

Australian Capital Territory

Smoke-Free Public Places (Public Transport Stops) Declaration 2017 (No 1)

Disallowable instrument DI2017—248

made under the

Smoke-Free Public Places Act 2003, s 90 (Declaration of smoke-free public place or event)

EXPLANATORY STATEMENT

Outline

This Declaration establishes the area within five metres of a public transport stop and public transport waiting area as smoke-free. This instrument is jointly made by the Chief Minister and Minister for Health and Wellbeing under section 90 of the *Smoke-Free Public Places Act 2003* (the Act).

This Declaration applies to all public transport stops and public transport waiting areas in the ACT and complements the *Smoke-Free Public Places (Public Transport Stations) Declaration 2017 (No 1)*.

Section 90(2) of the Act requires community consultation to be undertaken prior to declaring a new smoke-free public place. ACT Health undertook community consultation on a proposed policy to prohibit smoking at public transport waiting areas and stops from 24 February to 7 April 2017. ACT Health received 581 complete submissions to the consultation, with 93 per cent of respondents supporting the introduction of a policy to prohibit smoking at public transport waiting areas and stops.

Due Ministerial consideration has been given to the impact of declaring public transport waiting areas and stops smoke-free and has included matters listed in subsection 90(3) of the Act. A Regulatory Impact Statement has been prepared to explore the policy options and to assess the potential costs and benefits of smoke-free public transport waiting areas. Smoke-free areas are a vitally important tool to protect community health by reducing exposure to second-hand smoke (SHS) and to improve health outcomes in smokers and non-smokers. They help to denormalise smoking, which helps to prevent people from taking up the habit and also supports smokers who are trying to quit by reducing social cues to smoke.

The *National Tobacco Strategy 2012-2018* recommends that jurisdictions adopt policies that restrict smoking outdoors where people gather or move in close proximity. Public transport waiting areas and stops are places that often attract large numbers of people, including school children, the elderly and people with disability. Commuters have

limited ability to avoid exposure to SHS when waiting for public transport. The ACT and Western Australia are currently the only Australian jurisdictions that do not have legislation to prohibit smoking at public transport areas.

Exemptions

This Declaration only applies to designated public transport stops and public transport waiting areas. For example a nominated pick-up location for a taxi that is not a designated taxi rank is outside the scope of this instrument. This Declaration does not apply to a person:

- in or on a vehicle travelling within five metres of a public transport stop or public transport waiting area; or
- at a residential premises where the boundary of the premises falls within five metres of a public transport stop or public transport waiting area.

Rationale for five metre smoke-free zone

There is limited evidence available to inform the optimum distance to be safe from exposure to SHS. One study published in *Nicotine and Tobacco Research* (2014)¹ recommends a nine metre buffer be established to prevent SHS exposure. A study published in the *Journal of the Air & Waste Management Association* also found that tobacco smoke can be detected four or more metres downwind from a cigarette.² In balancing the public health considerations and travel needs of the ACT community, this declaration prohibits smoking within five metres of a public transport stop or public transport waiting area. Prohibiting smoking within five metres of a public transport waiting area is consistent with the policy approach used in Queensland.

The combined application of this Declaration, and offences within the Act such as sections 9T and 9U, prohibits smoking within five metres of a public transport stop or public transport waiting area.

Strict Liability Offences

This Declaration is linked to strict liability offences within the Act under sections 9T and 9U. The appropriateness of strict liability offences relating to Declarations made under section 9O of the Act was considered by the ACT Legislative Assembly as part of the *Smoke-Free Public Places Amendment Act 2016*.

In the case of this Declaration, the application of strict liability offences is considered necessary and appropriate to ensure the integrity of the smoke-free regulatory scheme and to align with government and community expectations. Public consultation conducted through the ACT Government's *Your Say* [website](#) from 24 February to 7 April 2017 found 93 per cent of the 581 respondents supported introduction of a policy that would prohibit smoking at public transport waiting areas.

¹ Jihee Hwang & Kiyoun Lee (2014) Determination of Outdoor Tobacco Smoke Exposure by Distance from a Smoking Source. *Nicotine & Tobacco Research*, Volume 16, Issue 4, 1 April 2014, Pages 478–484.

² Neil E. Klepeis, Wayne R. Ott & Paul Switzer (2007) Real-Time Measurement of Outdoor Tobacco Smoke Particles, *Journal of the Air & Waste Management Association*, 57:5, 522-534.

The ACT will implement a public education campaign to generate public awareness and understanding of the newly declared smoke-free areas. Public messaging about smoke-free transport areas will include temporary advertising on buses, posters, information pamphlets and the installation of signage at bus, train and light rail stations. To further help support the public in understanding the impact of a declared smoke-free area, the ACT Government will include information about the ban in the 'OUR CANBERRA' community newsletter for distribution to ACT residents. Temporary signage will also be erected at the 100 most commonly used bus stops for the implementation period. Thus, a defendant can reasonably be expected to be aware of the smoke-free area and possible penalties.

It is also noted that all other Australian jurisdictions, with the exception of Western Australia, have legislated to make smoking at public transport areas an offence. A person travelling in the ACT from another jurisdiction would therefore likely be reasonably aware of a community expectation that smoking in public transport waiting areas and stops is prohibited. This expectation is supported by established offences in neighbouring jurisdictions and the signage displayed in ACT transport stations and on ACT Government buses.

Inspectors should favour an educative approach in preventing smoking at public transport stops, public transport waiting areas and public transport stations in the ACT. Enforcement of this smoking ban should therefore prioritise explaining the ban and requesting that the smoker extinguish their cigarette or move outside the smoke-free area. Inspectors will retain their discretion to issue an infringement notice under the *Magistrates Court (Smoke-Free Public Places Infringement Notices) Regulation 2010* to people found to be smoking within a smoke-free zone. However infringement notices will normally only be issued for repeated contraventions of the Declaration or for disregarding an inspector's direction to stop smoking.

Human Rights Considerations

The application of strict liability has been accepted in the ACT as engaging the right to be presumed innocent under the *Human Rights Act 2004* (HRA). This is because such offences do not require a person to *intend* to undertake the prohibited conduct. It is sufficient to prove only that the defendant engaged in the conduct. The absence of intention as an element of the offence generally places a burden upon the defendant to challenge the prosecution case by establishing a defence. This Declaration has therefore been considered in relation to the factors listed under section 28 of the HRA, section 90 of the Act and community expectation.

Any limitations imposed by this Declaration are considered justified and proportionate in a free and democratic society. This is because the Declaration provides public health protections to the majority of the ACT population using public transport and is largely consistent with other states and territories, as well as community and government expectations. It is suggested that the object of protecting people who are waiting for public transport from the public health risks created by SHS is of sufficient importance to justify limitation to the rights listed above. In addition, the nature and extent to which these rights have been limited is no more than necessary, and they will be supported by an educative approach.