

**Explanatory Memorandum to THE SMOKE-FREE PREMISES ETC.  
(WALES) (AMENDMENT) REGULATIONS 2012**

This Explanatory Memorandum has been prepared by Health Improvement Division and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

**Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Smoke-Free Premises etc. (Wales) (Amendment) Regulations 2012. I am satisfied that the benefits outweigh any costs.

NAME OF MINISTER

DATE

## **1. Description**

- 1.1 The proposed Smoke-Free Premises etc. (Wales) (Amendment) Regulations 2012 (“the proposed Regulations”) will amend The Smoke-free Premises etc. (Wales) Regulations 2007 (“the Smoke-Free Regulations 2007”) by creating an exemption from the smoke-free requirements for performers provided certain conditions are satisfied. This exemption will apply only where i) the performance is given in connection with the making of a film or television programme; ii) the artistic integrity of the performance makes it appropriate for the performer to smoke; iii) there are no members of the public viewing the making of the television programme or film; and, iv) no children are present in the part of the premises which are not smoke-free and in which the performer would be smoking.
- 1.2 The exemption is a personal exemption afforded to the individual performer. It makes the part of the premises in which they are performing not smoke-free in relation to them. The exemption does not apply to persons who are present during the performance. It also does not apply to performances given during rehearsals.

## **2. Matters of special interest to the Constitutional and Legislative Affairs Committee**

- 2.1 None.

## **3. Legislative background**

- 3.1 The Health Act 2006 applies to England and Wales (“the Act”); Section 2 of the Act prohibits smoking in enclosed and substantially enclosed premises open to the public and/or used as a place of work, thus making those premises “smoke-free”. The policy aim of the legislation is to protect the public and workers from exposure to the harmful effects of second-hand smoke. Section 3 of the Health Act 2006 provides the Welsh Ministers in relation to Wales and the Secretary of State in relation to England with the power to make regulations that exempt certain prescribed premises or parts of the premises from the smoke-free requirements of section 2 of the Act. Under section 3(5) the Welsh Ministers can provide an exemption for performers in a performance not to be prevented from smoking on premises if the artistic integrity of the performance makes it appropriate for them to smoke. Section 3(6) allows the Welsh Ministers to specify in regulations that areas of premises specified in the regulations are only smoke-free if certain conditions are satisfied.
- 3.2 Smoking is defined in the Health Act 2006 as including smoking tobacco and being in possession of “lit tobacco” or “anything lit which contains tobacco”, or “being in possession of any other lit substance in a form in

which it could be smoked". The Welsh Ministers do not have the regulation-making power to amend this definition.

- 3.3 The proposed Smoke-Free Premises etc. (Wales) (Amendment) Regulations 2012 will be subject to the approval of the Assembly through the affirmative resolution procedure.

#### **4. Purpose & intended effect of the legislation**

- 1.1. The purpose and intended effect of the proposed Regulations is to amend the Smoke-Free Regulations 2007 to include an exemption that will allow performers to smoke provided the conditions set out in the proposed Regulations (which are outlined at paragraph 1.1 of this Explanatory Memorandum) are satisfied. The purpose of this exemption is to support the growing television and film industry in Wales but in such a way as to minimise the risk of exposure to second-hand smoke during such a performance.
- 1.2. The Smoke-Free Regulations 2007 set out those premises in Wales that are exempt from the smoke-free requirements in line with the Act. They make provision for very few exemptions; they primarily encompass premises where a person has his or her home or where a person is residing temporarily or permanently (such as in a designated room in a care home or in a hotel).
- 1.3. In making regulations for England, the Secretary of State in England created an exemption for performers from the smoke-free requirements which states: "*Where the artistic integrity of a performance makes it appropriate for a person who is taking part in that performance to smoke, the part of the premises in which that person performs is not smoke-free in relation to that person during his performance.*" The regulation provides a personal exemption for persons who are taking part in a performance where the artistic integrity of the performance makes it appropriate for them to smoke. This exemption does not apply to other persons who are present during the performance.
- 1.4. No such exemption was provided for in the Smoke-Free Regulations 2007 for Wales. However, the current smoke-free provisions in those Regulations do not prevent the filming of outdoor smoking scenes.
- 1.5. Since the Smoke-Free Regulations 2007 came into force, the Welsh Government has received an increasing number of representations from the creative industries calling for an exemption to the smoke-free requirements for performers. Several successful TV programmes have been filmed in Wales and, with the growth of BBC Wales Drama as a centre of excellence and the opening of the new Roath Lock Studios, it is hoped that more programme making will come to Wales. Certain productions, however, have run into difficulties due to being unable to film actors smoking. The programme makers wish to portray a level of

authenticity that audiences would expect, and many period dramas are set in times when smoking was commonplace.

- 1.6. At present, the only solution is for producers making films or TV shows in Wales to take smoking scenes in enclosed or substantially enclosed places to England. Therefore, in order to reduce the likelihood of Welsh Studios losing film and television production business to England, the Welsh Government is proposing to amend the Smoke-Free Regulations 2007 to permit smoking by performers, subject to certain conditions, in order to support the Welsh creative industries.
- 1.7. The proposed Regulations will create an exemption for performers from the smoke-free requirements. This exemption will only apply where: i) the performance is given in connection with the making of a film or television programme; ii) the artistic integrity of the performance makes it appropriate for the performer to smoke; iii) there are no members of the public viewing the making of the television programme or film; and, iv) no children are present in the part of the premises that is not smoke-free and in which the performer would be smoking. As set out in paragraph 1.2 above, the exemption is a personal exemption afforded to the individual performer. It does not apply to other persons who are present during the performance. It also does not apply to performances given during rehearsals.

## **5. Consultation**

- 5.1 Details of the consultation are included in the Regulatory Impact Assessment in Part 2.

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

### **1. Options**

In making any new legislation, the Welsh Ministers must act reasonably and on the basis of a good understanding of, on the one hand, the likely health impacts of any relaxation of the smoking ban that was introduced by the Health Act 2006 and exemptions to which are contained, in relation to Wales, in the Smoke-Free Regulations 2007, and, on the other hand, the potential negative consequences for the creative industries of maintaining the current prohibition in place. The potential costs and benefits are discussed under the two options set out below.

#### Option 1 – Do nothing: retain status quo

1.1. Retain the Smoke-Free Regulations 2007 without amendment (i.e. provide no exemption from the smoke-free requirements for performers).

#### Option 2 – Create an exemption from the smoke-free requirements for performers subject to certain conditions

1.2. Create a personal exemption by amending the Smoke-Free Regulations 2007 to allow performers to smoke where: i) the performance is given in connection with the making of a film or television programme; ii) the artistic integrity of the performance makes it appropriate for the performer to smoke; iii) there are no members of the public viewing the making of the television programme or film; and, iv) no children are present in the part of the premises that are not smoke-free and in which the performer would be smoking.

### **2. Costs and Benefits**

#### **Option 1: costs and benefits**

##### Health

There would be no health impacts in retaining the Smoke-Free Regulations 2007 without amendment. These Smoke-Free Regulations 2007 do not currently prevent the filming of outdoor scenes nor the use of alternatives (smoking props) in indoor performances and so this could continue. Indoor smoking scenes of productions being filmed in Wales could continue to be taken to England where there are provisions in the relevant English Regulations which provide for an exemption from the smoke-free requirements for performers if the artistic integrity of the performance makes it appropriate for the performer to smoke.

##### Economy

Smoking scenes from productions being filmed in Wales are already being taken to Bristol. There is therefore a risk that productions as a whole will elect to film in England instead of Wales if the current non-exemption for performers within the Smoke-Free Regulations 2007 is not amended to allow performers to smoke (provided the conditions contained in the proposed Regulations are met). This could make Wales less competitive as a location for film and TV

productions, impacting in terms of jobs, turnover in the creative industries and wider benefits to the economy such as hotel bookings for actors and production crew, locals employed as extras and other services.

The lack of exemption for performers in the Smoke-Free Regulations 2007 in Wales has already impacted on productions looking to film in Wales, especially period dramas set in the 19<sup>th</sup> and 20<sup>th</sup> centuries, historically a time when smoking was commonplace. 'Smoking' is defined in The Health Act 2006 and the definition includes "being in possession of any other lit substance in a form in which it could be smoked". This prohibits the use of any lit substance, including herbal cigarettes, when filming scenes in enclosed or substantially enclosed public places in Wales. This has led to production companies filming smoking sequences outside of Wales.

Taking smoking scenes from productions being filmed in Wales to England creates additional costs to production companies. The approximate additional costs where a lead character is smoking (i.e. not background shots) are as follows:

- If a day's location shooting is already planned in England it can be filmed alongside the smoking scene; then compared to doing the location shoot more locally, there will be the additional costs of overtime, travel and /or overnight so approximately £4,000 per day.
- If an additional day has to be arranged specifically to "pick-up" shots of the leads smoking then the overall cost of crew etc. would be in the region of £25,000. Generally less shooting is achieved in a day on location than in the studio which adds time and money to the budget.

These costs are additional for productions that film in Wales containing smoking scenes, which may prove a deterrent to bringing such productions to Wales.

#### Enforcement

Retaining the current non-exemption for performers within the 2007 Smoke-Free Regulations would not have any additional impact on enforcement for local authorities in Wales.

#### Other

Not amending the Smoke-Free Regulations 2007 will impact on the Welsh Government's strategic priority to ensure Wales' Public Service Broadcasters organise their affairs to provide the maximum economic advantages to Wales that can be practically achieved.

### **Option 2: costs and benefits**

The proposed Regulations create a personal exemption from the smoke-free requirements for performers subject to certain conditions. These conditions are more stringent than the exemption provided for in the equivalent regulations

applicable in England. In England, a performer participating in any type of performance is exempt from the smoke-free requirements provided the artistic integrity of the performance makes it appropriate for them to smoke. For Wales, the proposed Regulations will permit a performer to be exempt from the smoke-free requirements where it is considered to be appropriate to the artistic integrity of the performance to smoke but this is limited to performances given in connection with the making of film and television programmes where there is neither an audience viewing the making of the film or television programme nor children present in the part of the premises that are not smoke-free and in which the performer would be smoking.

The provisions of the proposed Regulations have been limited as such to ensure that only those performances where smoking is appropriate for the artistic integrity of the production are permitted to be smoke-free. They have also been limited to performances given in connection with the making of a film or television programme without an audience to keep the risk of exposure to second-hand smoke during the performance to a minimum and, in particular, to performances that do not involve children. Under the proposed Regulations, performances with an audience, such as theatre performances, would continue to be subject to the smoke-free requirements as the risk of a significant number of people being exposed to second-hand smoke would be too great.

#### Health

The likely increase in the number of deaths or illness caused by exposure to second-hand smoke (SHS) as a result of introducing the exemption will be marginal and therefore difficult to measure. This is because the proposed Regulations have been drafted in a way that limits the exemption through conditions that must be satisfied on: the artistic integrity of the performance; the type of performance (i.e. only those performances given in connection with TV and film productions and not rehearsals); no audience being present during the filming of the film or television programme; and no children are present in the part of the premises that are not smoke-free and in which the performer is smoking. Potential exposure on set is therefore limited to adult actors and crew for a limited period of time. The slightly higher exposure to SHS for the film crews and other actors in Wales may possibly also cause a small increase in costs to the NHS in Wales of treating smoking related diseases, but it is not possible to quantify this.

#### Economy

With the opening of the new Roath Lock Studios it is hoped more programme making will come to Wales. The exemption for performers on the terms set out in the proposed Regulations would make Wales a more attractive place for programme making and would remove the current costs involved with taking smoking scenes on productions being filmed in Wales to England. The smoking ban has been a major issue for a number of productions that have been filmed in Wales, especially period dramas set in a time when smoking was commonplace. The Wales Screen Commission estimate that the value to the Welsh economy of the productions that have been filmed in Wales is around £15-20 million per year. The creation of an exemption for performers

within the 2007 Smoke-Free Regulations could therefore benefit the Welsh economy by possibly bringing more productions to Wales.

### Enforcement

Responsibility for enforcing the Smoke-Free Regulations 2007, including judgements about the application of certain exemptions to the legislation, is a matter for local authorities. If an exemption for performers was to be introduced, and a local authority was asked to investigate a case to decide whether it had been appropriate for an actor to smoke during an artistic performance the overall cost of a typical inspection would be approximately £80. The inspection would last for around two hours, and the cost to local authorities for an Environmental Health Officer to inspect are typically £40 per hour.

Due to the conditions in the proposed Regulations, the Welsh Government will expect local authorities to monitor the application of the provisions within the proposed Regulations as closely as they enforce the rest of the smoke-free requirements. The Welsh Government will therefore produce guidance and a leaflet to inform businesses in the creative industries of the new exemption to the smoke-free requirements for performers subject to certain conditions. This guidance and leaflet would have a total one-off cost of £2,000 and will detail the conditions that must be met to qualify for the exemption and provide advice on assessing the 'artistic integrity' of a smoking scene during a performance.

The guidance will also cover who has responsibility for complying with the proposed Regulations. There are duties in the Health Act 2006 on the person who controls or is concerned in the management of premises in which a person performs to ensure that persons do not smoke unlawfully. Therefore, the Welsh Government would expect that the director and/or producer of an artistic performance, together with the person who controls or is concerned in the management of premises in which a person performs, to ensure that the requirements set out in these regulations for performers are followed. The offence of smoking in a smoke-free place as set out in section 9 of the Health Act 2006 will apply to the proposed Regulations where the conditions of the exemption for performers is not met. The penalty notice forms set out in the Schedule to The Smoke-Free Premises etc. (Wales) Regulations 2007 will apply to the proposed Regulations.

### Other

Creating an exemption from the 2007 Smoke-Free Regulations for performers will not create an increase in exposure to tobacco imagery and thus an increase in the glamorisation of smoking to young people. This is because smoking scenes from Welsh productions currently being filmed in England would potentially be aired in Wales in any event.

The environmental impacts such as increased litter and air pollution would be minimal and so these cannot be quantified.

It is possible that production companies may incur additional cleaning costs following the filming of a smoking scene to ensure the premises were left



smoke-free, particularly where the scenes are shot on location in private residences or public buildings. Production companies would also incur cost increases from the increase in the risk of fire during the filming of smoking scenes. Due to the varying circumstances and venues used in the shooting of location scenes for TV and film productions it is impossible to quantify these costs here.

### **3. Consultation**

3.1 The Welsh Government conducted a shortened 6 week consultation on the draft Regulations from 3<sup>rd</sup> February 2012. The consultation asked a number of specific questions on the regulatory proposal presented and also asked for feedback from stakeholders on the consultation-stage impact assessments that were published as part of the consultation document.

The consultation closed on 16 March 2012 and comprised of seven questions, the first of these asking if the Regulations should be amended to create an exemption for performers where artistic integrity of the performance makes it appropriate for the performer to smoke and where conditions are met.

A total of 48 responses were received to the consultation from a wide variety of stakeholders. With respect to question 1, 25% of respondents were in favour of an exemption most of who were from the creative industries. Of those respondents who opposed, most were health professionals, charities and local authorities.

No changes have been made to the draft regulations as a consequence of the responses. A summary of the response to the consultation will be published on the Welsh Government's website [www.wales.gsi.gov.uk](http://www.wales.gsi.gov.uk).

### **4. Competition Assessment**

4.1 The competition filter test has been applied (see Appendix A) and has shown that there are no competition concerns.

### **5. Post Implementation Review**

5.1 The effect of the exemption for performers from the smoke-free requirements within the proposed Regulations will be monitored by local authority enforcement teams within their remit to monitor and enforce the rest of the requirements within the 2007 Smoke-Free Regulations.

## APPENDIX A

### The Competition Assessment

The competition filter test	
Question	Answer yes or no
<b>Q1:</b> In the market(s) affected by the new regulation, does any firm have more than 10% market share?	YES
<b>Q2:</b> In the market(s) affected by the new regulation, does any firm have more than 20% market share?	YES
<b>Q3:</b> In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	NO
<b>Q4:</b> Would the costs of the regulation affect some firms substantially more than others?	NO
<b>Q5:</b> Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	NO
<b>Q6:</b> Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	NO
<b>Q7:</b> Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	NO
<b>Q8:</b> Is the sector characterised by rapid technological change?	NO
<b>Q9:</b> Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	NO