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Dear Andrew Robertson

27th February 2015

Re: NHSGGC Draft Smoke Free Policy (v0.1, 29/8/14, author: Beverley Grantham)

We write with regard to the above policy and NHSGGC plans to prohibit smoking in the grounds of its mental health facilities from October 2015. This issue is of great interest to our members and, having solicited their views on this subject, we wish to introduce you to their opinions and to contextualise their strong opposition to a comprehensive smoking ban.

1) Firstly, the NHSGGC Draft Smoke Free Policy contradicts clearly articulated Scottish Government policy and misquotes clearly articulated Scottish Government policy on smoking.

The Draft Smoke Free Policy claims that *Creating a Tobacco-Free Generation* (2013) "requires all NHS Boards to have a well implemented smoke free policy covering buildings and grounds." However, this reflects a very partial and selective reading of *Creating a Tobacco-Free Generation* and we quote verbatim from page 27 of this document to clarify the matter:

*All NHS Boards will implement and enforce smoke-free grounds by March 2015. Smoke-free status means the removal of any designated smoking areas in NHS Board buildings or grounds. We will work with Boards to raise awareness of the move to smoke-free hospital grounds. **This action will not apply to mental health facilities.***
[Emphasis added]

This exemption for mental health facility grounds is reiterated on p.43 of *Creating a Tobacco-Free Generation* and our members are concerned by the omission of this crucial clause from your draft Smoke Free document, particularly as NHSGGC justifies its intention to introduce a comprehensive smoking ban on the basis of this document.

As Scotland's Government has articulated a clear and unambiguous desire to maintain a smoking ban exemption for psychiatric hospital grounds, our members are keen to learn why this exemption has been excluded from your Draft Smoke Free Policy and to appreciate NHSGGC reasons for wishing to over-ride Government policy.

Our members further oppose the introduction of a comprehensive smoking ban on the following grounds:

2) NHSGGC justifies its enthusiasm for a comprehensive smoking ban on the grounds of patient welfare but our research (conducted among our members and your service users) challenges this assumption. To date, VOX and Mental Health Network Greater Glasgow have conducted three consultations around smoking in psychiatric hospital grounds and these consultations are enclosed to acquaint you with the depth of our members' opposition to a comprehensive smoking ban.

Put simply, our members believe that the stress and discomfort associated with enforced nicotine withdrawal will - if a comprehensive ban is introduced – amplify the mental anguish and distress experienced by smoker patients in hospital in a manner which must necessarily delay their recovery and extend their time spent in hospital. We cannot believe that enhancing patient distress and extending hospital stays could form any useful part of NHSGGC policy or practice and we strongly urge you to amend your draft policy to incorporate service user views. Our members also believe that a comprehensive smoking ban will undermine patient-staff therapeutic relationships, particularly if NHS staff are expected to police the smoking ban and smoker patients come to view them as adversaries. Our members also feel that introducing a smoking ban may discourage some people from seeking assistance at times when their condition may necessitate a hospital visit, and will also increase patient fears over hospital visits if they know they will be forced to renounce smoking.

3) Our members also believe that a comprehensive smoking ban will undermine key principles which inform the 2003 Mental Health (Scotland) Act. The Millan principles emphasise the importance of maximum participation and the least restrictive alternative as well as a general respect for diversity, and it is difficult to see how the least restrictive alternative is compatible with the introduction of a comprehensive smoking ban. We contend that the restrictions inherent in not allowing a patient time out of the ward to smoke a cigarette could have such a major impact on the way that care is delivered that these additional restrictions could lead one to conclude that treatment is not being delivered in a manner consistent with the Millan principles.

4) VOX and its members also contend that any attempt to introduce a comprehensive smoking ban would clearly and unambiguously breach Article 8 of the European Convention of Human Rights which enjoins respect for private and family life. In August 2013 Lord Stewart ruled that it would be unlawful to ban a patient from smoking in the grounds of the State Hospital Carstairs on the grounds that such a ban would breach Article 8 of the European Convention on Human Rights (ECHR) which confers *"a fundamental right... to have your identity, how you choose to express it and other personal, private and intimate choices, whatever they may be, respected, even if your choices are harmful to yourself, morally reprehensible or laughable."* The strong emphasis attached by the European Court to matters of personal autonomy and freedom of choice is outlined in two rulings from 2012 (Munjaz v United Kingdom and Kay v United Kingdom) and we provide excerpts from Munjaz v United Kingdom to illustrate European Court views on this matter:

78. The notion of a private life is a broad concept and covers, inter alia, the physical and psychological integrity of a person, the right to personal development and the right to establish and develop relationships with other human beings in the outside world. In addition, the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8

79. In assessing the proper scope of private life for those who are deprived of their liberty,... under the Convention system, the presumption is that detained persons 'continue

to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention (Hirst v United Kingdom (no 2) [(2006) 42 EHRR 41 at] § 69). Any restriction on those rights must be justified in each individual case.

The Draft policy states that the smoke-free policy does not “restrict [patients’] choice of whether to smoke or not” but seeks to restrict when and where they can smoke. However, if individuals are to have meaningful rights to personal autonomy and a private life, they must be able to exercise them *de jure* and *de facto*, and if NHSGGC does not seek to entirely prohibit patients’ right to smoke, it must outline in clear and unambiguous terms when and where patients may exercise their right to smoke. Given the diversity and uncertainty surrounding the jurisdiction and boundaries of NHSGGC estates and mental health facilities, such a task will prove to be extremely cumbersome and problematic. Moreover, the mental health patient population - when detained - already has a complex system in place to maintain maximum benefit with minimum restriction. Whilst a patient not detained may be able to leave hospital grounds to smoke (and may even be supported to do so) it is not always the case that this right can be facilitated for the mental health patient population as a whole, and our members advise us that this issue is extremely problematic in low- or medium-security settings.

5) If NHSGGC’s proposal to introduce a comprehensive smoking ban is influenced in any way by Lord Carloway’s August 2014 McCann vs State Hospitals Board ruling, we strongly reject the view that this ruling can be interpreted to inform the wider policy decision on the following grounds:

- Lord Carloway’s ruling concentrated entirely on the issue of smoking within the grounds of the State Hospital Carstairs, a point stressed 48 times within his ruling. We therefore contend that this ruling is not relevant in relation to other inpatient environments, including medium- and low-security settings.

- it is our belief that his Lordship’s ruling was partly inspired by a misinterpretation of Scottish Government smoking policy. We note in particular two passages in which his Lordship refers to “*the initiative to move towards entirely smoke-free hospitals, including hospital grounds*” and “*it is clear that this [prohibition of smoking in hospital grounds] is the [Government’s] intention in the relatively short term.*” However, as we have already demonstrated, Scotland’s Government expressed a clear desire to uphold and maintain the smoking ban exemption for mental health facilities in 2013 and 2014.

- Lord Carloway justified his ruling in favour of a comprehensive smoking ban in the State Hospital on the State Hospital Board’s right and duty to “manage” the State Hospital as defined by section 102 of the NHS (Scotland) Act 1978. However, the authority to “manage” other psychiatric facilities (i.e. low- or medium-security hospitals) is derived from other sources, so Lord Carloway’s interpretation of the 1978 Act is not applicable to other settings not covered by this legislation.

6) Finally, VOX and its members believe that NHSGGC seeks to promote smoking cessation for entirely laudable reasons. However, we believe that it has not appropriately interpreted Scottish Government legislation or policy, and that introduction of a comprehensive smoking ban would prove to be extremely problematic for patients and staff. We specifically contend that enforcing nicotine withdrawal for relatively short periods while patients are confined to psychiatric hospitals will not promote permanent or long-term smoking cessation, and that many patients will relapse following discharge from hospital. This, in turn, will have important repercussions on patient medications as the dosages prescribed in hospital (when patients are compelled to renounce smoking) will necessarily be at variance with the dosages required on discharge (when they resume smoking) and this will require additional monitoring and resources to protect patient wellbeing.

Moreover, research on addictions clearly indicates that smokers are most likely to permanently renounce smoking when they (a) make a conscious and voluntary decision to do so (b) select a suitable date to become smoke-free, and (c) receive full support from family, friends and workmates. Such criteria are unlikely to apply coincidentally with admission to a psychiatric hospital and we therefore contend that the imposition of a comprehensive smoking ban will merely serve to enhance patient distress while achieving no good end.

For all the reasons outlined above, VOX and its members feel that NHSGGC would be committing a grave error by introducing a comprehensive smoking ban in October 2015. Such a ban would violate clearly articulated Government policy, enhance patient distress, violate the principles of the 2003 Mental Health Act, undermine article 8 of the ECHR, fail to promote permanent smoking cessation and, in our view, cannot be justified with reference to Lord Carloway's August 2014 ruling.

We urge you to read the enclosed research materials to acquaint yourself with the depth of our members' opposition to your proposed policy. We respectfully request that the Draft Smoke Free Policy document is rewritten to reflect the many legal, health and rights-based issues raised by this letter and the Scottish Government's clearly articulated intention to uphold and maintain the smoking ban exemption for mental health facilities. We do not believe that a full smoking ban would operate successfully and would only serve to maximise patient distress while generating no good outcome. We believe the current arrangement (i.e. a smoking ban which does not apply to psychiatric hospital grounds) operates favourably and question the need to amend this policy at a time when NHSGGC is under considerable resources pressure. We welcome your considered response to this letter and trust that the voices of patients and service users will help to shape all future NHSGGC policy formulation at an early stage.

With every best wish

Yours sincerely

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Chair, Voices of Experience

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Chair, Mental Health Network Greater Glasgow

cc: Geoff Huggins, Head of Mental Health and Protection of Rights Division, Scottish Government

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