – this involves licensees developing smoking management plans that provide details about smoking areas including how the licensee will minimise the exposure of staff and patrons to SHS smoke.
- Prescribing of areas where smoking is permitted, and non-smoking areas, particularly around doorways and windows, to minimise smoke drifting from smoking to non-smoking areas.

Cancer Council NSW acknowledges that this would require legislative changes to the Act rather than the regulations.

THE CASE FOR REGULATORY INTERVENTION

Danger of Secondhand Smoke (SHS)

The RIS presents a strong case for regulating SHS because the health consequences of smoking and SHS are well established”.ⁱⁱⁱ

The RIS adds that, “SHS has also been shown to have adverse impacts on non-smoking adults and children, and have been linked to numerous illnesses including: stroke, coronary heart disease, impaired lung function, middle ear disease and sudden infant death syndrome.”^{iv} The RIS adds that “[f]or non-smoking staff and patrons of public venues, the potential health risks from exposure to indoor SHS is considerable”.^v The RIS further points out the substantial literature on the economic cost of SHS as it relates to health care cost, loss of productivity, and damage to property as a result of fire.^{vi}

Cancer Council NSW supports the analysis in the RIS that identifies the market failure in the context of smoking regulation on the grounds of information asymmetry/failure, negative externalities (health costs) resulting from exposure to SHS, and institutional failure. Cancer Council NSW agrees that regulation is required in this area due to the level of information asymmetry and the overwhelming evidence outlining the health risks of exposure to SHS.

Building on the analysis in the RIS, Cancer Council NSW adds that air quality in outdoor areas can be just as poor as indoor areas. For example, Minister Skinner, when speaking in Parliament on the issue of Smoke-Free Environment legislation in 2012, cited evidence that the air quality in outdoor smoking areas can be just as toxic as indoor smoking areas.⁶ If outdoor areas can contain unsafe levels of SHS in the air, then it follows that any area that is enclosed would contain even higher levels of SHS. This is supported by research that found SHS levels can exceed prescribed air quality standards in dining and drinking areas as the enclosure increases (i.e. roofs and walls) and when there is little wind movement.⁶⁻¹⁰ Therefore,

ⁱⁱⁱ RIS, p 3.

^{iv} RIS, p 3.

^v RIS, p 4.

^{vi} RIS, p 4.

to protect public health, smoking should only be allowed in outdoor areas that allow smoke to dissipate.

Air quality testing conducted by Cancer Council NSW in Sydney in June 2016 found that the air quality in currently accepted 75:25 enclosed spaces was 4.6 times worse than air quality outside the building, confirming that smoke does not dissipate in these areas. Air quality was determined using the validated measure of SHS smoke – the amount of particulate matter in the size of 2.5 microns in diameter (PM 2.5). A notable finding was that the average particulate matter measured in 75:25 spaces (55.7 ug/m³) was more than double the recognised ambient air quality standard (25 ug/m³).¹¹ This means that people in these spaces and nearby are being exposed to dangerous levels of SHS smoke.

The impact on the public and hospitality workers presents a further reason for strong regulation of smoke-free areas. Research consistently demonstrates that partial smoking restrictions are ineffective and do not sufficiently protect the public or hospitality workers from the effects of SHS.^{12, 13} Partial bans do not clear the area of smoke particles. A Swiss study found that the air quality in non-smoking rooms of venues that allowed smoking elsewhere in the building was very poor and contained twice the levels of dust/smoking particles than rooms in completely smoke-free hospitality venues.¹⁴ In a 2004 study of licensed clubs in Sydney, non-smoking areas that were located beside smoking areas contained dangerous levels of tobacco smoke, similar to some readings taken in smoking rooms.¹⁵

The public are continually being exposed to SHS in pubs and clubs; in the NSW Community Survey on Cancer Prevention (2016)¹⁶ of those who had visited a pub/club/licensed venue, 38% were exposed to someone else's smoke (68% smokers and 38% non-smokers). Hospitality staff working a typical eight-hour shift in pubs and clubs with outdoor areas where smoking is allowed could be exposed to SHS levels that exceed the annual average benchmark of the Australian Environmental Protection Measure for Ambient Air Quality.¹⁰

In addition to the evidence on the harms of SHS, NSW Community support for smoke-free pubs and clubs is as strong as ever. Polling results from 1207 NSW residents in 2015 found that:¹⁶

- 75% of survey respondents support making bars, pubs and clubs totally smoke-free.
- Occasional smokers (41%) were significantly more likely than daily smokers (19%) to support making bars, pubs and clubs totally smoke-free.
- More occasional smokers supported (41%) making bars, pubs and clubs totally smoke-free than opposed it (38%).

Research findings from a sample of 1042 clubs, hotels and bottle shops across NSW found:¹⁷

- 47% of those surveyed supported or were neutral about making bars, pubs, clubs and bottle shops totally smoke-free (52% oppose 11% neutral, 36% support.).

Research from Cancer Council Victoria further supports Australians' desire for smoke-free dining and drinking. When specifically asked about smoke-free outdoor dining areas:¹⁸

- 81% said that when smoking was allowed in areas where they are eating and drinking it stopped them from fully enjoying their meal.

- 65% reported that they would be more likely to go to outdoor drinking and dining areas if they were smoke-free.

Taken together, the information presented in the RIS, reinforced by the evidence gathered by Cancer Council NSW, makes a strong case for government intervention regarding smoke-free environments. Cancer Council NSW agrees with the RIS analysis that there is a clear case for government intervention to protect staff and patrons from exposure to second-hand smoke. And, in addition to the points articulated in the RIS, we note that:

- The industry is clearly either unwilling or unable to respond to market signals to voluntarily create smoke-free environments, even with the accumulation of evidence about community preferences, the evidence of health harm and litigation outcomes.
- Some of the signals that might be expected to prompt a market correction do not exist or are very weak in this environment – the workforce is highly casualised and transient, individuals are at a disadvantage in pursuing litigation against industry, and there is a long lead time between exposure and the diagnosis of some diseases.
- There is substantial power difference between players in the market – individuals who are exposed to SHS smoke will generally need to seek redress as an individual citizen, against a business which has the backing and support of an industry body.
- Arguably, the 75:25 rule has exacerbated the problems of institutional failure (particularly in relation to enforcement of Workplace Health and Safety legislation) and information asymmetry (consumers may believe that the new smoking areas are safe or safer than they really are).

THE FLAWED PREMISE OF THE RIS

The Ministry has released a RIS to support the Draft Regulation. The RIS notes that legislative objective of the Regulation “should be to promote public health by reducing public exposure to environmental tobacco smoke in enclosed public places.” The RIS sets out a base case (allow the regulation to sunset) and three options that are assessed against a range of criteria. The options set out for analysis in the RIS are:

- Base Case - letting the Regulation sunset so that no specific regulatory guidance is provided with respect to guidelines to define what constitutes an enclosed public place and signage requirements;
- Option 1 – remaking the existing Regulation without any changes (the status quo option)
- Option 2 – remaking the existing Regulation with two potential amendments:
 - changes to clarify what ‘opens directly to the outside’ means for determining if a place is enclosed (Clause 6 of the Regulation)
 - changes to clarify what ‘gaps in the wall or ceiling’ are for the purposes of Clause 6(5) of the Regulation

- Option 3 – letting the Regulation sunset as it relates to Clause 6 (i.e. guidelines) but retaining the existing signage requirements.

Cancer Council NSW argues that the RIS is flawed because it:

1. Overstates the value of the current Regulation in protecting public health
2. Largely discounts the view of Cancer Council NSW and the Ministry position that the current regulations do not perform as originally intended and is unenforceable
3. Undervalues the impact on public health in favour of ‘consistency’ and ‘flexibility’ for industry
4. The RIS explores benefits of the court imposing a stricter definition of an enclosed public place but ignores the benefits of using the regulation to impose a stricter definition.

The RIS is of limited value for presenting the costs and benefits of potential options to replace the current Regulation. In particular, the RIS overstates the suitability, and acceptance, of the current Regulation, which leads to the conclusion that the Draft Regulation should be relatively unchanged from the current Regulation. The conclusion in the RIS ignores the fact that the current Regulation is unenforceable and is not performing as intended. This impacts on the entire RIS because the benefits of the current situation are overstated and the benefits of amending the Regulation to impose a stricter definition are either ignored entirely or undervalued.

The RIS touches on the issues with the current regulation but does not take these to their logical conclusion. For example, the RIS comments that “the Ministry notes that although there have only been two court cases related to the enforcement of the guidelines in the Regulation since its 2007 implementation, anecdotally, regulators have been cautious at reaching a ‘non-compliant’ decision upon inspection unless the breach is particularly obvious or egregious, due to the treatment of the guidelines in the court rulings made for each case.”^{vii} Cancer Council NSW view this as a fundamental failing of the current regulation because it is admitting that regulators are uniformly **not** enforcing the regulation due to the Blacktown Workers’ Club case. This demonstrates a major flaw with the current Regulation, and undermines the selection of Option 1 as the best option in the RIS.

The RIS comments that “it is worth noting that some health advocates argue that the current guidelines are difficult to enforce because of the manner in which they are drafted. These views need to be further tested during the consultation period that will be undertaken by the Ministry before a decision is made about remaking or removing the Regulation.”^{viii} This is a major flaw with the RIS as it fails to explore these issues as would be good practice. The result is a RIS that overwhelmingly favours industry and results in a Draft Regulation that does not protect the health of people living and working in NSW.

It is no surprise that the drafters of the RIS found that industry supports the status quo.

^{vii} RIS, p 28.

^{viii} RIS, footnote 7, p vi.

The current regulations allow for the creation of attractive and sheltered areas to accommodate smokers that result in smoking to be allowed in places that do not have sufficient airflow for the SHS to disperse. The RIS notes that “most of the selected stakeholders consulted for this RIS noted that after an initial period of adjustment, the guidelines are now understood, followed and accepted.” However, Cancer Council NSW argues that it is only industry stakeholders that accept the guidelines, as health advocates uniformly argue that the current situation does not operate as intended, is unenforceable, and does not meet the legislative objective of protecting public health by reducing exposure to SHS.

Community sentiment supports Cancer Council NSW’s assertion that the status quo does not protect public health and demonstrates people across the State do not accept the current guidelines defining an enclosed space. Between 17 June – 1 July 2016, Cancer Council NSW encouraged the community to make a submission on the draft Regulations. Of the 1,624 submissions received by Cancer Council NSW, 96.5% supported stronger action than the 75:25 enclosed rooms to protect the community, and people who work in hospitality, from SHS. These submissions have been provided separately to the Ministry.

The RIS clearly articulates the issue with industry arguments regarding stranded assets, whereby investment in smoking areas under the current regulations are not stranded assets as these areas simply become non-smoking areas but still hold significant value as places where food and alcohol can be served. Given the agreement of the position between Cancer Council NSW and the drafters of RIS, it is unclear why the rest of the RIS focuses so much on the industry perspective instead of exploring options that would meet the purpose of the Act.^{ix}

The RIS notes that “none of the specified alternative approaches to defining what constitutes an ‘enclosed public place’ deliver an optimal outcome” but did not explore further options. The RIS further notes that a “stricter definition of enclosed public place could potentially bring additional health benefits from reduced SHS exposure”^x but does not explore options for imposing a stricter definition of enclosed public place in the regulation. The RIS concludes that, on balance, Option 1 – status quo, is the best option because, “taking into account that adopting the option to renew the guidelines with amendments made to Clause 6 would likely result in more costs than benefits compared to the retention of the existing Regulation in its current form, the preferred regulatory option is to maintain status quo – Option 1.”^{xi}

This is despite the RIS noting that:

Continuing to allow smoking in areas that may comply with the guidelines yet which expose staff and patrons to unacceptable levels of SHS,⁶ would appear inconsistent with the health focus of the Act.^{xii}

^{ix} RIS pp29-30.

^x RIS, p iv.

^{xi} RIS, pp 36-37.

^{xii} RIS, p 27.

The RIS repeatedly notes that if “the guidelines are eliminated, it is possible that when making a decision about what constitutes an ‘enclosed public space’ courts would look to give more weight to the objective of the Act and adopt a more restrictive definition than the current guidelines that is more consistent with the objectives of the Act.”^{xiii} It is therefore disappointing that the RIS makes no effort to discuss the potential for a stricter definition of enclosed to be implemented under the Regulation.

Consistency with legislative objectives and the protection of health should be the two key considerations in establishing regulations under the Act. However, the RIS downplays these components in favour of ensuring consistency and flexibility for industry. This industry focus of the RIS undermines the analysis as it leads the RIS to wrongly argue that continuing the current, poorly worded regulation is the best option.

Given the conclusions reached in the RIS about the health impact of SHS and the strong case for government intervention, it is puzzling that the RIS concludes that Option 1: status quo is the preferred option. This conclusion ignores or downplays clear evidence that the current Regulation is not operating as intended, does little to protect public health, and may in some cases be further damaging public health.

A BETTER APPROACH TO REGULATION IMPACT ANALYSIS

Cancer Council NSW has previously submitted in 2007 that any regulations supporting the Act should be designed to:

- Protect staff and patrons from exposure to SHS
- Eliminate SHS smoke under even the least favourable atmospheric conditions eg. still air
- Promote and enhance WHS obligations and guidelines.

The Current Regulation, and the Draft Regulation, fails on all of the above criteria.

In addition, potential options for protecting the public should be assessed for the extent to which they align with the following criteria:

- Proportionality – is the solution proportionate to the problem
- Ease of implementation – is the option easy to implement for both industry and regulators
- Acceptability – is the option acceptable to both industry, the public, and the government.

Best practice for a RIS would be provide a range of options from the base case through to more interventionist approaches within the Regulation making powers of the Act to provide potential options to meet the objectives of the Act and assess these against agreed criteria.

^{xiii} RIS, p V.

However, the RIS fails to present a valid scenario where a new Regulation could impose a stricter definition of ‘enclosed’ to better promote public health by reducing exposure to SHS in public places without the confusion of removing the Guidelines entirely. For example, there is no discussion in the RIS of drafting a Regulation that would remove the 75:25 definition of ‘enclosed’ but retain some guidelines for defining enclosed public places, or introducing a new percentage definition of enclosed (e.g. 50:50). Best practice analysis means that the full range of options for meeting the objects of the Act would be assessed.

Criteria for a good regulatory response

An appropriate regulatory response to the problem of exposure to SHS smoke in enclosed public places would meet the tests of clarity, certainty, and consistency with legislative objective. The optimal regulatory response would be to define ‘enclosed’ as anything that impedes the dispersal of smoke including, areas which have an impervious ceiling or other structure that impedes the upward dispersal of smoke or walls of a height which impedes the lateral dispersion of smoke. This more accurately follows from the arguments about market failure, weak market signals, the need to consider distributional impacts, and the role of OHS legislation as documented in the RIS. However, we note that altering the definition of enclosed would require changes to the Act.

The Act allows for Regulations to be made with respect to guidelines in relation to determining what is an enclosed place and when a covered outside area is considered to be substantially enclosed for the purposes of this Act. The Act only refers to an enclosed public place as an area that has a ceiling or roof, which limits the application of the Regulation as it is automatically permissible to smoke in any outdoor area that does not have a ceiling or roof, even if that area would not allow for the dissipation of SHS. Notwithstanding the issues where the height of walls can impede the dissipation of SHS, the Act provides significant flexibility in terms of defining an ‘enclosed public place.’

Options for defining ‘enclosed public place’

The definition of an ‘enclosed area’ is important in relation to permitting smoking in partially outdoor areas with a ceiling or roof.

The definition of an ‘enclosed area’ varies across Australian jurisdictions. In NSW, ACT and the Northern Territory, an ‘enclosed area’ means a structure that has an overhead covering or a roof and is 75 percent enclosed. In Western Australia, a structure that has a roof and is 50 percent enclosed around its sides is considered to be an ‘enclosed area’. In Queensland, the term ‘substantially enclosed’ is used and no specific percentage is specified.

A percentage or ‘substantial’ definition?

A percentage definition of an ‘enclosed area’ is a double-edged sword. On one-hand a percentage definition explicitly outlines to the hospitality industry what constitutes an indoor area and what constitutes an outdoor area.

This addresses a common complaint from the hospitality industry about the cost to industry of remodelling premises to accommodate smoking law changes, and the difficulty in determining

what is classed as outdoors and what is classed as outdoor eating. The application of a percentage definition mitigates against such complaints.

On the other hand, a percentage definition presents a loophole by effectively giving a recipe to the hospitality industry for how they can accommodate outdoor smoking to the letter of the law. In the past, the ‘enclosed area’ loophole has been exploited by the hospitality industry. Attractive and sheltered areas that fall just below the ‘enclosed’ threshold have been built by clubs, pubs, bars, cafes and restaurants to accommodate smokers.

The alternative option is the less specific Queensland ‘substantially enclosed’ definition.

Ultimately, the decision to implement a percentage or ‘substantially enclosed’ definition comes down to a trade-off between specificity and thus ease of interpretation (percentage approach) versus an arguably stronger public health measure that may be more subjective in its interpretation (substantially enclosed approach).

Additional Options for defining ‘enclosed public place’

This section sets out potential options for defining enclosed public place in the legislation, assesses them against the criteria for an appropriate regulatory response outlined above, and notes whether or not the option is possible through changes to the Regulations.

Option A) Regulation is allowed to sunset and is not replaced (Base case in RIS)

The Act prohibits smoking in public places with a roof or ceiling that are substantially enclosed but there would be no specific regulatory guidance provided to define what constitutes an enclosed public place.

Case law would be relied on to determine the extent of the definition of ‘enclosed’.

This option is possible through the Smoke-free Environment Regulation and is the base case in the RIS.

Option B) Status Quo (Option 1 in RIS)

The Regulation is remade with no changes. The 75:25 ratio continues to be used to determine whether a public place is enclosed or not.

This option is possible through the Smoke-free Environment Regulation and is Option 1 in the RIS and is the option selected for the Draft Regulation.

Option C) Status Quo with Amendments (Option 2 in RIS)

The existing Regulation is remade but with amendments to clarify what ‘opens directly to the outside’ means for determining if a place is enclosed (Clause 6 of the Regulation), and to clarify what ‘gaps in the wall or ceiling’ are for the purposes of Clause 6(5) of the Regulation

This option is possible through the Smoke-free Environment Regulation and is Option 2 in the RIS. This Option would resolve two major issues with the current Regulation that prevents it from working as intended.

Option D) Regulation provides a stricter percentage definition of ‘enclosed public place’

The general approach in the current Regulation of providing a percentage definition is retained, but a stricter ratio of closed to open space is implemented (e.g. 60:40 or 50:50).

This option is possible through the Smoke-free Environment Regulation but has not been outlined or assessed in the RIS.

Option E) Regulation provides broad guidance on defining ‘enclosed public place’

The percentage definition of enclosed is removed and replaced with a broad consideration of whether a normal person would consider the area enclosed. The Regulation would be retained to provide guidance on issues that should be considered when defining an area as ‘enclosed’, such as

- clarification on ‘opens directly to the outside’
- the definition of a ‘wall’ (e.g. including security grills, shutters, screens and gaps in the definition of a wall).

This option is possible through the Smoke-free Environment Regulation but has not been outlined or assessed in the RIS.

Option F) Anywhere that impedes the upward or lateral dispersal of smoke

This option would mean the definition of enclosed would include anywhere that impedes the upward or lateral dispersal of smoke including, areas that have an impervious ceiling or other structure that impedes the upward dispersal of smoke or walls of a height that impedes the lateral dispersion of smoke.

This option would require an amendment to the definition of “enclosed public place” in the Smoke-free Environment Act. As such, this option is outside the scope of the current opportunity of the draft Smoke-free Environment Regulation 2016.

Assessment Criteria	A) No Regulation (RIS Base Case)	B) Status quo (RIS Option 1)	C) Status Quo with Amendments (RIS Option 2)	D) Stricter Percentage Definition of Enclosed	E) Stricter Guidelines on Defining Enclosed	F) Anywhere that impedes the upward or lateral dispersal of smoke
Protect staff and patrons from exposure to second-hand smoke	Moderate – Potential for courts to impose a stricter definition but uncertain	Weak – Current regulations are unenforceable and allow a number of less-than-ideal scenarios	Moderate - resolves some fundamental issues with the current regulation	Moderate - imposes stricter definition but retains a percentage definition loophole to allow pubs to create areas that fall just below the 'enclosed' threshold	Strong – impose stricter definition of enclosed public place	Strong – impose stricter definition of enclosed public place
Eliminate second-hand smoke under even the least favourable atmospheric conditions eg still air	Moderate – stronger definition of enclosed would promote dissipation of smoke but significant	Weak – current regulations allow smoking in substantially enclosed public places with very limited airflow	Moderate – amendments to current Regulation would promote dissipation of SHS compared to status quo	Strong - imposes stricter definition of enclosed to promote dissipation of SHS	Strong – imposes stricter definition of enclosed to promote dissipation of SHS	Strong – imposes strictest definition of enclosed to promote dissipation of SHS

	uncertainty around the final definition					
Promote and enhance OH&S obligations and guidelines	Moderate – has potential to impose stricter definition of enclosed which would reduce exposure to SHS for hospitality workers	Weak –allows exposure to SHS by concentrating smoking in poorly ventilated areas	Moderate – removes fundamental flaws preventing the current Regulation from working as expected	Strong – reduces likelihood of hospitality staff being exposed to high concentrations of SHS	Strong – reduces likelihood of hospitality workers being exposed to high levels of SHS	Strong – reduces likelihood of hospitality staff being exposed to concentrations of SHS
Proportionality	Weak – weak government response to a significant health issue	Weak – weak government response to a significant health issue	Moderate – accepts that current situation is unworkable but still limited response	Moderate – improves on current situation but retains percentage definition loophole to allow pubs to create areas that fall just below the ‘enclosed’ threshold	Strong - strong response to a major health issue	Strong – strong response to a major health issue
Low Cost to Government	Weak – high likelihood of	Strong – no additional costs as	Strong - clarified definition makes enforcement	Strong - clarified definition makes enforcement	Strong – clarified definition makes enforcement	Strong – simplifies the definition of enclosed

	prosecutions being challenged in court	prosecutions continue to be rare	simpler, but may require prosecutions and court cases to confirm the limits of new definition	simpler, but may require prosecutions and court cases to confirm the limits of the definition	simpler, but may require prosecutions and court cases to confirm the limits of the definition	
Low Cost to Industry	Weak – the Act definition of ‘substantially enclosed’ may result in a stricter definition, plus court costs to challenge prosecutions	Strong – no additional cost to industry	Moderate – some existing smoking areas would be deemed ‘enclosed’ once key issues have been clarified	Moderate - some existing smoking areas may be deemed ‘enclosed’ but percentage approach gives clear ‘recipe’ for compliance	Moderate - some existing smoking areas may be deemed ‘enclosed’	Moderate – would require many public places inside pubs and clubs to become smokefree, which may have an impact

Based on this analysis the best option by far would be to define enclosed as anywhere that impedes the upward or lateral dissipation of smoke (Option F). However, this stricter definition would require amendments to the Act and is therefore not possible under the current regulation review.

The second-best approach for defining ‘enclosed public place’ would be Option E: to remove the percentage definition of enclosed and replace it with a broad consideration of whether most people would consider the area enclosed. The Regulation would be retained to provide guidance on issues that should be considered when defining an area as enclosed. Instead of requiring complicated formulas and calculations this approach uses a very basic question when addressing this issue: Would the average person say the area is enclosed?

Retaining the regulation would allow for Guidelines to issues and considerations to be clarified to assist with compliance, monitoring and enforcement. For example, the Guidelines could include;

- clarification on ‘opens directly to the outside’
- the definition of a ‘wall’ (to extend the definition of a wall to ensure security grills, shutters, screens and gaps are captured by the definition).

This would clarify the parameters that should be considered when making decisions about whether a public place is enclosed and would inform prosecutions under the Act and any subsequent court cases.

Option E is based on the approach used in Queensland. Queensland smoke free legislation prohibits smoking in enclosed areas but relies on the consideration of whether a normal person would consider the area enclosed. The Queensland Department of Health website notes that; “As a general rule, if the area has only one wall, it will most probably not meet the definition of enclosed. If the area has three or more walls, it most probably will meet the definition of enclosed. It is not possible to give a more definitive description of enclosed because of the infinite number of building configurations.”^{xiv} This approach allows for flexibility in individual circumstances.

Of the options presented in the RIS, Option 2 is preferred. Option 2 would resolve some fundamental issues with the current regulation and help to ensure that it works as it was originally intended. In addition to the amendments outlined in the RIS, additional amendments to clarify that a security grill, shutter, screen or gap should be included in the definition of a wall or ceiling, and to remove exemptions for gaps which open to the outside in calculation of total actual enclosed area.

CONCLUSION

Due the flawed RIS, the Draft Regulation that has been developed continues to allow exposure to SHS smoke. This is despite the Government acknowledging that there is ‘no safe level of SHS exposure.’

^{xiv} <https://www.health.qld.gov.au/public-health/topics/atod/tobacco-laws/eat-drink/default.asp>

The RIS outlines compelling reasons for government intervention to protect from the harms of exposure to SHS smoke in pubs and clubs in the face of manifest market failure. The body of the report over-emphasises the benefits of the current Regulation, which leads to conclusions that do little to protect public health. It seems inexplicable that the Government can concurrently acknowledge the dangers of SHS smoke and the legal obligation to protect health and safety, while instituting a Regulation that fails to address these issues. Cancer Council NSW does not support retaining the current Regulation.

Cancer Council NSW does not strongly support any of the options in the RIS. However, of the options in the RIS, Option 2 at least resolves some of the key issues with the current Regulations and would help to ensure they operate as originally intended. If Option 2 was selected, Cancer Council NSW would urge additional amendments to ensure the definition of a 'wall' includes security grills, shutters, screens and gaps in the definition.

Cancer Council NSW's long term position with regards to 'enclosed public places' is to amend the Act to move away from the percentage definition of enclosed public place and instead ban smoking in any place that impedes the dispersal of smoke. This includes areas that have an impervious ceiling or other structure that impedes the upward dispersal of smoke or walls of a height, such as courtyards with high walls, that have limited airflow and impedes the lateral dispersion of smoke.

However, as the Act only refers to enclosed public places as those areas that have a roof and are enclosed or substantially enclosed, **Cancer Council NSW recommends removing the percentage definition and adopting an approach in the Regulation that uses a very basic question when addressing this issue: Would the average person say the area is enclosed? This approach would retain the guidelines to provide clarity on the issues that should be addressed when determining whether an area is enclosed or not, for example ensuring the definition of a 'wall' includes security grills, shutters, screens and gaps.**

This would remove the need for complex calculations but still retain a measure of control to provide clarity on what would, and would not, be considered enclosed under the Regulation.

REFERENCES

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