



Clear the Air Submission to Legco Bills Committee 3rd May 2008

Dear Sir,

Clear the Air considers the introduction of the Fixed Penalty system is a good move by the Administration. We also consider that prior to its commencement, Cap 371 should receive amendments:

1) **Onus on licensees of restaurants , bars, mahjong centres, game centres, night clubs etc.** In overseas locations where effective anti smoking laws are in place such as UK, the onus to prevent smoking taking place lies with the person in charge of the premises. We cannot see why this is not the case in Hong Kong. The licensees would then pay more attention to preventing their customers from smoking if they knew they would also receive a ticket. To save the hassle of having a separate FPN the law could mandate licensees receive 2 tickets for a first offence, three for a second offence etc and loss of licence to operate the premises on a 'three strikes and you are out' basis. Licensees have the legal obligation not to serve alcohol to intoxicated persons and we see no reason why they cannot be obliged to enforce non smoking in their premises also. Please see UK legislation at the addendum for your consideration.

2) **Smoking in vehicles when other persons , children or animals are present.** It is the intention of anti smoking legislation to protect innocent workers and parties from the toxic passive cancerous poisons. An enclosed vehicle has one hundred times more concentrated poisons (studies available) than a pub prior to the smoking ban. The law already bans smoking in public and Government transport and should be amended to protect both human and animal passengers in all motor vehicle cabs.

http://www.opsi.gov.uk/si/si2007/uksi_20070760_en_1

3) **Tobacco tax.** If far fewer people smoked it will be easier to enforce the Fixed Penalty system ; i.e. prevention rather than enforcement. The WHO and World Bank state clearly that the most effective way to prevent youth smoking is by tobacco tax increase to be at least 70% of the sales price. The HK\$ 16 per 20 sticks excise tax has not been increased here since 1999 and after adjustment for inflation should be at least \$25 - \$ 30 per pack tax to have the required effect of preventing youth smoking and reducing adult smoking. University of HK studies show 50% of local male smokers aged 35-69 will die from tobacco related illnesses here with resultant costs on local medical facilities and loss of productivity . A HK Department of Community Medicine study shows the cost of smoking including loss of life to the community at 25 times the yearly excise tax and we consider the Ombudsman should task the Financial Secretary for not increasing the tobacco tax and reducing this phenomenal and totally preventable loss. Indeed the Legco Brief extract below says it all and we concur:

" Economic Implications 32. With strengthened enforcement powers, the compliance rate with the statutory smoking ban should be higher. Public exposure to second hand smoke in statutory no smoking areas would also be reduced. Some smokers may choose to quit smoking and some may reduce their daily consumption of cigarettes or other tobacco products. This should contribute towards better health of the local population, with intangible benefits on productivity and also saving in medical costs which would otherwise be incurred by smoking-related diseases. Sustainability Implications 34. In line with the sustainability principle of pursuing policies which promote and protect the physical health of the people of Hong Kong, the proposal may encourage more smokers to quit or reduce their consumption of tobacco products, thereby improving the health conditions of the general population of Hong Kong."

4) **Overseas studies** by experts at Stanford University have shown the inherent dangers of high levels of passive sidestream smoke emanating from smokers gathered around entrances to buildings. Legislation is required to prevent people gathering near building entrances. The fewer legal places they have to smoke, the more people are likely to quit for the betterment of Hong Kong's overall productivity and reduction in health care costs.

<http://news-service.stanford.edu/news/2007/may9/smoking-050907.html>

<http://www.tobaccocontrol.bmj.com/cgi/reprint/9/1/98.pdf>

http://www.repace.com/pdf/OTS_FACT_SHEET.pdf

5) **Hong Kong's first year of the smoking ban.** Clear the Air anticipated the Financial Secretary's inaction as regards tobacco tax in the 2008 budget and as can be seen below there is a list of penalties provided by the Customs Department Task Force 3 weeks before the budget speech. The Customs Department reply is clear. Too bad the Financial Secretary did not evidently consult them before making,





or rather not making a decision to increase taxation on tobacco. Please ask him what expert evidence he obtained that smuggling will increase here if he increased tobacco tax. Smuggling can only occur with the **direct complicity of the Tobacco companies** and again damning proof in their own words can be found in the tobacco company Legacy documents online. Major punitive penalties can be levied on the source manufacturer of any such products as happened in the EU and which resulted in massive long term settlements by the tobacco companies with the EU. The Financial Secretary's statement that increasing tax will result in increased smuggling is without merit and flawed and remedial urgent action is required on his part. *HK Customs Department Quote : "The illicit cigarettes cases effected by the department in 2007 was down 41% when comparing with 2006, whereas the illicit cigarettes seized in 2007 had increased by 39.45 million sticks when comparing those seized in 2006. It was because there were a number of cases involving substantial amount of illicit cigarettes (under transshipment) intercepted by Customs officers at the container port. The total illicit cigarettes seized in 2007 were 111.26 million sticks."*

Without replacement (youth) smokers the tobacco companies are dead as their current customer base is dying off at a rate of 7,000+ per year here. In a pre-budget interview with the HK Standard, the head of COSH stated that there are almost 16,000 smokers aged between 15 - 19 years old in Hong Kong, but there is only one youth Quit-line at HKU capable (in Cantonese) of handling 400 applicants. Before the Fixed penalty scheme is implemented it is most important that a competent cessation service be already in place to handle the expected numbers of addicts wishing to give up their habit providing free NRT paid for by the tobacco tax funds. Please see Addendum for UK information on this.

Overseas Comparison The UK taxation on cigarettes is \$ 62 a packet and there was already in place to enhance the UK smoking ban effective July 01 2007, NRT therapy and adequate Quit-lines. UK smoking rates have accordingly decreased 4% since the comprehensive ban commenced in July 2007. Almost 25% of 16-24 year old smokers and 21% of 25-34 year olds managed to give up, compared to just 4% of 45-54 year olds and 7% of 55-64 year olds. There are no smoking exemptions in UK workplaces and high tobacco taxation; hence the success of their ban.

Conversely in Hong Kong from January 01 to December 31st 2007, the first year of the new anti smoking legislation, the number of Duty Paid cigarettes sold here increased by an incredible 16,399,000 sticks. In 2006 pre smoking ban, there were 3331.74 million duty paid cigarettes sold in Hong Kong; in 2007 after the emasculated smoking ban 3495.73 million duty paid cigarettes were sold here. The Government reaped \$ 2.834 billion in tobacco tax in 2007 but plied next to nothing into smoking prevention, multi lingual Quit-lines and free NRT therapy and the availability of same outside of working hours. We do not consider the increase is due to tourists buying cigarettes here since they will carry Duty Free tobacco with them.

This dismal failure shows clearly that the combined effects of

- a) no tobacco tax increase hence affordable tobacco prices even for youth
- b) smoking exemptions in bars, restaurants claiming to have more liquor sales than food sales, mahjong parlours and night clubs reflect a failed policy.

This Hong Kong example will soon feature in an article in the Journal 'Tobacco Control' written by Professor David Simpson, Director International Agency on Tobacco and Health, showing how we have regressed rather than advanced as a result of our flawed anti smoking system.

Comments on Legislative Brief

LEGISLATIVE COUNCIL BRIEF FIXED PENALTY (SMOKING OFFENCES) BILL 2008

1)

"We do not propose to deal with other offences provided for by the Ordinance through an FPS, for example, the sale of tobacco products to persons under 18 years of age or the display of tobacco advertisement, as these may involve proof of complicated facts of the case in prosecution."

Clear the Air considers that

- a) all tobacco retailers in Hong Kong should be licensed. It is imperative our under-aged youth cannot buy tobacco products.
 - b) that any licensed vendor must check the Identity card of any youth attempting to purchase tobacco
 - c) enforcement of penalties for selling to under-aged persons including loss of the license to sell tobacco
- We cannot see how 'complicated proof' can be involved. Either the youth had an ID card showing he/she was over 18 or not.





2)

"If the person to whom an FPN is issued wishes to dispute liability, he may do so by notifying the enforcement authority of his intention in writing. A summons will then be served on him. "

The Fixed Penalty Traffic Contraventions Ordinance Cap 237 was developed in Hong Kong to decriminalize parking offences, making the transgressions into contraventions of civil law whereby the owner of the vehicle can either admit or deny liability. It is the most successful system of its kind worldwide. A computer generated notice of the offence is sent to the registered address of the vehicle's registered owner within a few days of the contravention. The owner, if not the driver, now has notification of the offence and can either pay the fee, decide to fight the case in court or ignore the notification. If the owner does not arrange payment within 3 weeks of the contravention a computer generated Summons to Defendant is issued and sent to the registered address of the vehicle owner. If the owner fails to attend court the case is heard *ex parte* in absentia and a judgement made including costs. If the owner fails to pay such fees his vehicle can be impounded and will not be released till he pays all outstanding charges. If he does not pay the vehicle can be auctioned.

Clear the Air suggests that within a few days of the offence a computerized demand for payment notice be sent to the registered address of the offender as listed in the Government Registration of Persons / Transport Department / Hospital authority / Voters / Jurors / Agriculture and Fisheries / Inland Revenue Department etc databases. The notice will have a section for the recipient to complete and return should he/she wish to dispute liability for the smoking contravention. The notice should list the additional costs involved should the case be heard in court. This should have the effect of shortening the time it takes to issue summons proceedings, dissuade people from attending court and hence will likely result in them paying the fine without contest. Please see the UK legislation at the Addendum - you may wish to consider following their example and offer a discounted fine of perhaps \$ 1,200 if the offender pays the FPN within 7 days of the offence as a further encouragement not to contest the case.

http://www.opsi.gov.uk/si/si2007/uksi_20070764_en_1

For information herewith is a similar incident in Great Britain :

"Cabbie fuming after smoking fine Apr 24 2008 by Dave Edwards, Rhondda Leader

*A TAXI driver has had to cough up more than £400 in court fines and costs after council officials spotted him smoking in his cab. John Colcomb, of Henllys, Trebanog, has become the first person in Rhondda Cynon Taff and one of the first in Wales to be prosecuted under the new smoking ban law thanks to a successful prosecution by RCT Council's Public Health and Protection Enforcement Officers. But Mr Colcomb has blasted what he describes as the 'Big Brother' attitude of the council and claims he has been victimised. Mr Colcomb, who has been a taxi driver for 18 years, told the Leader that there were "plenty of other taxi drivers smoking in their cabs". He said: "The council couldn't even get the name of the taxi company right. It is called AC Taxis. "It just feels like Big Brother is watching you. I enjoy my fags and I don't know what the world is coming to when you are not allowed to have a smoke in your vehicle. "There are plenty of other taxi drivers out there who are smoking in their cabs and the council will have their hands full trying to catch them." Mr Colcomb, **received two fixed penalty notices**; one for smoking in a work vehicle and the second for throwing the cigarette butt onto the highway. When he refused to pay the penalties the case was heard at Rhondda Magistrates' Court where he was ordered to pay **£435.21**.*

*The court was told that at 4.40pm on September 17, 2007 two of the council's enforcement officers saw Mr Colcomb driving a black Vauxhall Vectra along Trebanog Road, Trebanog. His vehicle was stationary and waiting to turn right into Trebanog Service Station when the offence took place. Mr Colcomb was seen throwing a cigarette butt through the driver-side window onto the road. The offence of littering contravenes Section 87 of the Environmental Protection Act 1990. The car he was driving was a licensed taxi, named as Ace Taxis, which resulted in him being fined for smoking in a work's vehicle, contrary to Section 7 of the Health Act 2006. On the following day Mr Colcomb received the two fixed penalty notices of £50 for smoking and £75 for litter, both of which he disputed. RCT prosecuted Mr Colcomb for failure to pay the fixed penalty notices at Rhondda Magistrates' Court. The defendant did not attend the hearing and the facts were proven in his absence. He was fined £100 for each of the charges, and ordered to pay **£220.21 costs and £15 in victim surcharge**. David Jones, Head of Community Protection said: "The council's Public Health and Protection Officers led an extensive campaign on the run-up to the ban. Nobody has an excuse in saying that they are not aware of the implications of it." Nigel Wheeler, Service Director for Streetcare said: "We continue to promote a programme of change to crackdown on litter, dog fouling, flyposting, flytipping, graffiti and waste issues. This is to ensure that Rhondda Cynon Taf will be a community where everyone who lives, works or visits the area will enjoy the*





benefits of a better quality of life." a 'fine' mess: Taxi driver John Colcomb is the first person to be fined in RCT under new smoking laws

<http://icwales.icnetwork.co.uk/news/south-wales-news/rhondda/2008/04/24/cabbie-fuming-after-smoking-fine-91466-20802134/>

3)

"require that person to supply his name, address and contact telephone number, and to produce proof of identity. Failure to supply these personal particulars or to produce proof of identity, or the supply of false or misleading personal particulars is an offence"

We can foresee numerous people attempting a 'runaway' approach to avoid the receipt of FPNs when they are caught. We suggest the new legislation includes the ability of all authorized persons who are allowed to issue such FPNs to be permitted to take the photograph of any suspected offender and indeed that they are instructed to do so for evidential value (by camera phone so the picture can be transmitted in case of a runaway.) Also that they be able to issue FPNs to persons they have not seen carrying lighted tobacco products but whom are identified by a witness (willing to attend court) who has seen the alleged offence. We also suggest the consideration of adding an offence of 'absconding to evade the issue of a FPN' and publicise the fact that this offence will carry a penalty of \$10,000 for the first offence and higher for a repeat offence.

4)

Tourists and business visitors

Hong Kong had 27 million tourists last year. Half of these were from the Mainland and 63% of Mainland Chinese males smoke. The percentage of smokers amongst our overseas visitors is generally higher than the smoking percentage of our population in Hong Kong. Immigration counters / airport luggage trolleys should advertise the requirement to carry ID in Hong Kong and advertise the fact that smoking is illegal in many places here and that there will be strict enforcement.

There needs to be co-operation between the issuing FPN department and the Immigration Department so that offenders trying to leave Hong Kong without paying their fines can make payment at Immigration points when they are trying to depart.

5)

Exceptional Cases

"There would be cases in which the offender could not afford to pay the fixed penalty or has other reasons to plead for different treatment. To retain flexibility for any compassionate consideration, a magistrate may for good cause, on an application by the enforcement authority at anytime, rescind any order for the payment of a fixed penalty and/or any additional penalty imposed and/or any administrative costs, or any other order made in the same proceedings."

We consider that if the offenders can afford to buy cigarettes they can afford to pay the penalty. There has to be some form of punishment whether community service or other as an indication that smoking in public will not be tolerated. This basically tells any person that if they plead they are poor they have a licence to smoke anywhere they like since they will not be fined and this will be abused.

Yours faithfully,

James Middleton

**Chairman Anti Tobacco Committee
Clear the Air**

<http://tobacco.cleartheair.org.hk>

<http://www.cleartheair.org.hk>





ADDENDUM

1)

<http://gosmokefree.nhs.uk/>

Please note that UK offers free Quit-lines staffed from 0700 hrs - 2300 hrs and Hong Kong should follow suit - there are 15,700 smokers aged between 15 - 19 in Hong Kong and there needs to be sufficient resources available to handle nicotine addicts who wish to try and give up and for these to be accessible outside of normal work hours.

2)



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Enforcement

General

What happens if someone smokes in a smokefree place?

Who's responsible for enforcing the smokefree law?

So does that mean you'll be sending enforcement officers to every public place and workplace in the country?

What if a smoker challenges me and claims that they have the right to smoke in the workplace?

Will the police be involved in enforcement?

Penalties and fines

What are the penalty amounts?

Will fixed penalty notices be applied at the time of the offence, or at a later date?

Fines are very well, but if the publican of my local persistently fails to provide a smokefree environment, shouldn't they lose their licence?

Compliance

Who do I call if I see someone smoking?

Will all calls be reported to local authorities?

What happens if people make false complaints to the compliance line?

Do I remain anonymous?

<http://www.smokefreeengland.co.uk/faq/enforcement.html>

General

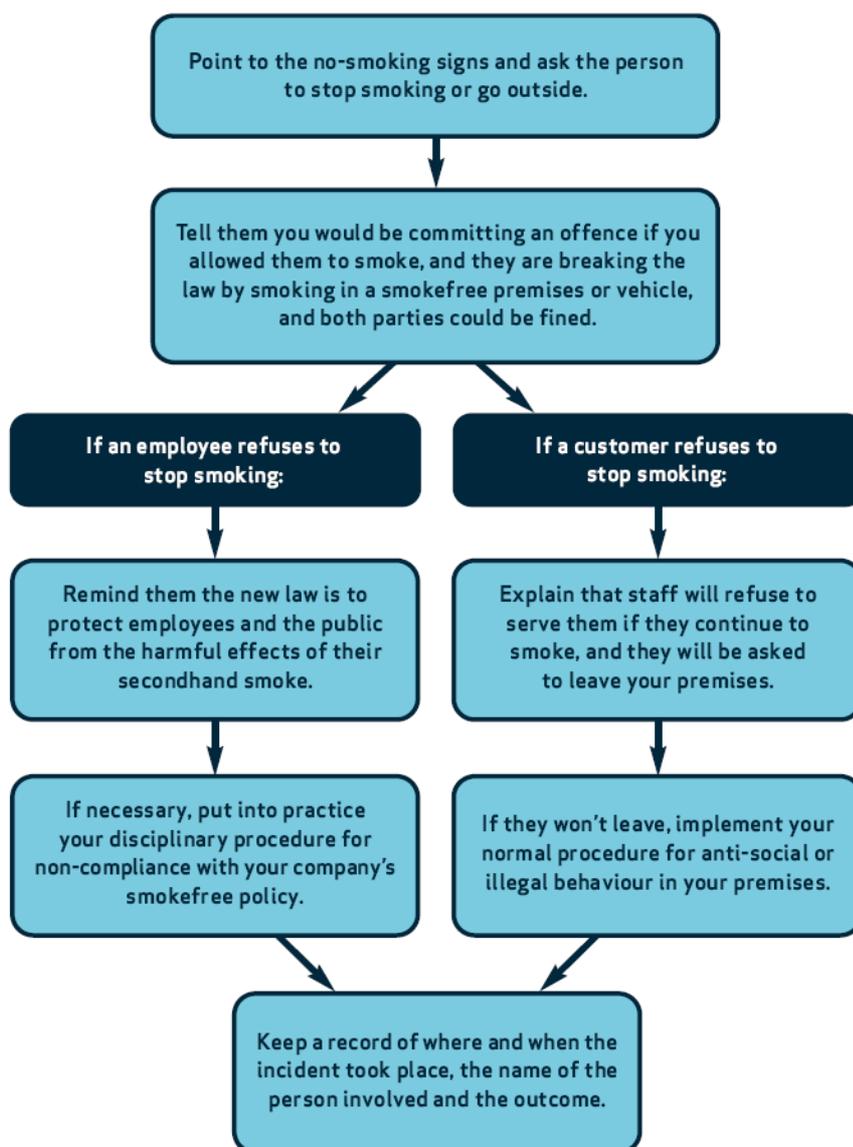
What happens if someone smokes in a smokefree place?

Smoking in smokefree premises or vehicles is against the law. The person with management responsibility for the premises or vehicle is legally responsible for preventing smoking as well. The guidance that businesses have received from the Department of Health includes advice on the steps that can be taken if someone smokes in a smokefree place. This flowchart suggests reasonable steps that could be taken to deal with smoking in any smokefree premises or vehicle.



HOW TO DEAL WITH SMOKING IN A SMOKEFREE PLACE

If you are in charge of smokefree premises and/or vehicles, you will have a legal responsibility to prevent people from smoking in them. If someone does smoke in any premises or vehicles you are responsible for, here are some practical steps you might take to deal with them.



If physical violence is threatened by a person smoking, we suggest you notify and/or seek the assistance from the police.



Who's responsible for enforcing the smokefree law?

Smokefree law will be enforced by local councils and port health authorities, within the areas for which they have responsibilities. The Smokefree (Premises and Enforcement) Regulations specify the bodies that will be enforcement authorities for the smokefree law.

The approach local councils will take to enforcement is based on supporting businesses and the public to comply with the smokefree law by providing advice, support and information at first. Formal enforcement action should only be needed when the seriousness of the cases warrants such action.

If you need advice on the smokefree law, please make contact with your local council. You can find your local council on the DirectGov website

So does that mean you'll be sending enforcement officers to every public place and workplace in the country?

The Government expects that there will be high levels of compliance with the new smokefree law. Environmental health officers are likely to visit premises considered to be at higher risk of non-compliance, usually because they are places that people could smoke before the law comes into place.

In addition to this, members of the public may call the smokefree compliance line on 0800 587 166 7 to report possible breaches of the law and this information will be passed to local councils to look into as appropriate.

What if a smoker challenges me and claims that they have the right to smoke in the workplace?

The Advisory, Conciliation and Arbitration Service (ACAS) has produced a Q&A which deals with these kinds of issues.

[Click here for more information \(new window\)](#)

Will the police be involved in enforcement?

Enforcement is the responsibility of local authorities, but as with other enforcement issues, police may need to be involved in cases of public disorder, threatening behaviour or breaches of the peace.

Penalties and fines

What are the penalty amounts?

The penalties and fines for the smokefree offences set out in the Health Act 2006 are:

- Smoking in a smokefree premises or vehicle: a fixed penalty notice of £50 (**discounted to £30 if paid within 15 days from the issue of a notice**) or a fine by a court not exceeding level 1 on the standard scale (**up to £200**)
- Failure to display no smoking signs in smokefree premises and vehicles as required by the new law: a fixed penalty notice of £200 (discounted to £150 if paid within 15 days from the issue of a notice) or a fine by a court not exceeding level 3 on the standard scale (up to £1000)
- **Failing to prevent smoking in a smokefree premises or vehicle:** a fine by a court not exceeding level 4 on the standard scale (up to £2500)

Will fixed penalty notices be applied at the time of the offence, or at a later date?





That will be up to the enforcement officer.

Fines are all very well, but if the publican of my local persistently fails to provide a smokefree environment, shouldn't they lose their licence?

There is no provision in smokefree legislation for smokefree offences to result in a review of a pub's licence. We believe the penalties are a sufficient deterrent, and we expect that pubs and other hospitality venues will comply with the legislation to make their premises a healthier place to visit and work.

Smokefree Compliance Line

Who do I call if I see someone smoking?

If you believe someone is breaking the law by smoking in a smokefree premises or vehicle, we suggest you let a member of staff know as soon as possible so the incident can be dealt with quickly.

Members of the public may alternatively call the smokefree compliance line on 0800 587 166 7 to report possible breaches of the law. Your call will be answered by a call centre operator, who will then forward the information to the relevant local councils to follow-up as appropriate.

A call to the smokefree compliance line should be approximately 3 minutes long. Information will be emailed to local authorities on a daily basis.

Will all calls be reported to local authorities?

All calls, where enough information has been provided will be forwarded to local councils.

What happens if people make false complaints to the compliance line?

Local councils have considerable experience of handling complaints on a wide range of issues. All valid complaints will be looked into by local councils, who will decide on the appropriate enforcement action to be taken. If employers can demonstrate that they have taken reasonable steps to comply with the smokefree law, they have nothing to fear in the unlikely event that false calls are made.

Do I remain anonymous?

If you make a call to the smokefree compliance line, you can ask to remain anonymous. However if you wish to leave your details you may be contacted by the local authority for further information to assist them when they are looking into the matter.

Links to regulations on the Office of Public Sector Information website:

<http://www.smokefreeengland.co.uk/thefacts/the-regulations.html>

1. The Smokefree (Premises and Enforcement) Regulations set out definitions of "enclosed" and "substantially enclosed" and the bodies responsible for enforcing smokefree legislation.

[The Smoke-free \(Premises and Enforcement\) Regulations 2006 \(new window\)](#)

2. The Smokefree (Exemptions and Vehicles) Regulations set out the exemptions to smokefree legislation and vehicles required to be smokefree.

[The Smokefree \(Exemptions and Vehicles\) Regulations 2007 \(new window\)](#)

3. The Smokefree (Penalties and Discounted Amounts) Regulations set out the levels of penalties for offences under smokefree legislation.

[The Smokefree \(Penalties and Discounted Amounts\) Regulations 2007 \(new window\)](#)





4. The Smokefree (Vehicle Operators and Penalty Notices) Regulations set out the responsibility on vehicle operators to prevent smoking in smokefree vehicles and the form for fixed penalty notices.

[The Smokefree \(Vehicle Operators and Penalty Notices\) Regulations 2007 \(new window\)](#)

5. The Smokefree (Signs) Regulations set out the requirements for no-smoking signs required under smokefree legislation.

[The Smokefree \(Signs\) Regulations 2007 \(new window\)](#)

FREE LOCAL NHS STOP SMOKING SERVICE 0700 -2300 HRS

One-to-one or group support sessions and advice in your area.

PATCHES, GUM AND MORE ...

Manage your cravings with the help of stop smoking medicines.

FREE SUPPORT AT HOME

Get advice and support at critical times by post, phone, email and text free with the Together Programme

FREE DVD, LEAFLETS AND MORE ...

Order brochures, leaflets and our DVD to be delivered to your home

3) Relevant Recent News

Cyprus: Top judges call for total smoking ban

The existing smoking ban law is not being enforced and what Cyprus really needs is **a total ban on smoking**. These are not the conclusions of health experts or politicians, but of **two Supreme Court judges who have had enough of the shortcomings of anti-smoking legislation**.

The law which prescribes measures for the restriction of public smoking was passed by the House of Representatives in June 2002. It outlines that nobody use or can smoke in an area where smoking is banned, except in a designated area which has been specifically regulated to accommodate smokers. Furthermore, employers can only allow smoking in designated areas and employees must ask for written permission to smoke in these. **Penalties for non-compliance are a fine of up to £1,000** (approximately €1,710), and/or a six-month jail sentence.

The judges note that the House of Representatives has failed to adequately define in which areas smoking should be banned and how big these areas should be. The judges also note that it is paradoxical that police who are present in closed sports centres to prevent violence between fans, do not take any action to stop people who are breaking the law by smoking. According to the judges passive smoking is a major worry and the only solution is a total ban on smoking in public places. They do not think that this would be impossible, since countries whose populations were considered fervent smokers such as Italy, Scotland and France have enforced it. Source: Cyprus Mail, April 2008 Link: <http://tinyurl.com/59hlsx>





Health News

In Mexico City, tequila to be downed without cigarette in hand

Apr 4, 2008, 0:45 GMT

Mexico City - Mexico City citizens who enjoy smoking while visiting the city's 35,000 public establishments had to stub out their cigarettes Thursday.

People who defy the law multiple times face fines of up to 150 dollars, and determined repeaters could even be thrown in jail for 36 hours. Owners of restaurants and hotels also face fines, and office buildings, hospitals and universities which continue to allow smoking in public spaces also face harsh sanctions.

Restaurants where smokers are caught twice in one year will be closed, according to the law.

The anti-smoking law reflects a growing trend across the North American continent and, more recently, Europe, spurred on by health-conscious governments trying to stem the human and material costs of tobacco's health consequences.

http://news.monstersandcritics.com/health/news/article_1398273.php/In_Mexico_City_tequila_to_be_downed_without_cigarette_in_hand

