

Updating New Zealand's national smokefree law to reduce anomalies and improve health protection

A Judicial Review¹ has identified problems with how “open areas” of buildings (where smoking is permitted in New Zealand) are determined in practice. In this letter we discuss the status of the New Zealand's national smokefree law and the need for an upgrade and expansion of this law.

This Judicial Review was the outcome of an application for a review of the instrument used to determine allowable smoking areas in licenced premises, that is, the “open area calculator”.² The application was by a group of non-governmental organisations including the Cancer Society.³ This application cited the case of the SkyCity Casino's Diamond Lounge, which had been given an approved “open area” status by Auckland Regional Health. The process they used for the approval depended on this calculator.¹

The application for review noted that the calculator was based on the possible flow of air in a room, and was at odds with the Smoke-free Environments Act.⁴ The view of these organisations equated with New Zealand based research evidence around very enclosed “open area” settings at bars and pubs, in which the measured air pollution (PM_{2.5}) from tobacco smoke can be quite high.^{5,6} This air pollution from smoking in such “open areas” also drifts into indoor areas—exposing even more people to this hazard (as per other New Zealand research⁷⁻⁹).

The “open area calculator”² that was considered in this Judicial Review is routinely used by Smoke-free Enforcement Officers around the country to assess licensed premises. It is relatively complex and uses information about the total floor area, openings and windows, side and ceiling measurements.

The outcome of the Judicial Review¹ was that this calculator was inconsistent with the definition of an “open area” under the Smoke-free Environments Act. As a result it is possible that a new calculator will have to be designed by the Ministry of Health so that it produces results that are more consistent with the intent of the current law. However, such re-design may not be worth the effort and might even lead to further legal processes. This is because the Smoke-free Environments Act appears to us to have an in-built contradiction between its purpose and the definition of “internal areas”.

The purpose of the relevant section of the Act on smokefree places (s.4a) is “to prevent the detrimental effect of other people's smoking” in indoor workplaces and public places.⁴ The definition of an “internal area” stipulates an area that is “completely or substantially enclosed” (Section 2). The words “substantially enclosed” mean that according to this part of the Act, smoking can be allowed in *partly* enclosed areas. This means that, in contradiction to the purpose of the Act, the effects from smoking in partly enclosed places *cannot* be prevented, since there is no known safe level of tobacco smoke (a proven carcinogen¹⁰).

We suggest that the optimal response to this situation is to take the opportunity to upgrade the law and expand it, so that it better resembles state-of-the-art international practice. Such new legislation could:

- Require a simple and highly transparent approach to smokefree outdoor areas at restaurants and pubs/bars. That is, all areas within 10 metres from all built structures that the public use are required to be smokefree. This is somewhat like the 20 and 25 foot laws that appears to work well in parts of the USA (e.g. in Washington State, 25 feet from entrances, exits, windows that open, and ventilation intakes).¹¹
- Include a smokefree car requirement for when children (<16 years) are present. This approach has public support in New Zealand¹² and is long overdue in this country when compared to Australia, Canada and various US states.
- Include smokefree children's playgrounds, parks and sports fields nationwide (to bring the country up-to-speed with developments in places like Auckland City¹³).
- Include smokefree transportation settings – all train platforms and 10 metres from all bus stop markings. Smoking in such settings has been identified as problematic in New Zealand research—e.g. in terms of air quality¹⁴ and perceived health and nuisance impacts.¹⁵

Achieving all of these measures would bring the country closer to world-leading jurisdictions in North America and various Australian states. A new law requiring smokefree areas within 10 metres of “built structures that the public use” should also result in a situation that is simpler and more comprehensible than the present “substantially enclosed” law. That is, smokers will more readily understand the law, and members of the public can know when to report situations where the law is being breached.

A new law would also provide the opportunity to make the law fully consistent with the Government's Smokefree Nation Goal for 2025.¹⁶ As such it could incorporate major endgame strategies such as regular effective annual tax increases through to the achievement of the goal, and the legal capacity to phase-down the number of retail outlets for tobacco products.

In summary, civil society is to be congratulated for highlighting the deficiency in the current national smokefree law. We now need an upgraded law that better protects New Zealanders from secondhand smoke and is a strong foundation for achieving the Government's 2025 goal.

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References:

1. New Zealand High Court. The Cancer Society of New Zealand Incorporated V The Ministry of Health [2013] NZHC 2538 [30 September 2013]. <http://www.courtsofnz.govt.nz/front-page/cases/the-cancer-society-of-nz-inc-v-the-ministry-of-health>
2. Ministry of Health. Internal and Open Areas under the Smoke-free Environments Act 1990 as at 25 May 2004. Wellington: Ministry of Health, 2004. <http://www.health.govt.nz/publication/internal-and-open-areas-under-smoke-free-environments-act-1990-25-may-2004>
3. Cancer Society of New Zealand. Successful outcome of the Open Area Calculator. (Media Release 1 October, 2013). <http://www.scoop.co.nz/stories/PO1310/S00007/successful-outcome-of-the-open-area-calculator.htm>
4. New Zealand Government. Smoke-free Environments Act 1990 (with amendments). Reprint as of 1 July 2013. <http://www.legislation.govt.nz/act/public/1990/0108/latest/DLM223191.html>
5. Wilson N, Edwards R, Maher A, et al. National smokefree law in New Zealand improves air quality inside bars, pubs and restaurants. BMC Public Health 2007;7:85.
6. Wilson N, Edwards R, Parry R. A persisting secondhand smoke hazard in urban public places: results from fine particulate (PM_{2.5}) air sampling. N Z Med J 2011;124(1330):34-47.
7. Edwards R, Wilson N. Smoking outdoors at pubs and bars: is it a problem? An air quality study. N Z Med J 2011;124(1347):27-37.
8. Wilson N, Thomson G, Edwards R. Good smokefree law compliance in rural pubs in New Zealand: results from fine particulate (PM_{2.5}) air sampling. N Z Med J 2011;124(1332):89-93.
9. Patel V, Wilson N, Collinson L, et al. Tobacco smoke pollution associated with Irish pubs in New Zealand: fine particulate (PM_{2.5}) air sampling. N Z Med J 2012;125(1356):105-10.
10. US Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.
11. Washington State Legislature. RCW 70.160.075: Smoking prohibited within twenty-five feet of public places or places of employment Olympia, WA Washington State Legislature, 2005.
12. Wilson N, Thomson G, Edwards R, Gifford H. Smokefree cars to protect children and denormalise smoking: a mini-review of New Zealand literature. N Z Med J 2012;125(1355):81-6.
13. Cancer Society of New Zealand. Smokefree Councils & Outdoor Areas: Regional cases. [Accessed 4 October, 2013]. <http://www.cantobacco.org.nz/campaigns/smokefree-councils-outdoor-areas/regional-cases>
14. Patel V, Thomson G, Wilson N. Smoking increases air pollution levels in city streets: observational and fine particulate data. Health Place 2012;18:1202-5.
15. Russell M, Wilson N, Thomson G. Health and nuisance impacts from outdoor smoking on public transport users: data from Auckland and Wellington. N Z Med J 2012; 125(1360):1-4.
16. New Zealand Parliament. Government Response to the Report of the Māori Affairs Committee on its Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Māori (Final Response). Wellington: New Zealand (NZ) Parliament, 2011. http://www.parliament.nz/en-nz/pb/presented/papers/49DBHOH_PAP21175_1/government-final-response-to-report-of-the-māori-affairs