

**Explanatory Memorandum to the Smoke-free Premises etc. (Wales)
(Amendment) Regulations 2016**

This Explanatory Memorandum has been prepared by Health and Social Services Group 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 2016. I am satisfied that the benefits justify the likely costs.

Mark Drakeford
Minister for Health and Social Services

17 December 2015

Explanatory Memorandum to the draft Smoke-free Premises etc. (Wales) (Amendment) Regulations 2016

This Explanatory Memorandum has been prepared by the Health and Social Services Group to accompany the smoke-free regulations regarding smoking in prisons.

1. Description

1.1 The Smoke-free Premises etc. (Wales) (Amendment) Regulations 2016 (“the Regulations”) introduce a time-limited exemption to the Smoke-free Premises etc. (Wales) Regulations 2007 for designated cells in prisons.

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

2.1 None.

3. Legislative background

3.1 The Health Act 2006 (“the 2006 Act”) applies to England and Wales; 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 2006 Act provides the Welsh Ministers, in relation to Wales, 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(2) the Welsh Ministers can provide an exemption for any premises where a person has his home, or is living whether permanently or temporarily, including prisons. No such exemption was provided for prisons in Wales in the Smoke-free Premises etc. (Wales) Regulations 2007 (“the 2007 Regulations”).

3.2 Smoking is defined in the 2006 Act 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”.

3.3 The High Court has recently decided in the *Black*¹ judicial review proceedings that the 2006 Act’s provisions on smoke-free premises apply to

¹ Black v Secretary of State for Justice [2015] EWHC 528 (Admin)
<https://www.judiciary.gov.uk/judgments/black-v-secretary-of-state-for-justice/>

private and state-run prisons in England and Wales. As such, since there are currently no regulations made by the Welsh Ministers to exempt prisons in Wales from the 2006 Act's smoke-free requirements, the 2006 Act requires all prisons in Wales to be smoke-free. The Secretary of State is appealing to the Court of Appeal against the High Court's ruling in *Black* that the 2006 Act applies to state-run prisons. The hearing is scheduled to be heard in February 2016.

3.4 However, despite the 2006 Act's application to prisons in Wales, it is apparent from High Court proceedings in a separate judicial review that, operationally, some prison inmates aged 18 years or over are being permitted to smoke in cells in prisons in Wales, subject to safeguards provided by Prison Service Instruction PSI 09/2007W.

3.5 The UK Government department responsible for the prison estate, the National Offender Management Service ("NOMS"), is committed to introducing a smoke free policy to make sure that staff, visitors and prisoners are protected from risk of exposure to second hand smoke. The priority remains the safe, decent and secure operation of the custodial estate.

3.6 In accordance with section 79 of the 2006 Act, the Regulations are subject to the affirmative resolution procedure.

4. Purpose & intended effect of the legislation

Context

4.1 Currently there are four prisons in Wales, with a further prison planned to open in north Wales in 2017. It is noted that all existing prisons in Wales cater exclusively for male prisoners. HMP Parc is privately run, whilst the remainder are part of the Crown estate. Although health is a subject devolved to Welsh Ministers, the management of prisons is not. The Secretary of State for Justice has responsibility for prisons in Wales.

4.2 A report from Public Health England indicates that nationally around 80 per cent of prisoners smoke compared with around 20 per cent in the general population²³⁴. Data from Wales suggest that 76% of prisoners smoke⁵⁶. Smoking is reported to be an integral part of prison life⁷.

² Public Health England. Reducing Smoking in Prisons. Management of tobacco use and nicotine withdrawal. March 2015

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/412567/Reducing_smoking_in_prisons.pdf

³ Singleton N, Farrell M & Meltzer H. Substance Misuse among Prisoners in England and Wales. London: Office for National Statistics. 1999

<http://www.tandfonline.com/doi/abs/10.1080/0954026021000046092>

⁴ Lester C, Hamilton-Kirkwood L, Jones N. Health Indicators in a prison population: asking prisoners. Health Education Journal 2003;62:341-349. (Awaiting OpenAthens log in details from the library to

4.3 The high rates of smoking among prisoners also causes them to suffer marked health inequalities compared with the general population, both through active smoking and breathing in other people's smoke².

4.4 Recent reviews have identified the various ways prison influences smoking behaviour^{7,8}. Smoking is reported to be a coping strategy to manage stressful situations such as imprisonment, transfers, court appearances, sanctions and prison visits, and help to alleviate boredom. Given the high prevalence of smoking, it is thought that prisoners also smoke for social reasons, as being a non-smoker in such a high prevalence population could be socially isolating.

4.5 Offenders are over-represented among deprived and socially excluded communities. For example, around half of prisoners have no educational qualifications, nearly half have experienced exclusion from school and over two-thirds are unemployed prior to entering prison. Offenders are also more likely to have experienced poverty and unemployment than those in the general population. Adverse family and social experience prior to entering prison is common: for example, 24 per cent reported having spent time in local authority care as a child, and homelessness or living in temporary accommodation prior to sentence is prevalent⁹. Smoking prevalence is much higher among prisoners than among lower socio-economic groups as a whole².

4.6 Smoking is also more prevalent among those with mental health problems in the general population (about twice as high on average and it is more common in those with more severe mental health conditions)¹⁰. There is a very

access the report)

⁵ Smoking rates based on SystemOne data from July/August 2014 and NOMS prisoner questionnaire in Welsh Public Sector Prisons. July 2014. Unpublished. SystemOne data are the LHB healthcare system used within prisons.

⁶ Prison population taken from Prison Population Bulletin Monthly September 2014 and annual receptions based on data for 2013/14.

<https://www.gov.uk/government/statistics/prison-population-figures-2014>

⁷ MacLeod L, MacAskill S, Eadie D. Rapid Literature Review of smoking cessation and tobacco control issues across criminal justice settings. Stirling: Institute for Social Marketing, 2010.

https://www.uclan.ac.uk/research/explore/projects/assets/tobacco_control_cjs_lit_review_aug_2010.pdf

⁸ Department of Health. Acquitted: Best practice guidance for developing smoking cessation services in prisons. London, Department of Health, 2003.

http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4034484.pdf

⁹ Ministry of Justice. Surveying Prisoner Crime Reduction. 2014.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261620/re-offending-release-waves-1-3-spcr-findings.pdf

strong relationship between offending and having mental health problems which may again help explain the higher smoking prevalence in this population. A recent review identified that 80% of prisoners in England have mental health problems and 72% of convicted male prisoners suffer from two or more mental disorders, compared with 5% in the general population^{3,11,12}.

4.7 Most people smoke to ingest nicotine and smoking is now recognised as a drug dependence disorder. In 2001 the RCP stated that *“it is now well established that users of tobacco tend to regulate or titrate their nicotine intake to maintain body levels within a certain range.”* referenced in 2

4.8 When smokers go without nicotine, withdrawal symptoms can begin within hours of the last cigarette and are at maximum intensity for the first week¹³. Some of the characteristic symptoms of nicotine withdrawal include impaired concentration, irritability, tension, disturbed sleep or drowsiness, intense longing or craving for a cigarette, and headaches. These symptoms mean that people frequently relapse back to smoking.

4.9 A variety of measures can be taken to reduce withdrawal and to support people in stopping smoking.

4.10 Some evidence suggests that a significant majority of offenders who smoke are motivated to stop. For example, a study of smokers in Cardiff prison revealed 79% wished to stop⁴. Studies of offenders in contact with other criminal justice service settings have also revealed an interest in support to stop smoking¹⁴. The prison setting, in particular, presents a valuable

¹⁰ Royal College of Physicians Tobacco Advisory Group. Smoking and Mental Health. RCP, London 2013.

https://www.rcplondon.ac.uk/sites/default/files/smoking_and_mental_health_-_full_report_web.pdf

¹¹ Mental Health Network NHS Confederation. Key facts and trends in mental health. NHS Confederation 2011.

http://www.nhsconfed.org/~media/Confederation/Files/Publications/Documents/Key_facts_mental_health_080911.pdf

¹² McManus S, Meltzer H, Brugha T, Bebbington P, Jenkins R. Adult psychiatric morbidity in England, 2007. Results of a household survey. 2007. A survey carried out for the NHS Information Centre for health and social care by the National Centre for Social Research and the Department of Health Sciences, University of Leicester.

<http://www.hscic.gov.uk/catalogue/PUB02931/adul-psyc-morb-res-hou-sur-eng-2007-rep.pdf>

¹³ Jarvis MJ. Why do people smoke British Medical Journal 2004 Jan;328:277-9.

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC324461/pdf/bmj32800277.pdf>

¹⁴ MacAskill S, Lindridge A, Stead M, Eadie D, Hayton P, Braham M. Social Marketing with challenging target groups: Smoking cessation in prisons in England and Wales. International Journal of

opportunity to engage marginalised groups with very high smoking prevalence in cessation initiatives. Prisoners themselves have described imprisonment as an opportunity to access cessation services, an opportunity that is viewed by some as a means of achieving something positive while in prison¹⁴.

4.11 An analysis of approaches to prison smoking bans around the world has concluded that total bans appear to be more effective than partial bans, and that successful implementation of such bans seems to be associated with a range of factors which include thorough planning, good communication, effective staff training, comprehensive support for prisoners and effective smoking cessation programmes¹⁵.

4.12 Prisoners in Welsh prisons can access smoking cessation support, from the relevant health board, within the prison and e-cigarettes are available for purchase from the prison shop. Some prisons have implemented smoke-free areas on a voluntary basis. The new north Wales prison will open as a smoke-free prison.

4.13 The UK Government announced on 29th September 2015 its intention to start to implement a full smoke-free policy in all prisons in Wales from January 2016.¹⁶ This announcement included the publication of two recent academic studies commissioned by NOMS which identified that high levels of second-hand smoke are still prevalent in the communal areas of some prisons¹⁷¹⁸. NOMS is currently working to this timetable across Welsh prisons but in the event of slippage or safety issues a time-limited exemption would allow work to

Nonprofit and Voluntary Sector Marketing, 2008;13:251-261

<http://onlinelibrary.wiley.com/doi/10.1002/nvsm.327/abstract>

¹⁵ The Offender Health Research Network. Smoking in Prisons in England and Wales: Considerations for Policy Change. University of Manchester. February 2014.

<http://www.ohrn.nhs.uk/OHRNResearch/Smoking.pdf>

¹⁶ National Offender Management Service, UK Government, Letter from Prisons Minister to Robert Neil MP, Chairman of the Justice Select Committee regarding smoking in prisons, published 29 September 2015.

<https://www.gov.uk/government/speeches/smoking-in-prisons>

¹⁷ Division of Epidemiology and Public Health and UK Centre for Tobacco and Alcohol Studies, University of Nottingham, Second-hand smoke in four English prisons an air quality monitoring study, 2015.

<https://www.gov.uk/government/publications/air-quality-reports>

¹⁸ National Offender Management Service, London, Report on Second-hand Smoke in Prisons Final Report, 2015.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469654/SHS_in_Prisons_Final_Report_minus_Appendix.pdf

continue towards a smoke-free estate in a safe and secure way. Therefore, a time-limited exemption is still required.

Purpose of the Provisions

4.14 The purpose of the Smoke-free Premises etc. (Wales) (Amendment) Regulations 2016 is to amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be supported to become operationally smoke-free in a safe and secure way during the period of the exemption.

Effect of the Provisions

4.15 The intended effect of the Regulations is to:

- allow smoking in designated prison cells, for a time-limited period
- allow NOMS in Wales to work towards implementation of smoke-free prisons in a safe and secure way which would not increase the risk to the operational safety and security of Welsh prisons.

4.16 The removal of the exemption after a time-limited period will then:

- protect prisoners and prison staff from the harms associated with smoking and second-hand smoke in prisons
- support inmates to give up smoking
- contribute to a reduction in health conditions in prisoners and prison staff caused by smoking and/or exposure to second-hand smoke.

5. Consultation

5.1 A consultation on draft Regulations was undertaken between 11th September and 12th November 2015. The consultation summary document can be accessed via the following links:

<http://gov.wales/consultations/healthsocialcare/smokefree/?lang=en>
<http://gov.wales/consultations/healthsocialcare/smokefree/?lang=cy>

Detail of the Regulations

6.1 Under the 2006 Act, a place where smoking is not permitted is termed a 'smoke-free place'. These Regulations amend the 2007 Regulations to exempt designated cells in prisons from being required to be smoke-free places for a time-limited period.

6.2 The Regulations will provide that a "designated room" that is used as accommodation in a prison for a person aged 18 or over is not required to be smoke-free. A "designated room" is defined as a cell which: —

- has been designated by the person in charge of the prison as a room in which smoking is permitted;

- has a ceiling and, except for doors and windows, is completely enclosed on all sides by solid floor to ceiling walls;
- does not have a ventilation system that ventilates into any other part of the premises (except any other designated rooms); and
- is clearly marked as a room in which smoking is permitted.

6.3 The Regulations will come into force on 4 February 2016.

7. Regulatory Impact Assessment (RIA)

7.1 A cost analysis of the impact of the Regulations is included at part 2 of this document.

7.2 Welsh Government officials have held discussions with officials in NOMS to help identify the potential costs and benefits of the various options set out in the Regulatory Impact Assessment.

7.3 Some gaps exist and these have been set out in the impact assessment.

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Three options have been considered.

- Option 1 - Make no changes to the 2007 Regulations.
- Option 2 - Amend the 2007 Regulations to include an exemption from the smoke-free requirements for designated cells in prisons in Wales.
- Option 3 - Amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be supported to become operationally smoke-free in a safe and secure way during the period of the exemption.

For the purposes of all calculations set out below, it has been assumed that, as per the High Court judgment in the *Black* judicial review proceedings, the 2006 Act applies to all prisons in Wales. However, as noted above, the Secretary of State is appealing against the effect of the ruling that the 2006 Act applies equally to state-run prisons as it does to private ones.

Option 1 - Make no changes to the Smoke-free Premises etc. (Wales) Regulations 2007

Description

There would be no change to the current legislation under this option. This would mean that smoking would not be legally permitted in prisons in Wales. However, in practice we know that it is currently being allowed, despite existing legislation.

Maintaining the current position could lead to at least two possible different outcomes:

- (i) That, following the High Court's clarification of the law in the *Black* case, a new Prison Service Instruction (PSI) on the application of smoke-free legislation is issued for Wales, and prisons in Wales will immediately become smoke-free;
- (ii) That prisons will continue to allow prisoners aged over 18 to smoke in their cells.

It is acknowledged that other outcomes may occur, for example support to reduce the harmful effects of tobacco smoking and/or a gradual move to becoming smoke-free.

Option 1 outcome (i) – no change to legislation; immediate move to compliance with legislation

Costs

Health Service

The cost model indicates high level costs rather than the detail of the cessation support offer that local health boards will need to determine. NOMS is working with health boards to refine the cessation support resources and offer that will be in place for prisoners in a smoke free environment.

The costs to the Health Service associated with this option have been calculated using a baseline of 3,486 prisoners in Wales, with an annual turnover of 9,740. Additional costs would be incurred when the new north Wales prison opens in 2017. These are being factored into planning but are not incorporated here.

Prison Population^{56*}

	Cardiff	Swansea	Parc	Usk	Prescoed	Total
Population	811	449	1,723	273	230	3,486
Churn	4,403	1,732	2,999	241	365	9,740

**These figures were used for indicative costings. More recent figures are now available,*

Smoking cessation support and the supply of nicotine replacement therapy (NRT) would be provided by health boards to help support prisons become smoke free in a safe and secure manner. A range of potential smoking cessation costs have been calculated using an assumption that 76% of prisoners in Wales smoke⁵.

NOMS will be working with healthcare providers to determine how to quantify and define a single successful attempt in a custodial environment, and will be developing a care pathway for prisoners, and a prisoner compact for participation in a formal cessation/quit programme.

Two separate scenarios have been calculated; upfront costs for the treatment of the existing prisoner population and an ongoing cost for the treatment of new receptions per annum. Prisoner transfers have been considered as part of this costing process.

Costs per treatment week have been calculated as £10.47 and the cost per treatment period of 12 weeks as £125.64. Treatment is defined as the initial consultation to prescribe NRT and the time taken to collect NRT throughout the 12 week course.

There would also be staff costs for health professionals to dispense NRT. A member of the prison healthcare team would dispense the NRT and these

costs have been calculated using the Grade 5 nurse pay band¹⁹ Treatment comprises of 20 minutes staff time in week one, 10 minutes each week from weeks two to twelve. Therefore, a total of 1.5 hours for each patient to complete their treatment has been calculated.

The costs for the delivery of a smoking cessation programme are based on Stop Smoking Wales Toolkit for delivery of cessation support groups in prison allowing time for preparation and administration. There would be a maximum of 16 prisoners per group; a total of 14.5 hours per group over a 7 week course and would be delivered by a Support Officer Grade at point 3 on the pay scale²⁰.

A range of costs have been calculated using three potential uptake rates of support from prisoners:

Prediction One – based on 70% uptake of NRT (using SystemOne data from July/August 2014)

Prediction Two – based on 44% uptake of NRT (using results from the prisoner questionnaire conducted in Welsh Public Sector Prisons in July 2014).

Prediction Three – based on 55% uptake of NRT as a reasonable estimate which also assumes availability of electronic cigarettes for prisoners to purchase.

Overall predicted healthcare costs – based on models developed for internal purposes and to inform planning

Prediction	Upfront (per treatment episode)				Ongoing (per annum)			
	NRT	Health	Support groups	Total	NRT	Health	Support groups	Total
One – 70%	£233,006	£40,341	£20,002	£293,349	£651,026	£112,714	£55,887	£819,627
Two – 44%	£146,461	£25,357	£12,537	£184,391	£409,217	£70,849	£35,129	£515,194
Three – 55%	£183,076	£31,696	£15,716	£230,489	£511,521	£88,561	£43,911	£600,081

It is the view of officials that 55% of prisoners will require nicotine replacement therapy (“NRT”) (assumed as a reasonable estimate from prisoner questionnaires indicating that 44% would require NRT⁵, and a 70% uptake predicted from SystemOne data). Total costs are therefore calculated as

¹⁹ FTE annual cost £27,901

²⁰ FTE annual cost £22,898pa

£230,500 upfront costs for the existing prisoner population, with ongoing annual costs for new receptions of £600,100.

Indicative costs have been presented to each local health board with a prison in their area. LHBs will need to meet these costs from their existing budgets, and all have made an 'in principle' commitment to doing so.

Local authorities

Local authority enforcement officers may undertake prison visits if intelligence is received that smoking is being allowed in prisons which are now smoke-free. However, prison managers may enforce the legislation effectively and so there may not be any intelligence to suggest that enforcement visits are required. The minimum potential cost is zero; the cost for an investigatory visit has been assessed at £120²¹. Therefore a maximum cost of £480, i.e. one visit per prison, has been included for 2016/17 only. An assumption has been made that local authority enforcement officers would support prison governors to comply with their duty to prevent smoking in a smoke-free place in the first instance, and so we would not anticipate cases being taken to court initially. If cases are taken to court then costs would rise to £990 per case, with a maximum of £3960 if cases are taken to court relating to all 4 prisons; these costs have been included in the table as a maximum cost in 2017/18.

Prisons

An assumption has been made that if prison cells become smoke-free then there will be no opportunities for prisoners to smoke and so the prison shops will cease to sell tobacco and related products, but will continue to sell e-cigarettes. There may be costs to prisons due to reduced sales of tobacco and related products in the prison shops, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

There may also be costs due to safety and security issues. Evidence from other countries and jurisdictions suggests that legislation to ban smoking in prisons can be put in place without major problems. However, media reports of a recent riot in a maximum security prison in Melbourne, Australia, attributed by the media to the introduction of a smoke-free prison estate, estimated that rebuilding costs could be as high as AU\$10 million²²; with additional costs for emergency services, as well as disruption to the justice system. However, it is important to stress that official reports detailing costs as a result of the Melbourne riot are not available.

²¹ Based on average senior environmental health officer rate, plus on-costs, of £39.60 an hour

²² Report by Nine News Melbourne, 1 July 2015.

[Nine News Melbourne on Twitter: "Tuesday's prison riots will cost taxpayers \\$10 million in damage repairs. #9News http://t.co/eRaFq59DpB"](https://twitter.com/NineNewsMelb/status/617111111111111111)

Evidence indicates that total bans on smoking in prisons appear to be more effective than partial bans, and that successful implementation of such bans seems to be associated with a range of factors¹⁵. A key element of success in other jurisdictions appears to be ensuring that prisoners receive sufficient access to nicotine replacement therapy and smoking cessation support.

Tobacco industry

If tobacco is no longer available in prison shops in Wales, then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

Government

Cost will be incurred in producing and implementing a new prison service instruction (PSI) on the application of smoke-free legislation for Wales. These costs have been calculated by NOMS as a minimum £140,000 over one year.

Risks associated with implementation have been estimated by NOMS to be at least a 30% optimism bias added to the minimum implementation cost. Therefore, the minimum costs including optimism bias for risks associated and contingency planning is estimated at £182,000 over one year, and have been shared between 2015/16 and 2016/17

Rapid implementation of policy could increase risks and associated costs. These cannot be quantified, and are not included in the table below

Courts

It is assumed that this option would have only a limited cost impact on the Courts. If a new PSI were introduced, setting out that, effectively, current legislation is to be complied with, it is not envisaged that many prosecutions would be brought. As there are only 4 prisons in Wales, we have assumed a maximum of 4 prosecutions. A detailed costing framework has not yet been discussed between the Welsh Government and the Ministry of Justice, and so these costs are unknown at present.

Summary of costs associated with Option 1, outcome (i)

Sector	2015/16	2016/17 (£)	2017/18 (£)	2018/19 (£)	2019/20 (£)
NHS	230,500*	600,100	600,100** maximum	600,100** maximum	600,100** maximum
Local Authorities		480 maximum	3,960	-	-
Government	91,000***	91,000***	-	-	-
Total costs per year	321,500	691,580	604,060 maximum	600,100 maximum	600,100 maximum

*These will be the costs incurred if implementation is in the last quarter of the year.

**It is anticipated that costs will reduce over time, but these reductions cannot be quantified at present.

*** This figure includes the 30% optimism bias identified for contingency planning purposes.

Benefits

Health

There would be no changes to the law but if the prison service moves to implement smoke-free policies then there will be benefits to the health of both prisoners and prison staff from cessation of smoking. The current Prison Service Instruction relating to smoking in prisons in Wales²³ states *'Non smokers must not be required to share a cell with smokers who are actively smoking. The status of a prisoner as a smoker or non smoker should be established as part of reception procedures. Thereafter, arrangements must be made to place non-smokers and smokers in separate accommodation.'* Even so there may be benefits from the effect of the absence of second hand smoke.

There have been some studies looking at air quality in prisons, e.g. The US state of North Carolina introduced smoke free prisons for inmates, staff and visitors in 2006. Researchers investigated air quality at six prison facilities 10 to 12 months later and compared their findings to measurements taken before the new regulations went into effect. Tobacco smoke is the major source for tiny disease-causing particulates (RSPs), and researchers found RSP levels had declined by 77 per cent after the regulations took effect²⁴.

The Offender Health Research Network report the following from an unpublished report: 'In order to assess the impact of the smoking ban, the Tobacco Control Collaborating Centre (unpublished) measured second hand smoke levels in the Manx prison in the Isle of Man prior to the ban being enforced in March 2008 and then again three months later. Members of staff were asked to wear personal monitors for the duration of their shift which measured airborne particulate matter. The average measure of second hand smoke concentrations (PM_{2.5}) was largely reduced (75%), although concentrations varied, depending on location within the prison. Saliva samples were also taken from staff before and after the ban, to measure levels of salivary cotinine, a breakdown product of nicotine. There was no difference reported in average salivary cotinine levels before and after the ban; however, saliva samples were taken from different members of staff before and after, which may explain the lack of difference noted. Interestingly, an increase in

²³ HM Prison Service. Smoke Free Legislation :Prison Service Application 09/2007 W

²⁴ Proescholbell SK. Foley KL. Johnson J. Malek SH. Indoor air quality in prisons before and after implementation of a smoking ban law. Tobacco Control 2008; 17: 123-127.

salivary cotinine was reported during shifts before the ban, but not after. The Tobacco Control Collaborative concluded that allowing smoking to continue in prisons exposed staff and prisoners to unhealthy levels of particulate contamination and that this contamination had a cumulative effect, demonstrated by the rising cotinine levels identified during pre-ban working shifts¹⁵.

In two academic studies commissioned by NOMS^{17,18}, sampling was undertaken to measure the levels of second-hand smoke in six prisons in Wales and England (only Cardiff Prison in Wales) by measuring concentrations of fine particulate matter (as PM_{2.5} – particulate matter less than 2.5 microns in diameter). Samples were taken from both prisoners and prison staff. Biological markers of second-hand smoke exposure (SHS) including exhaled carbon monoxide and salivary cotinine were also gathered. Questionnaire data to determine how frequently prison staff considered they were exposed to SHS were obtained.

There was clear evidence of second hand smoke in smoking cells, occasionally in non-smoking cells and all prison wing samples measured. Measurements of personal exposure of prison staff also indicate exposure to SHS across the work-shift, with levels varying considerably between each of the six prison establishments. In three of the six prisons the personal exposure of the majority of prison staff measured exceeded the World Health Organisation (WHO) guidance value for PM_{2.5}, (25 µg/m³).

The two studies found that overall, approximately one-sixth of the time that prison staff spent at work involved exposure to PM_{2.5} at concentrations that exceeded the WHO guidance limit. Prison staff were also found to experience considerable short-term peak exposures with the highest 1-minute PM_{2.5} measurement being 1,027 µg/m³. These peaks are likely to be associated with entering cells where smoking takes place. Cross-shift salivary cotinine measurements also provided data that indicated SHS exposure was apparent among this workforce.

Potential health benefits identified in the report

There is well established evidence that acute exposure to second-hand smoke (SHS) causes a range of harmful health effects including lung cancer, lower respiratory tract infections, asthma, and cardiovascular diseases.^{25,26}.

²⁵ U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta, GA: 2006.

http://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf_NBK44324.pdf

²⁶ Royal College of Physicians. Passive smoking and children. A report by the Tobacco Advisory Group of the Royal College of Physicians. London: 2010.

<https://cdn.shopify.com/s/files/1/0924/4392/files/passive-smoking-and-children.pdf?15599436013786148553>

The findings from these studies suggest that smoking in prisons is a source of high levels of pollution for both prisoners and staff in Wales and England.

There is some evidence that suggests that physiological cardiovascular and respiratory changes occur immediately after exposure to second-hand smoke²⁷. There is less direct evidence available to suggest that removal of exposure to second-hand smoke reduces the risk of acute coronary events, stroke, acute respiratory infection and asthma.

However, taking all of the evidence from the study in its entirety it seems likely that prison officers who are exposed to second-hand smoke will experience some degree of physiological change as a result. The acute effects of this are uncertain and will vary between workers but at the level of the entire prison officer population this exposure is likely to increase the overall risk of acute adverse cardiovascular and cardiorespiratory health events that are linked to exposure to second-hand smoke.

Thus, removal of second-hand smoke from prisons is likely to be of benefit to the health of both prison staff and prisoners.

In addition, prisoners may also achieve long-term health benefits if they remain smoke-free for a long time, either in prison or if they maintain abstinence on release. However a US study has concluded that: 'Forced tobacco abstinence alone during incarceration has little impact on post-release smoking status. A behavioural intervention provided prior to release greatly improves cotinine-confirmed smoking cessation in the community.'²⁸ These potential benefits cannot be quantified.

Option 1 outcome (ii) – no change to legislation, non-compliance with legislation.

Costs

Health

A significant proportion of prisoners and prison staff would continue to be exposed to the harms associated with smoking and exposure to second hand smoke in prisons and could be at risk of developing health conditions associated with exposure to second-hand smoke in confined spaces.

It is anticipated that additional smoking cessation services would be made available if legislation is not changed. This may, however, have lower uptake, or be less effective if the smoke-free regime is not being enforced. Existing costs for smoking cessation and smoking-related healthcare will continue. Additional costs to the health service could range from no costs if there is no

²⁷ Otsuka et al, 2001. Cited in ¹⁸

²⁸ Clarke JG, Stein LA, Martin RA, et al. Forced smoking abstinence: not enough for smoking cessation. JAMA Intern Med 2013; 173:789-794

<http://archinte.jamanetwork.com/article.aspx?articleid=1675874&resultclick=1>

additional take up, to the full costs outlined in Option 1, outcome (i), that is £0 - £230,500 upfront costs for the existing prisoner population, with ongoing annual costs for new receptions of £0 - £600,100.

Local authority

In light of evidence being available that smoking is being allowed in prisons, it will be important to increase enforcement activity. This is likely to be limited to enforcement with prison managers regarding failure to prevent smoking in enclosed or substantially enclosed premises, and failure to provide adequate signage that premises are smoke-free. There will be additional costs to local authorities from this outcome, which have been estimated at £990 for investigating and taking one case to court²¹. As there are only 4 prisons in Wales, the maximum cost has been estimated at £3,960, i.e. one prosecution per prison, and has been attributed to 2016/17 only.

Prisons

There will be no additional costs to prisons from this outcome as shops will still sell tobacco and related products, and the safety and security of prisons will not be compromised.

There will be no changes to operational costs.

Tobacco industry

There will be no costs to the tobacco industry from this outcome as tobacco and related products will still be available in prison shops.

Courts

As there are only 4 prisons in Wales, we have assumed a maximum of 4 prosecutions. A detailed costing framework has not yet been discussed between the Welsh Government and the Ministry of Justice, and so these costs are unknown at present.

Summary of costs associated with Option 1, outcome (ii)

Sector	2015/16 (£)	2016/17 (£)	2017/18 (£)	2018/19 (£)	2019/20 (£)
Local Authorities		3,960 maximum	-	-	-
NHS	0 - 230,500*	0 - 600,100	0- 600,100**	0- 600,100**	0- 600,100**
Total costs per year	230,500	604,060 maximum	600,100 maximum	600,100 maximum	600,100 maximum

*These will be the costs incurred if implementation is in the last quarter of the year.

**It is anticipated that maximum potential costs will reduce over time, but these reductions cannot be quantified at present

Benefits

No benefits have been identified for this option.

Option 2 - Amend the Smoke-free Premises etc. (Wales) Regulations 2007 to include an exemption from the smoke-free requirements for designated prison cells.

Description

This option would amend the existing Regulations to allow smoking in designated prisons cells permanently.

There are two possible outcomes to this option:

- (i) NOMS maintains the status quo and does not further encourage/support prisons to limit the harms from smoking; or
- (ii) NOMS encourages/supports prisons to limit harms from smoking by encouraging additional cessation attempts, providing smoke-free wings voluntarily, with possible eventual move to becoming smoke-free voluntarily.

Option 2 outcome (i) legislation to allow smoking in designated prison cells; no additional support for prisons to limit the harms from smoking

Costs

The costs of this option would be the same as the costs for local authorities in Option 1, outcome (ii).

Summary of costs associated with Option 2, outcome (i)

Sector	2016/17 (£)	2017/18 (£)	2018/19 (£)	2019/20 (£)	2020/21 (£)
Local Authorities	3,960 maximum	-	-	-	-
Total costs per year	3,960 maximum	-	-	-	-

Benefits

There are no benefits identified for this option, as for Option 1, outcome (ii).

Option 2 outcome (ii) legislation to allow smoking in designated prison cells; prisons encouraged and supported to limit the harms from smoking

Costs

Health

If prisons are being encouraged and supported by NOMS to support cessation attempts by more prisoners, and to move voluntarily to becoming smoke-free, then there could be costs to the health service for providing NRT and cessation support. These costs could range from no increase to current costs, to the full costs of all current prisons in Wales becoming smoke-free as calculated in Option 1 outcome 1. The range is therefore £0 - £230,500 upfront costs for the existing prisoner population, with ongoing annual costs for new receptions of £0 - £600,100.

Local authorities

There is no indication that the enforcement regime will need to change, so no costs have been attributed.

Prisons

If prisons support more prisoners to quit, and move towards becoming smoke-free, then it is assumed that fewer tobacco products will be purchased from the prison shops. There may be costs to prisons due to reduced sales of tobacco and related products in the prison shops, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

Tobacco industry

If less tobacco is purchased from prison shops in Wales, then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

Government

There would be costs to NOMS in providing support for a voluntary approach to becoming smoke-free. These costs are estimated by NOMS to be a minimum of £140,000 over one year; and will be managed, as far as possible, within existing resources and budgets. These costs have been attributed equally to 2015/16 and 2016/17 in the first instance.

Summary of costs associated with Option 2

Sector	2015/16 (£)	2016/17 (£)	2017/18 (£)	2018/19 (£)	2019/20 (£)
NHS	230,500*	600,100	600,100** maximum	600,100** maximum	600,100** maximum
Government	70,000	70,000	-	-	-
Total costs per year	300,500	670,100	600,100** maximum	600,100** maximum	600,100** maximum

*These will be the costs incurred if implementation is in the last quarter of the year.

**It is anticipated that costs will reduce over time, but these reductions cannot be quantified at present

Benefits

Health

If the prison service moves to implement smoke-free policies then there will be benefits to the health of both prisoners and prison staff from cessation of smoking, and the effect of the removal of exposure to second-hand smoke. These benefits will range from zero, if no prisons reduce smoking, to the full extent of health benefits which could be achieved if all prisons in Wales become smoke-free voluntarily, as outlined in Option 1, outcome (i).

Option 3 - Amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be supported to become operationally smoke-free in a safe and secure way during the period of the exemption.

Description

An exemption would be put in place so that specific cells can be designated as smoke-free. This exemption would expire on a specific date – possibly 5th April 2017 as suggested in the draft regulations. During the period of the exemption NOMS would support prisons to become smoke-free. Enclosed and substantially enclosed areas of prisons would then be required to be smoke-free on the day after the exemption is removed.

As with previous options, there could be more than one different outcome:

- (i) NOMS supports prisons to become smoke-free by the date for removal of the exemption, and a new Prison Service Instruction (PSI) on the application of smoke-free legislation is issued for Wales.
- (ii) NOMS supports prisons, but they do not become smoke-free by the date for removal of the exemption.

Option 3 outcome (i) a time-limited exemption is put in place and prisons become smoke-free at the expiry of the exemption

Costs

(a) During the time when the exemption is in place

Health Service

If prisons are supported by NOMS to facilitate cessation attempts by prisoners in advance of the exemption being removed, there will be costs to the health service for providing NRT and cessation support. Assuming 55% of smoking prisoners in Wales take up this support, then the costs will be as calculated in Option 1 outcome (i). There will be £230,500 upfront costs for the existing prisoner population in 2016/17.

Local authorities

There is no indication that the enforcement regime will need to change, so no costs have been attributed.

Prisons

If prisons support more prisoners to quit, and sections of prisons become smoke-free, then it is assumed that fewer tobacco products will be purchased from the prison shops. Therefore there may be costs to prisons due to reduced sales of tobacco and related products, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

Tobacco industry

If less tobacco is purchased from prison shops in Wales during the period of the exemption then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

(b) When the exemption is removed

Health Service

Assuming 55% of new reception prisoners in Wales who are smokers take up this support, as calculated in Option 1 outcome (i), the ongoing annual costs for support and NRT for new receptions⁵ will be £600,100.

Local authorities

Local authority enforcement officers may undertake prison visits if intelligence is received that smoking is being allowed in prisons which are now smoke-free. However, prison managers may enforce the legislation effectively and so there

may not be any intelligence to suggest that enforcement visits are required. The minimum potential cost is zero; the cost for an investigatory visit has been assessed at £120²¹. Therefore a maximum cost of £480, i.e. one visit per prison, has been included for 2017/18 only. An assumption has been made that local authority enforcement officers would support prison governors to comply with their duty to prevent smoking in a smoke-free place in the first instance, and so we would not anticipate cases being taken to court initially. If cases are taken to court then costs would rise to £990 per case, with a maximum of £3960 if cases are taken to court relating to all 4 prisons; these costs have been included in the table as a maximum cost in 2018/19.

Prisons

If prisons become smoke-free then it is assumed that tobacco and related products will be removed from the prison shops. There may be costs to prisons due to reduced sales of tobacco and related products in the prison shops, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

Tobacco industry

If tobacco and related products are removed from prison then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

There is the potential for this policy (in combination with other Welsh Government policies and campaigns) to contribute to the de-normalisation of smoking. There may therefore be an indirect impact on future tobacco consumption with resultant costs to the industry.

Government

Cost will be incurred in producing and implementing a new prison service instruction (PSI) on the application of smoke-free legislation for Wales. These costs have been calculated by NOMS as a minimum £140,000 over one year.

Risks associated with implementation have been estimated by NOMS to be at least a 30% optimism bias added to the minimum implementation cost. Therefore, the minimum costs including optimism bias for risks associated and contingency planning is estimated at £182,000 over one year. Rapid implementation of policy could increase risks and associated costs. These cannot be quantified, and are not included in the table below.

Courts

It is assumed that this option would have only a limited cost impact on the Courts. If a new PSI were introduced, setting out that, effectively, current legislation is to be complied with, it is not envisaged that many prosecutions would be brought. As there are only 4 prisons in Wales, we have assumed a maximum of 4 prosecutions. A detailed costing framework has not yet been

discussed between the Welsh Government and the Ministry of Justice, and so these costs are unknown at present.

Summary of costs associated with Option 3, outcome (i)

Sector	2016/17 (£)	2017/18 (£)	2018/19 (£)	2019/20 (£)	2020/21 (£)
NHS	230,500*	600,100	600,100** maximum	600,100** maximum	600,100** maximum
Local Authorities	-	480 maximum	3,960 maximum	-	-
Government	182,000	-	-	-	-
Total costs per year	412,500	600,580 maximum	604,060 maximum	600,100 maximum	600,100 maximum

*These will be the costs incurred if implementation is in the last quarter of the year. Costs for supporting new receptions will also be required if implementation is earlier.

**It is anticipated that costs will reduce over time, but these reductions cannot be quantified at present.

*** This figure includes the 30% optimism bias identified for contingency planning purposes.

Benefits

Health

This option would help to protect non smoking offenders and prison staff from the health harms associated with exposure to second-hand smoke in prisons and contribute to a reduction in health conditions caused by smoking, and from exposure to second-hand smoke, as outlined in Option 1 outcome (i); although full realisation of these benefits could be delayed by up to a year in the case of slippage or security issues

Prisons

Prisons would be supported to become smoke-free in a safe and secure way, thus minimising the risk of disruption to the prison service. This would mean for the duration of the implementation the prisons in Wales would be compliant with legislation and in line with prisons in England thereby regularising the position.

Option 3 outcome (ii) a time-limited exemption is put in place and prisons do not become operationally smoke-free at the expiry of the exemption

It would be necessary to review all options and costs, as outlined above, in order to decide if a further exemption is required. Separate costs for this have not been calculated.

Preferred option

As a result of an analysis of the costs and benefits of each option, draft regulations were prepared for consultation which reflect Option 3 - amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be supported to become operationally smoke-free in a safe and secure way during the period of the exemption. The time limit of the exemption is such that the need for any further exemption can be considered as part of the development of Regulations arising from the Public Health (Wales) Bill. This is the option which is being proposed to the National Assembly for Wales.

Consultation

A summary of consultation responses can be found at:

<http://gov.wales/consultations/healthsocialcare/smokefree/?status=closed&lang=en>

Competition Assessment

9.1 The draft regulations do not affect charities and/or the voluntary sector. The only retail businesses affected will be prison shops which are managed entirely by the prison in which they are situated on a monopoly not-for-profit basis. There may be some effect on tobacco businesses due to reduced sales of tobacco, but these may be offset by sales of electronic cigarettes. Therefore we anticipate only minor impact to business.

Post implementation review

The effect of the any time-limited Regulations, as drafted, will be considered prior to the removal of the time-limited exemption.

APPENDIX A

The Competition Assessment

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

*The businesses affected are prison shops which are run on a monopoly not-for-profit basis in each individual prison, therefore competition doesn't apply.