

A Consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland

Draft Consultation Paper

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CONSULTATION ON ELECTRONIC CIGARETTES AND STRENGTHENING TOBACCO CONTROL IN SCOTLAND

Responding to this consultation paper

We are inviting written responses to this consultation paper by 2 January 2015.

Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:

Tobaccocontrolteam@scotland.gsi.gov.uk

Or;

Tobacco Control Policy Team
3E, St Andrew's House
Scottish Government
Regent Road
EDINBURGH
EH1 3DG

If you have any queries contact the Tobacco Policy Team on 0131 244 4387.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government has an email alert system for consultations, <http://register.scotland.gov.uk>. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** as this will ensure that we treat your

response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

As a party to the World Health Organization's Framework Convention on Tobacco Control (FCTC), Scotland has an obligation to protect the development of public health policy from the vested interests of the tobacco industry. To meet this obligation, we ask all respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. We will still carefully consider all consultation responses from the tobacco industry and from those with links to the tobacco industry and include them in the published summary of consultation responses.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form). These will be made available to the public in the Scottish Government Library and on the Scottish Government consultation web pages by the end of 2014. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the questions contained in the consultation. We aim to issue a response to this consultation by March 2015.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact details above.

INTRODUCTION

Tobacco use is the primary preventable cause of ill health and premature death. Each year in Scotland, it is associated with over 13,000 deaths (around a quarter of all deaths in Scotland every year) and 56,000 hospital admissions¹. Annual costs to Scotland's health service associated with tobacco-related illness are estimated to exceed £300m and may be higher than £500m².

Effective tobacco control in Scotland is therefore central to realising the right to life and the right to the highest attainable standard of health for everyone. Reducing the number of people who take up smoking, supporting those who do smoke to quit and protecting people from second-hand smoke have long been clear public health priorities for the Scottish Government.

Since the Scottish Parliament was established in 1999, clear and decisive action has helped shift cultural attitudes to smoking. Measures include a complete ban on tobacco advertising in 2002, smoke-free public places legislation in 2005, an increase in the age for tobacco sales from 16 to 18 in 2007, the recent ban on tobacco vending machines and the ban on the display of tobacco and smoking-related products in shops. Alongside this, record levels of funding continue to be invested in NHS smoking cessation services and comprehensive awareness-raising campaigns.

Scotland was the first country in the UK to commit to the introduction of standardised packaging, and we remain convinced that it will have a positive impact on public health. Following a decision by the UK Government to consult again on standardised packaging, a Legislative Consent Motion was secured in the Scottish Parliament to allow the UK Government to introduce UK wide regulations. We will continue to work closely with all the other UK administrations to ensure that this important measure becomes a reality as soon as possible.

On 27 March 2013 our latest Tobacco Control Strategy, *Creating a Tobacco-free Generation*³, was launched. This reaffirmed our vision for a tobacco-free Scotland and set a world-leading target to achieve this by 2034. This will mean that a child born in 2013 will become an adult in a Scotland which is largely devoid of tobacco-use with all the health, social and economic benefits that entails. This would be an achievement of which we should all be proud - whatever our personal choices, we can surely agree that we would prefer our children to choose not to smoke.

This is a challenging target. Achieving it will require a determined effort to support people to choose not to smoke. Our current Strategy sets out a package of measures to move us along this journey over the next five years. Fundamental to this is the need to continue to protect young people from messaging and behaviours that promote smoking as a normal activity.

¹ <http://www.scotpho.org.uk/publications/reports-and-papers/868-smoking-ready-reckoner>

² <http://www.scotpho.org.uk/publications/reports-and-papers/868-smoking-ready-reckoner>

³ <http://www.scotland.gov.uk/Publications/2013/03/3766>

This message was key to the work of the Youth Commission on Smoking Prevention in Scotland.⁴ They undertook a year-long work programme to present the views of young people on what measures are needed to protect future generations from the harms caused by tobacco.

Since the publication of our latest Tobacco Control Strategy, there has been an increase in the sale, promotion and popularity of Electronic Cigarettes (e-cigarette). These devices are mainly used as an alternative to, or in addition to, tobacco. There has been much interest and debate around the potential impact of these devices on both smokers and non-smokers and how they should be regulated.

Our Tobacco Control Strategy includes a commitment to consider what action is required to regulate the use of these products which balances any potential benefit to current smokers with the need to protect those who don't smoke, particularly young people, from any potential harm.

Until Scotland is smoke-free we must also continue to ensure that non-smokers, particularly children and young people, are protected from harm caused by passive smoking. This consultation therefore also seeks views on the proposal to ban smoking in cars carrying children under the age of 18.

The primary aim of this consultation is to invite views on a range of potential measures for the sale and use of electronic cigarettes and strengthening tobacco control in Scotland. Throughout the document it will be clear that there are some measures that the Scottish Government are committed to, and on others, we remain open minded about the need for intervention.

⁴ www.youngscot.net

PURPOSE

Our aim is to continue to build on a robust statutory and policy framework, which supports our public health policy objectives on tobacco control. These are to reduce the harm caused by tobacco through:

- **preventing** the take-up of smoking, particularly amongst young people
- **protecting** adults and children from exposure to second-hand smoke
- **supporting** those who do smoke to quit and not relapse back to smoking

PROPOSALS AND QUESTIONS

We are seeking the views of interested people, businesses and organisations on a range of options as follows.

Electronic Cigarettes (e-cigarettes)

1. Designate e-cigarettes as an age-restricted product for purchase by adults aged 18 and over
2. Create an offence to supply an e-cigarette to a young person under age 18 ('proxy purchase')
3. Advertising and promotion of e-cigarettes
4. Establish a statutory requirement for e-cigarette retailers to register on the Scottish Tobacco Retailers Register

Tobacco Control

5. Ban smoking in cars in the presence of children under the age 18
6. Smoke-free NHS grounds
7. Smoke-free children and family areas

Tobacco Control and E-cigarettes

8. Create a mandatory age verification policy for tobacco products and e-cigarettes akin to alcohol legislation
9. Prohibit young people under the age of 18 from selling tobacco products and e-cigarettes unauthorised

The use and availability of e-cigarettes continues to be a rapidly developing area. We are therefore also inviting evidence and views on the following open question to inform future policy development.

10. Should there be restrictions on where e-cigarettes may be used?

E-cigarettes

Electronic cigarettes, e-cigarettes or ENDS (electronic nicotine delivery systems) are battery operated, vapour inhaler devices. They are used to vaporise and deliver a chemical mixture typically composed of propylene glycol, flavouring agents and nicotine; although non-nicotine options are also available. Some e-cigarettes are disposable and some are rechargeable⁴. Throughout this document, we will refer to these products as e-cigarettes.

The e-cigarette was developed as an alternative to traditional tobacco products. While a traditional cigarette is lit (for example by a lighter or a match) an e-cigarette is generally heated via the battery although products are emerging which have no electronic features and are charged with compressed air instead. A traditional cigarette contains tobacco; the vast majority of e-cigarettes do not. However, the technology is developing rapidly and there are now some products on the market which are capable of containing tobacco as part of the mixture that is vaporised by the e-cigarette. While some initial e-cigarettes adopted the form and look of a traditional tobacco cigarette, as the market develops, there is an increasing range of shapes, sizes and colours of e-cigarettes available.

E-cigarettes are not considered the same as licensed Nicotine Replacement Therapy. However, some specific e-cigarette products could be licensed as nicotine-containing products in the future if they applied for, and were granted, a medicines licence. One product, which contains compressed air rather than a heating element, has recently been successful in applying for a medicines licence in the UK⁵. Nicotine Replacement therapy is on the World Health Organisation's list of essential medicines⁶ and mainly comes in the form of patches, gum or inhalators. They have longstanding safety and effectiveness profiles and almost exclusively contain nicotine. Nicotine replacement therapy can be bought directly from shops or chemists or can be provided on prescription. In the UK, Nicotine Replacement Therapy products are granted a medicines licence from the Medicines and Healthcare Products Regulatory Agency after a rigorous testing process. If an e-cigarette manufacturer wanted their product to become a licensed nicotine-containing product, they would have to apply to the Medicines and Healthcare products Regulatory Agency. The options in the consultation paper are therefore concerned with regulating non-medicinal e-cigarettes only.

E-cigarettes have been on the market for less than a decade but there has been a significant increase in availability and take up of these products in recent years in Scotland⁷ as in other parts of the UK⁸. In response to a need for regulation of these products across Europe, the recently revised European Tobacco Products Directive⁹ set a Framework for the regulation of e-cigarettes, which will be implemented across

⁴ <http://www.ashscotland.org.uk/media/6093/E-cigarettesbriefing.pdf>

⁵ <http://www.nicoventures.co.uk/announcing-voke-safer-alternative-smoking-licensed-medicines-and-healthcare-products-regulatory>

⁶ http://apps.who.int/iris/bitstream/10665/93142/1/EML_18_eng.pdf?ua=1

⁷ Calculations are by ASH. They applied the proportions of e-cigarette use by smoking status in the 2014 YouGov survey to the most recent available ONS mid-year GB population estimates (2012).

⁸ www.smoinginengland.info

⁹ The [Tobacco Products Directive \(2014/40/EU\)](#)

the UK by May 2016. Under the terms of the European Directive, e-cigarettes that do not voluntarily seek a medicines licence will continue to be regulated as consumer products but with a range of additional safeguards for consumers. These regulatory safeguards include:

- a limitation on the nicotine content;
- a requirement for manufacturers and importers to report on ingredients in and emissions resulting from the use of e-cigarettes and provide toxicological data;
- a requirement for the provision of information to consumers, including a health warning on packaging; and
- restrictions on advertising and promotion with a cross-border impact, including on TV, radio, the internet and events sponsorship.

There are a number of areas that the European Directive does not regulate. These include certain domestic advertising (such as billboards, leaflets and posters), whether to restrict flavours, whether to ban use in certain areas in line with smoke-free legislation and whether to implement a minimum age for sale or use. Our Strategy, *Creating a Tobacco-Free Generation*, included a commitment to continue to respond to market developments, which may promote or normalise smoking behaviours. It also included a specific commitment to consider what further action on e-cigarettes might be required in Scotland to protect public health following the publication of the European Directive.

There is much debate amongst academics about the potential benefit and risk of e-cigarettes. The main points of the debate can be set out in three key themes: safety, usefulness as a quitting tool and impact on tobacco control efforts.

Safety

E-cigarettes are relatively new products and it will take some time before we can properly understand the impacts of their use on health (for individual users and for the wider population). Until the European Directive comes into force they are subject to very little regulation.

There are uncertainties about safety. It will take some time to monitor the long-term effects on people who use them and on bystanders exposed to second-hand vapour. Even with the safety regulations introduced by the European Directive, adverse health impacts may come to light over time. For example, we do not know what effects there might be from long-term inhalation of nicotine and the other permitted ingredients in e-cigarettes.

While there is widespread agreement that these products present much less risk for users and bystanders than traditional combustible tobacco products, it is not possible to say that they are risk free.

Role in stopping smoking and harm reduction

There is on-going debate over the potential value of e-cigarettes as aids to help people quit smoking. There is some evidence from former smokers that e-cigarettes have helped them quit and they may especially help smokers who have been unable to quit with traditional Nicotine Replacement Therapy. However, the evidence is limited and more research is needed which follows individuals over time to understand the role of e-cigarettes as quitting aids, and whether they help people to stop smoking over the long term. There is concern around dual use, for example, in terms of whether some people who smoke tobacco and use e-cigarettes may be less motivated to quit.

Tobacco control and renormalisation of smoking behaviours

Protecting young people has always been at the core of Scottish Government tobacco policies and will continue to guide us through our considerations for policy options on e-cigarettes. While the Scottish Government remains open-minded on the potential benefits of these products to current smokers, we need to ensure that they are regulated in a way which limits their attractiveness and accessibility to non-smokers, and in particular, to young people.

A great deal has been achieved through efforts to reduce exposure to tobacco products and smoking behaviours such as legislation to ban the advertising and display of tobacco, the ban on smoking in enclosed public spaces and campaigns to raise awareness about the dangers of smoking.

There is real concern that a possible modelling of smoking behaviours can occur as the use of e-cigarettes mimics the use of tobacco and may undermine tobacco control efforts. Some fear that an unintended consequence of the use of e-cigarettes (and particularly consequent nicotine addiction) could lead to tobacco use amongst non-smokers, particularly young people. Indeed the Parliament and Council of Europe set out in the Tobacco Products Directive that 'electronic cigarettes can develop into a gateway to nicotine addiction and ultimately traditional tobacco consumption, as they mimic and normalise the action of smoking'¹⁰. Given the addictive nature of nicotine and the clear and well established health harms of tobacco, this is a risk that the Scottish Government must carefully consider.

¹⁰ [Tobacco Products Directive \(2014/40/EU\)](#)

Age restriction for e-cigarettes

There is currently no restriction on the age that a young person can purchase an e-cigarette in Scotland. We know that nicotine is extremely addictive and evidence for tobacco has shown that the younger an individual starts to smoke, the more likely they are to be an adult smoker, the heavier they are likely to smoke during adulthood and the more likely they are to fall ill and die early as a result of smoking.¹¹

As nicotine is the addictive component of tobacco, it is reasonable to assume that the younger an individual becomes addicted to nicotine through e-cigarette use, the longer the addiction could last.

There has been co-operation across retailers and manufacturers to implement a voluntary age-restriction on the sale of e-cigarettes to adults aged 18 and over. Earlier this year the Electronic Cigarette Industry Trade Association welcomed the UK Government's announcement that it would introduce an age restriction¹². However, there is evidence that the voluntary trade practice is not preventing young people from obtaining e-cigarettes.

Evidence about rates of use and access by young people is limited but improving. In Scotland, we will have the first robust data on under-18 e-cigarette use in November 2014.¹³ A number of surveys already show that a small proportion of young people have tried or use e-cigarettes, typically regular tobacco smokers.¹⁴

An e-cigarette test-purchasing exercise in England also found that of 574 visits made by young people in March 2014, successful purchases were made by a child on 227 occasions (40%), despite 80% of the products purchased carrying an age-restriction warning¹⁵. While we recognise that the evidence base for e-cigarette use continues to develop, there is a clear indication that young people are accessing e-cigarettes which have either been purchased by themselves or provided by someone else.

Due to the addictive nature of nicotine and the risk of promoting smoking behaviours, the Scottish Government believes it is appropriate to introduce legislation that will restrict children and young people's access to e-cigarettes and refills. This would bring the sale of e-cigarettes into line with other age-restricted products such as alcohol, tobacco and solvents. Similar action is being progressed in England, Wales and Northern Ireland.

Limited exemptions may apply to e-cigarette devices which become licensed as a medicinal product. Age restrictions for these products would be a matter for the Medicines and Healthcare products Regulatory Agency.

¹¹ <http://www.rcplondon.ac.uk/sites/default/files/documents/passive-smoking-and-children.pdf>

¹² <http://www.bbc.co.uk/news/uk-wales-27908026>

¹³ From the Scottish Adolescent Lifestyle and Substance Use Survey

¹⁴ Although they vary in reliability, a few UK surveys provide an indication of likely levels of youth use and experimentation: Hughes, K. et al. (2014) *E-cigarette access among young people in Cheshire and Merseyside*; ASH Scotland (2014) *Young people and e-cigarettes in Scotland. Report on a survey of young people*; ASH Wales (2014) *Young People and the Use of E-cigarettes in Wales*

¹⁵ Trading Standards Institute (2014) [Youth Access to E-cigarettes and Associated Products. Report for Public Health England](#)

If an age restriction were introduced, proof of age requirements would be consistent with those for other age-restricted goods in Scotland. These include a passport, a photocard driving licence or a photographic identity card bearing the National Proof of Age Standards Scheme hologram such as the Young Scot National Entitlement Card¹⁶.

In line with tobacco sales legislation, we propose that all sales of e-cigarettes and e-cigarette refills from self-service vending machines should be banned. This is because proof of age cannot be verified.

We propose that enforcement of this measure would be consistent with other non-licensed age-restricted consumer products. This would be an extension to the role of Local Authority Trading Standards Officers.

We propose that an offence for selling an e-cigarette to a child or young person under the age of 18 would be liable on summary conviction to a fine not exceeding level 4 on the standard scale, the same as that for sales of tobacco to those under the age of 18. If an offence is also applied to the child or young person purchasing an e-cigarette, we propose that it is liable on summary conviction to a fine not exceeding level 1 on the standard scale, the same as that for sales of tobacco.

- 1. Should the minimum age of sale for e-cigarette devices, refills (e-liquids) be set at 18?**
- 2. Should age of sale regulations apply to:**
 - a. only e-cigarette devices / refills (e-liquids) that contain nicotine or are capable of containing nicotine, or**
 - b. all devices / refills (e-liquids) regardless of whether they contain or are capable of containing nicotine?**
- 3. Whom should the offence apply to:**
 - a. the retailer selling the e-cigarette;**
 - b. the young person attempting to purchase the e-cigarette; or**
 - c. both?**
- 4. Should sales of e-cigarette devices and refills (e-liquids) from self-service vending machines be banned?**
- 5. Should a restriction be in place for other e-cigarette accessories?**
- 6. If you answered 'yes', to question 5, which products should have restrictions applied to them?**

¹⁶ <http://www.pass-scheme.org.uk/card-suppliers/>

Proxy purchase for e-cigarettes

If an age restriction were implemented to prevent children and young people under the age of 18 from purchasing e-cigarettes and refill products, it would still be possible for someone aged 18 and over to purchase an e-cigarette and supply it to a young person under the age of 18. This is known as 'proxy purchasing'. We propose introducing legislation to make it an offence for an adult to purchase a e-cigarette and supply it to a child or young person under the age of 18.

It is already an offence to proxy purchase tobacco. We propose that the e-cigarette proxy purchase offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale. This is in line with proxy purchase of tobacco products.

<p>7. Should the Scottish Government introduce legislation to make it an offence to proxy purchase e-cigarettes?</p>

Domestic advertising and promotion of e-cigarettes

The role of advertising and promotion has long been understood as contributing to the take up of tobacco use. A well-established evidence base has underpinned a range of legislative measures to protect young people from exposure to tobacco advertising. These include the 2002 tobacco advertising ban¹⁷, recent legislation to ban tobacco displays in shops¹⁸ and the current development of regulations on standardised packaging of tobacco products¹⁹.

Most recently, the independent review of the evidence²⁰ for standardised packaging of tobacco products reiterated that pro-smoking imagery and role modelling contributes to smoking normalisation. This is relevant to our considerations for e-cigarettes because their use mimics smoking behaviour. There is also concern that the marketing of e-cigarettes can suggest that people should only quit tobacco use, inferring that nicotine addiction in itself is of no concern.

Formal analysis of the content of websites, adverts and promotional materials (including a study in the UK commissioned by Cancer Research UK)²¹, provides evidence that some e-cigarette advertising is specifically aimed at a young audience.

The European Tobacco Products Directive²² recognises the need for action here. By May 2016, certain advertising and promotion of e-cigarettes will be banned. This includes:

- Telecommunications (communication over a distance by cable, telegraph, telephone, or broadcasting)
- Radio
- Internet
- Most publications (e.g. newspapers)
- Events marketing with a cross-border effect (such as televised sporting events)

¹⁷ <http://www.legislation.gov.uk/ukpga/2002/36/contents>

¹⁸ <http://www.legislation.gov.uk/asp/2010/3/contents>

¹⁹ <https://www.gov.uk/government/consultations/standardised-packaging-of-tobacco-products>

²⁰ [Standardised packaging of tobacco – report of the Chantler review](#)

²¹ de Andrade, M. et al, G (2013a). *The Marketing of E-cigarettes. A report for Cancer Research UK.* (http://www.cancerresearchuk.org/prod_consump/groups/cr_common/@nre/@pol/documents/general_content/cr_115991.pdf) Other analyses undertaken in the USA include: Grana, R.A. and Ling, P.M (2014) "Smoking Revolution". A Content Analysis of Electronic (Cigarette Retail Websites, *American Journal of Preventive Medicine* 46(4): 395-403. (<http://www.ncbi.nlm.nih.gov/pubmed/24650842>); Gateway to Addiction? A survey of popular electronic manufacturers and targeted marketing to youth (2014) (Report for several US Senators) (<http://democrats.energycommerce.house.gov/sites/default/files/documents/Report-E-Cigarettes-Youth-Marketing-Gateway-To-Addiction-2014-4-14.pdf>); Legacy (2014) *Vaporized. E-cigarettes, Advertising and Youth.* (http://legacyforhealth.org/content/download/4542/63436/version/1/file/LEG-Vaporized-E-cig_Report-May2014.pdf)

²² [Tobacco Products Directive \(2014/40/EU\)](#)

While the Tobacco Products Directive does not cover purely domestic forms of advertising, it does encourage Member States to consider regulation within their own jurisdiction.

This could include:

- Bill boards;
- Leafleting;
- Brand-stretching (the process of using an existing brand name for new products or services that may not seem related);
- Free distribution (marketing a product by giving it away free);
- Nominal pricing (marketing a product by selling it at a low price);
- Point of sale advertising (advertising for products and services at the places where they are bought); and
- Events sponsorship within a purely domestic setting.

Although public health experts remain divided on many of the issues that relate to e-cigarettes, there appears to be broad consensus that advertising and marketing of these products should not be aimed at young people^{23 24}. However, some have argued that it is unworkable to distinguish between advertising aimed at young people and adults or between smokers and non-smokers. Others have argued that a total ban on the advertising and promotion of e-cigarettes would restrict the availability of information about, and the accessibility of e-cigarettes for, current smokers which could then reduce the likelihood that they will use e-cigarettes as a cessation tool or reducing their tobacco use.

In line with our policy aim of protecting people, but in particular young people, from the promotion of e-cigarettes and smoking behaviours, the Scottish Government would like to invite views on what forms of domestic advertising and promotion, if any, should be regulated in Scotland.

²³ [public-health expert letter to WHO 2](#)
²⁴ [public health expert - letter to WHO 1](#)

- 8. Should young people and adult non-smokers be protected from any form of advertising and promotion of e-cigarettes?**
- 9. In addition to the regulations that will be introduced by the Tobacco Products Directive do you believe that the Scottish Government should take further steps to regulate domestic advertising and promotion of e-cigarettes?**
- 10. If you believe that regulations are required, what types of domestic advertising and promotion should be regulated?**
 - a. Bill boards;**
 - b. Leafleting;**
 - c. Brand-stretching (the process of using an existing brand name for new products or services that may not seem related);**
 - d. Free distribution (marketing a product by giving it away free);**
 - e. Nominal pricing (marketing a product by selling at a low price);**
 - f. Point of sale advertising (advertising for products and services at the places where they are bought); or**
 - g. Events sponsorship within a domestic setting?**
- 11. If you believe that domestic advertising and promotion should be regulated, what, if any, exemptions should apply?**
- 12. Are you aware of any information or evidence that you think the Scottish Government should consider in relation to regulating domestic advertising in relation to impacts on children and adults (including smokers and non-smokers)?**
- 13. Are you aware of any information or evidence that you think the Scottish Government should consider in relation to regulating domestic advertising in relation to impacts on business, including retailers, distributors and manufacturers?**

Inclusion of electronic cigarettes on the Scottish Tobacco Retailer Register

The Scottish Tobacco Retailers Register was introduced by the Tobacco and Primary Medical Services (Scotland) Act 2010²⁵. The Register was introduced because international experience had shown that age restrictions on the sale of tobacco products were more difficult to enforce effectively without licensing²⁶. The Register allows retailers to be clearly identified without the introduction of a full licensing scheme. It also enables Trading Standards officers and others to offer advice and support to them to avoid illegal sales.

Retailers who sell e-cigarettes and refills, in addition to tobacco products, are already required by law to register because they sell tobacco. However, there is no way of knowing which retailers on the Tobacco Register also sell e-cigarettes. There is an increasing number of independent shops, pop-up kiosks, pharmacies and other outlets which sell e-cigarettes but not tobacco.

If an age restriction for e-cigarettes is introduced, it will be necessary to enforce this measure in a higher number and diverse range of available outlets than is currently the case for tobacco products. Including e-cigarettes and e-cigarette refills on the Register would assist with advice, support and enforcement of measures, such as the introduction of an e-cigarette age restriction. Recognising that the name of the register may need to change, this would mean that retailers who are already registered to sell tobacco products would be required to update their registration, if they also sell e-cigarettes. Any other e-cigarette retailers would be required to register their premises.

We anticipate that the offence of selling e-cigarettes without registration, or an updated registration, will be liable on summary conviction to a fine not exceeding £20,000, or imprisonment for a term not exceeding 6 months, or both. This is in line with the offence for selling tobacco products without being registered.

14. Do you agree that retailers selling e-cigarettes and refills should be required to register on the Scottish Tobacco Retailers Register?

15. Do you agree that the offences and penalties should reflect those already in place for the Scottish Tobacco Retailers Register?

16. If you answered 'no' to question 15, what offences and penalties should be applied?

²⁵ <http://www.legislation.gov.uk/asp/2010/3/contents>

²⁶ [http://www.scottish.parliament.uk/S3_Bills/Tobacco%20and%20Primary%20Medical%20Services%20\(Scotland\)%20Bill/b22s3-intro-pm.pdf](http://www.scottish.parliament.uk/S3_Bills/Tobacco%20and%20Primary%20Medical%20Services%20(Scotland)%20Bill/b22s3-intro-pm.pdf)

E-cigarettes – use in enclosed public spaces

Smoking in public places is banned under the Smoking, Health and Social Care (Scotland) Act 2005²⁷. E-cigarettes are not covered by this legislation; however, a number of public and private sector organisations including work places, public transport, hotels, universities and others have introduced voluntary bans on e-cigarettes to bring their policies into line with legislation on tobacco.

The Scottish Government are aware that there are many views on whether to legislate for where e-cigarettes may be used^{28 29}. Public Health experts around the world are divided on the long-term health impacts of e-cigarettes and whether there is a risk to others from second-hand vapour.

There is concern amongst some experts that e-cigarettes may re-normalise smoking-like behaviours which have been made socially unacceptable and that they could undermine existing smoke-free legislation implemented in Scotland in 2006. This concern could increase as e-cigarette products come on the market that vapourise tobacco. Environmental Health officers have responsibility for enforcing current smoke-free legislation. The Royal Environmental Health Institute for Scotland (REHIS) and the British Medical Association have recently called on the Scottish Government to ban the use of e-cigarettes in enclosed public places.

The Scottish Government recognise that there is not yet sufficient evidence to fully understand: the potential impact of e-cigarettes on existing smoke-free legislation; whether or not second-hand vapour may be harmful to bystanders; or the long-term health impacts for users. We also acknowledge that individual organisations and service providers can already act to include e-cigarettes in their own HR policies or apply rules on their use on the premises, such as pubs, clubs and public transport.

The Scottish Government remains open-minded about what, if any, intervention is necessary on the use of e-cigarettes in indoor spaces. While we are clear that there are no plans to legislate at this time, we would like to invite views, suggestions and evidence that you think should be considered for longer term policy development. These could include:

- No action;
- Scottish Government actively supports and encourages individual organisations to agree their own policies on the restriction of e-cigarettes;
- Scottish Government consults with organisations to develop national guidance;
- Consider amending current smoke-free legislation to include e-cigarettes, which would mean they could not be used in any significantly enclosed public area;

²⁷ <http://www.legislation.gov.uk/asp/2005/13/contents>

²⁸ [public-health expert letter to WHO 2](#)

²⁹ [public health expert - letter to WHO 1](#)

- Consider legislation to ban e-cigarette use in designated public spaces (for example, those frequented most by children and families); or
- Consider a ban on use of certain e-cigarette products in enclosed public spaces (for example, those which include tobacco or look most like and behave most like traditional tobacco products).

17. Do you believe that the Scottish Government should take action on the use of e-cigarettes in enclosed public spaces?

18. If you answered 'yes' to Question 17, what action do you think the Scottish Government should take and what are your reasons for this?

19. If you answered, 'no' to Question 17, please give reasons for your answer.

20. Are you aware of any evidence, relevant to the used of e-cigarettes in enclosed spaces, that you think the Scottish Government should consider?

Tobacco Control

The Scottish Government is determined to see Scotland remain at the forefront of those countries around the world committed to bold action to reduce the harm caused by tobacco. Reducing smoking prevalence to 5% or lower will make an important contribution to reducing health inequalities. We have been clear about our ambition to create a tobacco-free Scotland and we remain committed to introducing the necessary measures that will help us achieve our goal.

However, until we realise our vision of a smoke-free Scotland, we must continue to protect people from the harmful effects of second-hand smoke (smoke caused by someone else smoking tobacco) and promote the health, safety, comfort, convenience, and welfare of society by supporting smoke-free environments.

In 2006, Scotland was the first country in the UK to introduce legislation to ban smoking in enclosed public spaces. Implementation of the legislation has been accompanied by very high levels of compliance. Evaluations have shown a significant reduction in exposure to second-hand smoke in public places and a range of positive health outcomes including: reduced heart attack admissions to hospital, reduced childhood asthma admissions to hospital and fewer premature births³⁰. More generally, the legislation has also helped raise awareness and understanding of the impacts of second-hand smoke.

Despite the clear public health benefits that smoke-free legislation has delivered, the harms from second-hand smoke remain. Doctors say second-hand smoke in the UK accounts for over 300,000 consultations a year with children. Children exposed to second-hand smoke at home are more at risk of coughs, colds, ear problems, chest infections, wheezing, asthma, phlegm, breathlessness and poorer lung function. Every year, 9,500 children in Britain are admitted to hospital because of the effects of second-hand smoke³¹.

We want Scotland to be the best place in the world for children to grow up. Scottish Ministers have introduced legislation to ensure that every child and young person should be safe, healthy, achieving, nurtured, active, responsible, respected and included³². We therefore have an obligation to protect children from risks to their life and health caused by exposure to environmental tobacco smoke³³. Growing up in a smoke-free environment is an important part of that. While existing legislation goes some way towards achieving this, cars and homes remain significant sources of exposure to second-hand smoke, particularly for children as they have less control over their environment. Where children are medically at risk, due to conditions such as asthma, the harmful effects of second-hand smoke can be especially severe.

Earlier this year, we announced our ambition to reduce the number of children exposed to second-hand smoke in Scotland to 6% by 2020. This is the first such

³⁰ <http://www.healthscotland.com/scotlands-health/evidence/smokefreelegislation/publications.aspx>

³¹ http://www.ash.org.uk/files/documents/ASH_596.pdf

³² <http://www.legislation.gov.uk/asp/2014/8/contents/enacted>

³³ See for example UN Committee on the Rights of the Child, General Comment no. 4: adolescent health, 1 July 2003, UN Doc. CRC/GC/2003/4, para 10.

target in the world. Our most recent social marketing campaign, *Take it Right Outside*, supports this ambition.³⁴ The aim of this campaign was to raise awareness of the risks of second-hand smoke to children and to encourage people who smoke to keep their homes and cars smoke free.

The harm caused by second-hand smoke is clear. We know that children who live with parents or siblings who smoke are up to 3 times more likely to become smokers themselves than children of non-smoking households³⁵. It is therefore essential that children are not only protected from exposure to second-hand smoke but that measures are taken to protect them from behaviours which could establish smoking as the 'norm'.

³⁴ www.rightoutside.org

³⁵ Leonardi-Bee J, Jere ML, Britton J. Exposure to parental and sibling smoking and the risk of smoking uptake in childhood and adolescence: a systematic review and meta-analysis.

Smoking in Cars carrying children aged under 18

When someone smokes in a car, the harmful chemicals in second-hand smoke reach dangerously high levels very quickly. Exposure to second-hand smoke in cars is harmful to all occupants, but especially to children because they breathe faster than adults, have smaller airways and their immune systems are not fully developed³⁶.

As many as 60,000 children in Scotland may be exposed to second-hand smoke within a car each week³⁷.

Our Strategy committed to monitoring the impact of efforts to reduce children's exposure to second-hand smoke to inform future steps. An initial evaluation of our *Take it Right Outside* campaign showed an increased awareness that smoking in a car with children is harmful and that some people have taken action to stop smoking in cars. However, it also suggests that more needs to be done to promote behaviour change amongst Scotland's heaviest smokers³⁸.

Last year, Jim Hume, MSP and Liberal Democrat Health Spokesperson, consulted on proposals to ban smoking in cars with children. He received strong support for this proposal from those who responded to the consultation and from within the Scottish Parliament³⁹. A recent survey also suggests that 75% of adults in Scotland support a ban on smoking in cars when children and young people aged under 18 are present⁴⁰.

Proposals to introduce such legislation in England and Wales are well underway. It is our belief that legislation to ban smoking in cars with children should also be introduced in Scotland on public health grounds.

Our proposal is that it would be an offence for anyone aged 18 and over to smoke in a car while carrying a child or young person who is under the age of 18. Police Scotland may be best placed to enforce this legislation; they enforce the law on travelling in a car without a seatbelt⁴¹ and driving whilst using a mobile phone. The offence will result in a fixed penalty notice of £100⁴² or will be referred to court.

We are also minded to propose that vehicles that are also people's homes (e.g. caravans or motor caravans) would have an exemption.

³⁶ http://www.ashscotland.org.uk/media/5637/ASHScotland_smoking_in_vehicles_April2013.pdf

³⁷ Submission from the Respiratory Group at the University of Aberdeen to the consultation on the Proposed Smoking (Children in Vehicles) (Scotland) Bill - <http://jimhume.org/en/document/consultation-responses#document>

³⁸ <http://www.scotland.gov.uk/topics/health/services/smoking>

³⁹ [http://www.scottish.parliament.uk/S4_MembersBills/Proposed_Smoking_\(Children_in_Vehicles\)_\(Scotland\)_Bill_Summary.pdf](http://www.scottish.parliament.uk/S4_MembersBills/Proposed_Smoking_(Children_in_Vehicles)_(Scotland)_Bill_Summary.pdf)

⁴⁰ YG-Archive-140314-ASH-Scotland

⁴¹ <http://www.legislation.gov.uk/ukpga/1988/52/section/14?view=extent>

⁴² <http://www.legislation.gov.uk/uksi/2000/2792/schedule/made>

- 21. Do you agree that it should be an offence for an adult to smoke in a vehicle carrying someone under the age of 18?**
- 22. Do you agree that the offence should only apply to adults aged 18 and over?**
- 23. If you answered 'no' to Question 22, to whom should the offence apply?**
- 24. Do you agree that Police Scotland should enforce this measure?**
- 25. If you answered 'no' to Question 24, who should be responsible for enforcing this measure?**
- 26. Do you agree that there should be an exemption for vehicles which are also people's homes?**
- 27. If you think there are other categories of vehicle which should be exempted, please specify these?**
- 28. If you believe that a defence should be permitted, what would a reasonable defence be?**

Smoke-free (tobacco) NHS grounds

Since 2005, guidance has been issued to NHS Scotland and local authorities which encouraged them to demonstrate leadership by implementing smoking policies that go beyond the requirements of existing smoke-free legislation^{43 44}. Guidance issued by the National Institute for Health Care and Excellence also recommended that health care authorities develop policies for smoke-free grounds.⁴⁵

In moving towards a Scotland where choosing not to smoke is the norm, our current Tobacco Control strategy recognises that National HS Boards should be exemplars in providing smoke-free environments and calls on NHS Boards to implement and enforce smoke-free policies across all NHS grounds by April 2015. NHS Boards are making good progress. However, NHS Chief Executives have expressed concern about a lack of enforcement powers and about poor compliance. They have called for national legislation.

There is public support for smoke-free hospital grounds. A recent survey indicated that the majority (73%) of the Scottish population would be in favour of a complete ban on smoking in hospital grounds⁴⁶. There are some international examples of smoke-free health grounds, for example in various states in the USA⁴⁷, Canada, Australia, and New Zealand⁴⁸.

A review of a large number of studies found in a range of settings that there is potential for high second-hand smoke in some outdoor spaces and indoor locations adjacent to outdoor smoking areas. This review showed that high smoker density, highly enclosed outdoor areas, low wind conditions, and close proximity to smokers generate higher outdoor second-hand smoke concentrations⁴⁹.

The Scottish Government remains open-minded about the need to introduce legislation which would make it an offence to smoke in health grounds and / or the need for further voluntary measures. We therefore invite views on this matter.

⁴³ <http://www.scotland.gov.uk/Publications/2005/12/21153341/33417>

⁴⁴ http://www.sehd.scot.nhs.uk/mels/CEL2012_01.pdf

⁴⁵ <http://www.nice.org.uk/guidance/ph48/chapter/1-recommendations>

⁴⁶ YG-Archive-140314-ASH-Scotland

⁴⁷ <http://no-smoke.org/pdf/smokefreehealthcare.pdf>

⁴⁸ <http://www.globalSmokefreePartnership.org/>

⁴⁹ Sureda, X., Fernández, E., López, MJ. And Nebot, M. (2013) Secondhand Tobacco Smoke Exposure in Open and Semi-Open Settings: A Systematic Review. *Environmental Health Perspectives*. Vol. 121 Issue 7, p. 766-773.

29. Should national legislation be introduced to make it an offence to smoke or allow smoking on NHS grounds?

30. If you support national legislation to make it an offence to smoke on NHS grounds, where should this apply:

- a) All NHS grounds (including NHS offices, dentists, GP practices)
- b) Only hospital grounds;
- c) Only within a designated perimeter around NHS buildings; or
- d) Other suggestions?

31. If you support national legislation, what exemptions, if any, should apply (for example, grounds of mental health facilities and / or facilities where there are long-stay patients)?

32. If you support national legislation, who should enforce it?

33. If you support national legislation, what should the penalty be for non-compliance?

34. If you do not support national legislation, what non-legislative measures could be taken to support enforcement of, and compliance with, the existing smoke-free grounds policies?

Smoke-free (tobacco) children and family areas

We believe that children and young people have a right to learn, play and take part in sport in a tobacco-free environment.

Our current Tobacco Control strategy, which is supported by the Convention of Scottish Local Authorities, includes an action for local authorities to extend tobacco-free policies to outdoor areas within their jurisdiction. This should focus on areas likely to be frequented by children, such as play parks, in order to reduce their exposure to second-hand smoke, smoking behaviour and cigarette related litter which is one of the most common forms of litter in Scotland.⁵⁰

There is public support for smoke-free play areas. A recent survey indicated that a majority of the Scottish population (75%) would be in favour of a complete ban on smoking in outdoor children's play areas⁵¹.

Outdoor smoke-free areas are increasingly being introduced in many countries, especially in areas which are used by children. An international review of public attitudes data detected a growing trend in support for smoke-free outdoor areas.⁵² Some examples of smoke-free outdoor areas for children include children's play parks, schools, nurseries, beaches and sports and leisure facilities.

Our Strategy calls on local authorities to work with the NHS and other local partners to include policies for smoke-free areas within local Tobacco Control Plans. While there are no confirmed plans for legislation, the Scottish Government remains committed to increasing the number of outdoor areas which are free from tobacco use. We believe that there are a number of options that could achieve this, this includes but is not limited to:

- That the Scottish Government takes no action;
- Further voluntary measures at a local level to increase the number of smoke-free areas;
- Introducing national legislation that defines smoke-free areas across Scotland; or
- That the Scottish Government ensures sufficient local powers to allow decisions at a local level as to what grounds should be smoke-free?

We invite your views on the best way to achieve smoke-free children and family areas.

⁵⁰ <http://www.scotland.gov.uk/Resource/0042/00426900.pdf>

⁵¹ YG-Archive-140314-ASH-Scotland

⁵² Thomson, G., Wilson, N. and Edwards, R. (2009) 'At the frontier of tobacco control: A brief review of public attitudes towards smoke-free outdoor places' (abstract), *Nicotine & Tobacco Research*, Vol. 11, No.6, pp.584-90

35. Do you think more action needs to be taken to make children's outdoor areas tobacco free?

36. If yes, what action do you think is required:

- a) Further voluntary measures at a local level to increase the number of smoke-free areas;**
- b) Introducing national legislation that defines smoke-free areas across Scotland;**
- c) That the Scottish Government ensures sufficient local powers to allow decisions at a local level as to what grounds should be smoke-free; or**
- d) Other actions?**

37. If you think action is required to make children's outdoor areas tobacco-free, what outdoor areas should that apply to?

Age verification policy ‘Challenge 25’ for the sale of tobacco and e-cigarettes

It can be difficult to determine a person’s age based on appearance. To support retailers in determining the age of a young person when attempting to buy alcohol, the requirement for premises to have a mandatory age-verification policy was introduced for all premises licences in Scotland in 2011.⁵³ These schemes are more commonly referred to as Challenge 25 or Think 25.

This means that, while the legal age to purchase alcohol remains 18, the person selling alcohol should ask for proof-of-age if the person buying alcohol appears to be under the age of 25.

Challenge 25 has been welcomed by retailers in relation to alcohol licensing, as it allows them to request proof of age more easily and encourages people to carry identification.⁵⁴ Many retailers already voluntarily apply the same approach to tobacco sales. The Scottish Government’s current Tobacco Control Strategy welcomed this and encouraged all retailers of tobacco products to do the same.

In line with proof of age requirements for purchasing tobacco we anticipate that there will be a requirement for retailers to challenge the age of any person who appears to be under the age of 25. As such, only specified documents will be sufficient for proof of age for the young person. These are a passport, a European Union photocard driving licence, or card accepted by the PASS scheme such as a Young Scot card.⁵⁵

We believe that the penalty for this offence should be in line with that for selling tobacco or an e-cigarette to a person under the age of 18, since that is what the policy is intended to prevent. This will mean that the offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

38. Do you agree that retailers selling e-cigarettes, refills and tobacco should be required by law to challenge the age of anyone they believe to be under the age of 25?

39. Do you agree that the penalties should be the same as those which are already in place for selling tobacco to someone under the age of 18?

⁵³ <http://www.legislation.gov.uk/asp/2010/18/section/6>

⁵⁴ <http://www.healthscotland.com/documents/5989.aspx>

⁵⁵ <http://www.pass-scheme.org.uk/card-suppliers/>

Unauthorised sales by under 18 year olds for tobacco and e-cigarettes

Concerns have been raised that a young person under the age of 18 may be less able to refuse sale to a young person seeking to purchase tobacco or a e-cigarette, for example, this could be a friend or peer. This could be magnified though the implementation of a Challenge 25 policy, where they will be required to challenge the age of customers who could appear much older than them. We believe that the sales of these products, when sold by a young person under the age of 18, should be authorised by an adult over the age of 18. This will bring a level of consistency between sale of tobacco and an e-cigarettes and the sale of alcohol.⁵⁶

The requirement for such a sale to be authorised means that the adult who authorised the sale is present and can also challenge a customer who appears under age. Alternatively, the adult who authorises the young person to make the sale without an adult present will be liable for the offence, if the young person is found to have sold tobacco or an e-cigarette to an under 18 year old. In our view, this creates a more robust environment for challenging those who appear underage and provides that it is the adult and not the young person who commits an offence by selling tobacco or e-cigarettes to underage customers.

We envisage that the offence would apply to the person who has registered their business to sell tobacco or e-cigarettes, or to a person over 18 that has authorised the young person under age 18 to make the sale. In line with the enforcement of other age restriction requirements relating to tobacco and e-cigarettes we believe that this measure would be best enforced by Local Authority Trading Standards Officers. We envisage that such an offence would be liable on summary conviction to a fine not exceeding level 4 on the standard scale. This is in line with the offence of selling tobacco products to someone under age 18.⁵⁷

40. Do you agree that young people under the age of 18 should be prohibited from selling tobacco and e-cigarettes and refills unless authorised by an adult?

41. Who should be able to authorise an under 18 year old to make the sale, for example, the person who has registered the premises, manager or other adult working in the store?

42. Do you agree with the anticipated offence, in particular:
a) the penalty, and
b) the enforcement arrangements?

⁵⁶ ⁵⁶ <http://www.legislation.gov.uk/asp/2005/16/section/107>

⁵⁷ <http://www.legislation.gov.uk/asp/2010/3/section/4>

Equality considerations

The Scottish Government are committed to promoting equality. To do so we need to understand the needs of each person. Therefore, in the development of our proposals we will ensure that we identify any equality impacts for people with a protected characteristic (as defined by the Equality Act 2010).

We are undertaking an Equality Impact Assessment which will allow us to fully explore these issues. The results of this will be published on the Scottish Government's website when completed.

This consultation provides an opportunity to obtain the views of interested parties and members of the public on any possible equality impacts, including impacts on those with protected characteristics. The responses to our consultation will assist in our development of the Equality Impact Assessment.

43. What issues or opportunities do the proposed changes raise for people with protected characteristics (age; disability; gender reassignment; race; religion or belief; sex; pregnancy and maternity; and sexual orientation)?

44. If the proposed measures are likely to have a substantial negative implication for equality, how might this be minimised or avoided?

45. Do you have any other comments on or suggestions relevant to the proposal proposals in regard to equality considerations?

Business and Regulatory Impacts Considerations

The Scottish Government are committed to the 5 principles of better regulations. These are:

- **Proportionality** - Regulators should intervene only when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
- **Accountability** - Regulators should be able to justify decisions and be subject to public scrutiny.
- **Consistency** - Government rules and standards must be joined up and implemented fairly.
- **Transparency** - Regulators should be open, and keep regulations simple and user-friendly.
- **Targeting** - Regulation should be focused on the problem and minimise side effects.

46. What is your assessment of the likely financial implications, and / or any other impacts (if any), of the introduction of each of these proposals on you or your organisation?

47. What (if any) other significant financial implications are likely to arise?

48. What lead-in time should be allowed prior to implementation of these measures and how should the public be informed?

49. Do you have any other comments on or suggestions relevant to the proposal?

Partial Business and Regulatory Impact Assessment

Title of Proposal

A Consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland

Purpose and intended effect

- **Background**

The proposals in the accompanying consultation document support the commitments in the latest Scottish Government tobacco control strategy, *Creating a Tobacco-Free Generation – A Tobacco Control Strategy for Scotland (2013)*⁵⁸. This Strategy sets out the Scottish Government's vision for a tobacco-free generation by 2034 (defined as smoking prevalence of less than 5%). It also recognises the growing market of new products which may promote smoking behaviours, such as electronic cigarettes (e-cigarettes), and sets out a commitment to exploring necessary action to protect public health.

- **Objective**

Creating a Tobacco-Free Generation builds on previous policy documents and legislation which aimed to protect public health by shifting cultural attitudes to smoking by reducing the attractiveness and availability of tobacco products and protecting people from second-hand smoke. These proposals build on the Scottish Government's existing approach to tobacco control. The proposals on e-cigarettes seek to recognise the potential benefits of e-cigarettes to current smokers while protecting non-smokers, particularly young people, from the promotion of smoking behaviours. They aim to reduce access and availability of these products to young people under the age of 18. The proposal relating to smoking in cars seeks to build on previous legislation by protecting young people under the age of 18 from exposure to second-hand smoke in enclosed spaces.

- **Rationale for Government intervention**

Smoking is associated with a range of illnesses and is the primary preventable cause of ill health and premature death. Each year, tobacco use is associated with over 13,000 deaths (around a quarter of all deaths in Scotland every year) and 56,000 hospital admissions in Scotland. Smoking makes a significant contribution to Scotland's health inequalities with smoking rates in our most deprived communities remaining disproportionately high - 39% in the most deprived areas compared to 11% in the least deprived areas in 2013. Annual costs to Scotland's health service associated with tobacco-related illness are estimated to exceed £300m and may be higher than £500m each year⁵⁹.

⁵⁸ <http://www.scotland.gov.uk/Publications/2013/03/3766>

⁵⁹ <http://www.scotland.gov.uk/Publications/2013/03/3766>

In recent years, there has been a growth in the availability and popularity of e-cigarettes which mimic smoking behaviours and contain nicotine. Our Strategy, *Creating a Tobacco-Free Generation*, included a commitment to continue to respond to market developments, which may promote or normalise smoking behaviours. It also included a specific commitment to consider what further action on e-cigarettes might be required in Scotland to protect public health. Helping those who smoke to stop, protecting people from exposure to second-hand smoke, and reducing the number of new people who take up smoking each year are clear public health priorities.

The Scottish Government's purpose is to focus Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. This is underpinned by five strategic objectives. These proposals, in support of *Creating a Tobacco-Free Generation – A Tobacco Control Strategy for Scotland (2013)*, contribute positively to the following objectives:

- **WEALTHIER & FAIRER** - Enable businesses and people to increase their wealth and more people to share fairly in that wealth.

Discouraging young people from starting to smoke and reducing smoking prevalence rates in Scotland will reduce the burden of tobacco use on business, public services and our most deprived communities, and thus contribute to a Wealthier and Fairer Scotland.

- **SAFER & STRONGER** - Help local communities to flourish, becoming stronger, safer places to live, offering improved opportunities and a better quality of life.

Discouraging young people from starting to smoke and reducing smoking prevalence rates in the long term could reduce demand for illicit tobacco and help support the development of more resilient, cohesive and successful communities.

- **HEALTHIER** - Help people to sustain and improve their health, especially in disadvantaged communities, ensuring better, local and faster access to health care.

Discouraging young people from starting to smoke and reducing smoking prevalence rates will contribute to increased physical and mental wellbeing and increased life expectancy amongst Scots, especially in our most disadvantaged communities.

- **SMARTER** - Expand opportunities for people in Scotland to succeed from nurture through to life long learning, ensuring higher and more widely shared achievements.

Discouraging young people from starting to smoke will support them to make positive choices and fulfil their potential.

The Strategic Objectives themselves are supported by 15 national outcomes which describe in more detail what the Scottish Government wants to achieve over the next ten years. Policies to tackle smoking will make a positive contribution to delivering over half of our published national outcomes:

- we live longer and healthier lives;
- we have tackled the significant inequalities in Scottish life;
- we have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others;
- we live our lives safe from crime, disorder and danger;
- we realise our full economic potential with more and better employment opportunities for our people;
- our young people are more successful learners, confident individuals, effective contributors and responsible citizens;
- we have improved the life chances for children, young people and families at risk; and
- our children have the best start in life and are ready to succeed.

Consultation

- **Within Government**

As well as the Better Regulation Unit and analysts, we have spoken with colleagues in criminal justice policy in relation to the creation of offences; we will continue to work with them. We have worked with licensing policy to understand the operation of policies such as 'Challenge 25' as we seek to bring some consistency between alcohol, tobacco and e-cigarettes.

- **Public Consultation**

This consultation-stage Business and Regulatory Impact Assessment will sit alongside a public consultation paper to form a 12 week public consultation. We will consider the views of businesses, retailers, statutory organisations, enforcement agencies, third sector and other interested parties as the consultation develops.

- **Business**

To date there have been some conversations with business around e-cigarettes and strengthening tobacco control as part of the Ministerial Working Group on Tobacco Control and during the development of *Creating a Tobacco-Free Generation*. This public consultation invites the views of businesses on specific proposals.

Proposal 1 - Age Restriction for e-cigarettes

Options

Option 1 - Do nothing. There would continue to be no age restriction on e-cigarettes and refills which could be sold to individuals of any age, including children. Although many retailers operate a voluntary restriction on sales to children and young people.

Option 2 – Designate e-cigarettes and / or refills as age-restricted products for purchase by adults aged 18 and over.

Doing nothing would allow the current voluntary measures implemented by many retailers to continue. Introducing a statutory restriction will allow this measure to be enforced and provide clarity and consistency on age-appropriate sales.

Sectors and groups affected

Young people and children under the age of 18 will be impacted by both option 1 and 2. Businesses, including, Small Medium Enterprise and micro businesses, big retailers and specialist high street will be impacted by option 2. They will have to ensure they comply with the legislation. Local authorities will be responsible for enforcing the legislation. Government and society will be affected.

Benefits

Option 1: This option, because young people could purchase e-cigarettes, could provide an indirect benefit to business through a larger legal customer base. An online survey of 11 – 18 year olds conducted by ASH across Great Britain in March 2014⁶⁰ suggested that 7% had tried electronic cigarettes at least once and 2% used them weekly or monthly. Applying this to the Scottish population gives an estimate of around 8,000 young people in Scotland who could be occasional users of e-cigarettes.⁶¹

Further evidence on use by secondary school pupils in Scotland will be available from November 2014 in the Scottish Schools Adolescent Lifestyle and Substance Use Survey report. Given the large sample size (more than 30,000) and spread across state sector schools, this will provide a very good indication of the proportion of 11 -18 year old who have tried, used or still use e-cigarettes. Additionally, Scottish Health Survey data will be available in September 2015 on prevalence across the general population and will provide additional evidence for estimating and tracking use by young people.

We are aware that many businesses and manufacturers already state that e-cigarettes should not be sold to anyone under the age of 18 so the potential market share is likely to be very small.

Option 2: This option will provide a benefit to government, society, and young people in particular, by providing a clear and consistent message that e-cigarette products are not suitable for, and therefore should not be sold to, children and young people under the age of 18. There are over a million young people in Scotland under the age of 18, of whom, around 40% are in the 11-17 age group and all with the potential to benefit from this proposal.⁶² A Great Britain online survey of 11 – 18 year olds conducted by ASH in March 2014¹ suggested that

⁶⁰ ASH (2014) The use of electronic cigarettes in Great Britain
<http://www.ash.org.uk/information/facts-and-stats/fact-sheets>

⁶¹ population of 11 – 17 year olds = approximately 405,600. National Records of Scotland mid-year population estimates 2013

⁶² National Records of Scotland mid-year population estimate, 2013, = 1.035 million under 18yrs.

7% had tried electronic cigarettes at least once and 2% used them weekly or monthly. Applying this to the Scottish population suggests that over 8,000 young people in Scotland could be occasional users of e-cigarettes.

Further evidence on use by secondary school pupils in Scotland will be available from November 2014 in the Scottish Schools Adolescent Lifestyle and Substance Use Survey report. Given the large sample size (more than 30,000) and spread across state sector schools, this will provide a very good indication of the proportion of 11-18 year olds who have tried, used or still use e-cigarettes. Additionally, Scottish Health Survey data will be available in September 2015 on prevalence across the general population and will provide additional evidence for estimating and tracking use by young people.

It will reduce confusion by bringing the products into line with other age restricted products such tobacco, alcohol and solvents. This would benefit businesses by providing a consistent legal basis for sale across all retailers. There is an existing legislative framework around proof-of-age for other age-restricted products, with which retailers are already familiar.

This option supports the Scottish Government's ambition to have a tobacco-free generation and associated health benefits, reduced costs to the NHS and productivity.

Costs

Option 1: There are no direct costs associated with option 1 but it could indirectly lead to increased health costs if non-smokers start using e-cigarettes as young people, and future evidence showed that e-cigarette use is a risk to health. There may also be a risk that a young person who starts using e-cigarettes may go on to use tobacco, though the evidence around this is not yet clear. The health harms associated with the tobacco use are well established. The Great Britain online survey of 11 – 18 year olds conducted by ASH in March 2014 suggested 2% used them weekly or monthly. Applying this to the Scottish population gives an estimate of over 8,000 young people in Scotland who could be occasional users of e-cigarettes⁶³.

Further evidence on use by secondary school pupils in Scotland will be available from November 2014 in the Scottish Schools Adolescent Lifestyle and Substance Use Survey report. Given the large sample size (more than 30,000) and spread across state sector schools, this will provide a very good indication of the proportion of 11-18 year olds who have tried, used or still use e-cigarettes. Additionally, Scottish Health Survey data will be available in September 2015 on prevalence across the general population and will provide additional evidence for estimating and tracking use by young people.

Option 2: This option could result in a cost to business associated with staff training and familiarisation with the new legislation though many businesses will already be familiar with age-restricted legislation if they already sell goods such as alcohol or tobacco. It is anticipated that this cost would be small and is not

quantified.

There is also the potential for a small decline in income for businesses from retailing e-cigarettes and related products. The Great Britain online survey of 11 – 18 year olds conducted by ASH in March 2014 identified 2% as weekly or monthly users of e-cigarettes. Applying this to the Scottish population suggests 8,000 young people who could currently be possible customers, even if only occasionally. It is difficult to quantify the impact on the retail sector as we do not have data on the number of retailers currently operating in this market in Scotland. In addition, some retailers already voluntarily restrict sales to children and young people.

The consultation will allow businesses retailing e- cigarettes to provide the Scottish Government with information and data which can be taken into consideration when preparing the final Business and Regulatory Impact Assessment.

This option will result in costs to government and local government associated with enforcement.

Proposal 2 - Proxy Purchase for e-cigarettes

Option 1 - Do nothing. The introduction of an age restriction for e-cigarettes would prevent children and young people under the age of 18 from directly purchasing them. However, it would still be possible for an adult to purchase them and legally supply them to a child or young person under age 18.

Option 2 - Create an offence for an adult to supply an e-cigarette and / or refill to a young person under age 18 ('proxy purchase').

Sectors and groups affected

Young people and children under the age of 18 will be impacted by this proposal. People over the age of 18 will have to comply with the legislation. Government and society will be affected.

Benefits

Option 1: This option could lead to indirect benefits to businesses if people over the age of 18 purchase e-cigarettes on behalf of children and young adults under the age of 18. A Great Britain online survey of 11 – 18 year olds conducted by ASH in March 2013 identified 2% as weekly or monthly users of e-cigarettes. Applying this to the Scottish population suggests around 8,000 young people in Scotland are currently possible customers, even if only occasionally.

Further evidence on use by secondary school pupils in Scotland will be available from November 2014 in the Scottish Schools Adolescent Lifestyle and Substance Use Survey report. Given the large sample size (more than 30,000) and spread across state sector schools, this will provide a very good indication of the proportion of 11-18 year olds who have tried, used or still use e-cigarettes. Additionally, Scottish Health Survey data will be available in September 2015 on prevalence across the general population and will provide additional evidence for

estimating and tracking use by young people. We do not have data on the extent to which adults purchase these products on their behalf. This is likely to be a very small market share.

Option 2: This option will provide a benefit to society through a clear and consistent message that e-cigarette products are not suitable for, and therefore should not be provided for, children and young people under the age of 18 (outwith the medicinal regulatory framework). It will reduce confusion by bringing the products into line with other age restricted products such tobacco, alcohol and solvents.

A Great Britain online survey of 11 – 18 year olds conducted by ASH in March 2014¹ suggested that 7% had tried electronic cigarettes at least once and 2% used them weekly or monthly. This suggests that over 8,000 young people in Scotland could be occasional users of e-cigarettes.

Further evidence on use by secondary school pupils in Scotland will be available from November 2014 in the Scottish Schools Adolescent Lifestyle and Substance report. Given the large sample size (more than 30,000) and spread across state sector schools, this will provide a very good indication of the proportion of 11-18 year olds who have tried, used or still use e-cigarettes. Additionally, Scottish Health Survey data will be available in September 2015 on prevalence across the general population and will provide additional evidence for estimating and tracking use by young people. We do not have data on the extent to which adults purchase these products on young people's behalf. It is likely that this is a very small market share.

Option 2: This option supports the Scottish Government's ambition to have a tobacco-free generation and associated health benefits, reduced costs to the NHS and productivity. There are over a million young people in Scotland under the age of 18 with the potential to benefit from this proposal. It directly benefits Government by allowing strengthened enforcement of **Proposal 1**.

Costs

Option 1: This option could lead indirectly to increased health costs to government if there is use of e-cigarettes among children and young adults and future evidence shows that e-cigarette use is a risk to health. There may also be a risk that someone who starts using an e-cigarette may go on to use tobacco though the evidence around this is not yet clear. The health harms associated with the tobacco use are well established. A Great Britain online survey of 11 – 18 year olds conducted by ASH in March 2014 identified 2% as weekly or monthly users of e- cigarettes. This suggests around 8,000 young people in Scotland could be occasional users of e-cigarettes.

Further evidence on use by secondary school pupils in Scotland will be available from November 2014 in the Scottish Schools Adolescent Lifestyle and Substance report. Given the large sample size (more than 30,000) and spread across state sector schools, this will provide a very good indication of the proportion of 11-18 year olds who have tried, used or still use e-cigarettes. Additionally, Scottish

Health Survey data will be available in September 2015 on prevalence across the general population and will provide additional evidence for estimating and tracking use by young people.

Option 2: This option will result in costs to government and local government associated with enforcement. There is the potential for a small loss of revenue for businesses if adults currently purchase e-cigarettes and associated products for use by young people under 18 years old. We do not have data on the extent to which adults purchase these products on young people's behalf. It is likely that this is a very small market share.

Proposal 3 - Domestic Advertising and Promotion of e-cigarettes

The European Tobacco Products Directive⁶⁴ bans a range of advertising and promotion mechanisms for e-cigarette and calls on Member States to take similar action on domestic advertising within their own jurisdictions.

Option 1 - Do nothing

Option 2 – Introduce a ban on domestic advertising and promotion (this could include advertising and promotion of e-cigarettes by way of billboards, leafleting, brand-sharing, free distribution, nominal pricing, point of sale and domestic events sponsorship) of e-cigarettes.

Option 3 - Introduce a ban on domestic advertising and promotion of e-cigarettes with exceptions to allow distribution of information about, and the accessibility of, e-cigarettes aimed at adult smokers to enable them to make informed choices about whether to switch from tobacco to an e-cigarette.

Sectors and groups affected

Businesses, including Small Medium Enterprises, micro businesses, big retailers and specialist high street retailers will be impacted by option 1, 2 and 3. Government and society will be impacted by option 1, 2 and 3.

Benefits

Option 1: This option would allow retailers to continue to advertise by way of billboards, leafleting, brand-sharing, free distribution, nominal pricing, point of sale and domestic events sponsorship. This will increase awareness of their product and potential growth in customer base. A Great Britain online survey conducted by ASH in March 2014⁶⁵ estimated that there were 2.1 million adults in Great Britain using electronic cigarettes. An estimate, based on population share, would be that 180,600 adults in Scotland use e-cigarettes. Scottish Health Survey data will be available in September 2015 providing further evidence on prevalence of e-cigarettes in Scotland. This option would also provide a customer base for advertising and marketing firms.

⁶⁴ http://ec.europa.eu/health/tobacco/docs/dir_201440_en.pdf

⁶⁵ ASH (2014) The use of electronic cigarettes in Great Britain <http://www.ash.org.uk/information/facts-and-stats/fact-sheets>

This option could result in an indirect benefit to government if the new customer base included smokers who stop using traditional tobacco products as a result of using an e-cigarette. This could lead to fewer smoking related illnesses and a more productive society. The ASH survey found that over 50% of e-cigarette users were ex-smokers. Additional evidence⁶⁶ suggests a steep rise in the number of smokers who use e-cigarettes (for any purpose) from 2% in 2011 to 14% in 2014 in England. It also found that 15% of attempts to stop in the past year have involved e-cigarettes⁶⁷. The Scottish Household Survey (2013) reports that the adult smoking rate in Scotland is 23.1%. There remains considerable potential for smoking cessation. It is not currently possible to quantify how many smokers might be influenced to move from tobacco to e-cigarettes as result of advertising.

Option 2: This option could be a direct benefit to business in reduced advertising costs. It would benefit government and society by strengthening the restrictions on cross-border advertising and promotion required by the Tobacco Products Directive. This option could provide direct health benefits for society, if by preventing the promotion of a behaviour which mimics smoking, it leads to prevention of young people and adult non-smokers taking up nicotine use and possibly smoking tobacco. There are over a million young people in Scotland under the age of 18 with the potential to benefit from this proposal.

Option 3: This option could provide a direct benefit to business in reduced advertising costs and it would allow customers who were interested in smoking cessation to access appropriate information about the use of e-cigarettes. Smokers, might stop using traditional tobacco products as a result. This could lead to fewer smoking related illnesses and a more productive society. The Scottish Household Survey (2013) reports that the adult smoking rate in Scotland is 23.1%. There remains considerable potential for smoking cessation. It is not currently possible to quantify how many smokers might be influenced to move from tobacco by receiving information about e-cigarettes.

Costs

Option 1: This option could risk indirect costs to Government and society as a result of increased nicotine addiction and / or smoking in young people and adult non-smokers due to continued marketing and promotion of a product that promotes nicotine addiction and mimics smoking behaviour. This could lead to an increase in health costs, resulting in decreased work related productivity. An ASH survey from 2014⁶⁸ estimated that there were 2.1 million adults in Great Britain using e-cigarettes. An estimate based on population share would be that 180,600 adults in Scotland use e-cigarettes. Scottish Health Survey data will be available in September 2015 on e-cigarette prevalence across the general population and will provide additional evidence for estimating and tracking use by young people.

⁶⁶ 'The smoking toolkit study': a national study of smoking and smoking cessation in England.

⁶⁷ ASH (2014) Briefing on Electronic Cigarettes. May 2014.

⁶⁸ ASH (2014) The use of electronic cigarettes in Great Britain

<http://www.ash.org.uk/information/facts-and-stats/fact-sheets>

Option 2: This option could lead to a loss of revenue for manufacturers, retailers and advertising businesses as they would not be able to use domestic advertising to give product information and / or to increase their customer base. This could be of particular importance for retailers selling only or mainly e-cigarettes and related products. It is difficult to quantify the impact on the retail sector as we do not have data on the number of retailers currently operating in this market in Scotland. It is expected that data on sales of e-cigarettes in Scotland will become available in October 2014. NHS Health Scotland are analysing a dataset purchased by the Scottish Government from Neilsen. ASH Scotland reported that sales of e-cigarettes rose from £2.5m to £23.9m in 2012⁶⁹. A report for Public Health England published in May 2014, summarised evidence for the UK market.⁷⁰

The consultation will allow businesses retailing e-cigarettes to provide the Scottish Government with information and data which can be taken into consideration when preparing the final Business and Regulatory Impact Assessment.

This option will result in associated enforcement costs to government and local government. In line with government guidance it is assumed that any reduction in consumer expenditure on e-cigarettes would be offset by an increase in expenditure elsewhere in the economy with broadly similar macroeconomic effects. There could be indirect health costs for government and society if people who wish to stop smoking and would have chosen e-cigarettes fail to do so as a result of having less access to information because of restricted advertising. The ASH survey found that over 50% of the e-cigarette users in Great Britain were ex-smokers. It also found that 15% of attempts to stop smoking in the past year have involved e-cigarettes in England. The Scottish Household Survey (2013) reports that the adult smoking rate in Scotland is 23.1%. There remains considerable potential for smoking cessation. It is not currently possible to quantify how many smokers might be influenced to move from tobacco to e-cigarettes as result of advertising.

Option 3: This option could lead to a loss of revenue for businesses from a reduced customer base through reduced advertising. There could also be costs relating to familiarisation with the legislation and to what it might apply. It is not possible to quantify this as there is no data available on the e-cigarette retail sector. It is expected that data on sales of e-cigarettes in Scotland will become available in October 2014 as NHS Health Scotland commissioned data evidence gathering. ASH Scotland reported that sales of e-cigarettes rose from £2.5m to £23.9m in 2012⁷¹.

The consultation will allow businesses retailing e- cigarettes to provide the Scottish Government with information and data which can be taken into consideration when preparing the final Business and Regulatory Impact Assessment.

⁶⁹ The Grocer" magazine. (ASH 2013)

⁷⁰https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311491/Ecigarette_take_and_marketing.pdf

⁷¹ The Grocer" magazine. (ASH 2013)

Option 3: This option will result in associated enforcement costs to government and local government. In line with government guidance it is assumed that any reduction in consumer expenditure on e-cigarettes would be offset by an increase in expenditure elsewhere in the economy with broadly similar macroeconomic effects.

Proposal 4 – Registration requirements to retail e-cigarettes

Options

Option 1 - Do nothing.

Option 2 - Establish a statutory requirement for e-cigarette retailers to register on the Scottish Tobacco Retailers Register.

Sectors and groups affected

Businesses that retail e-cigarettes, government and local government.

Benefits

Option 1: This option would benefit businesses as they would not be required to undertake the administration associated with the requirement to register, nor would any businesses that aren't already on the Register for tobacco purposes, have to familiarise themselves with the legislation.

Option 2: This option would benefit businesses as their inclusion on the Register will identify them as a legitimate retailer of the product, demonstrating that they are responsible retailers. This would also support the reduction of illegal trade of e-cigarettes and therefore the risk of loss to legitimate traders.

Option 2: this option will benefit government and enforcement agencies as it will support the sale of legitimate products and strengthen the enforcement of **proposals 1, 3 and 9**. Improving safety and strengthening enforcement will provide health and work related productivity benefits.

Costs

Option 1: This option would result in costs to Government and local government as it would be more difficult to identify retailers of legitimate products to support and enforce compliance with regulations around the sale of e-cigarettes. Non-compliance could result in health and productivity costs derived from more young people potentially becoming addicted to nicotine and ineffective monitoring of product safety.

This option will result in a small cost to businesses in undertaking the administrative requirements to register and familiarising themselves with the legislation. Any retailers who already tobacco will already be registered on the Scottish Tobacco Retailers Register in compliance with the Tobacco and Primary Medical Services (Scotland) Act 2010. As of September 2014, there were 9,803 retail premises on the Register. For these retailers there would be a very small administrative cost involved to update their details if they sell e-cigarettes. We do

not have data on the number of retailers who sell e-cigarettes but don't sell tobacco.

The consultation will allow businesses retailing e- cigarettes to provide the Scottish Government with information and data which can be taken into consideration when preparing the final Business and Regulatory Impact Assessment.

There will be a small cost to government in amending the existing Register to include e-cigarettes and in raising awareness about this requirement. There would be some costs to enforcement agencies associated with facilitating registration, providing support to business and enforcing the legislation. In 2013-2014 there were 9 Fixed Penalty Notices issued for carrying on a tobacco retail business whilst unregistered⁷².

Proposal 5 – Smoking in cars in the presence of a child or young person under the age of 18

Option 1 - Do nothing

Option 2 - Introduce an offence for adults to smoke in a vehicle in the presence of a child or young person under the age of 18

Sectors and groups affected

Government and society, especially adults who smoke and children and young people under the age of 18.

Benefits

Option 1: This option provides no benefits to government, society or business. Smokers will retain the ability to smoke in cars.

Option 2: This option will reduce the number of children and young people exposed to second-hand smoke in cars and the risk of associated illness. There are over a million young people in Scotland under the age of 18. The Scottish Household Survey (2013) reports that the adult smoking rate in Scotland is still 23.1%. So there remains the potential for a substantial number of children and young people to be exposed to second-hand smoke.

There could be benefits to adult smokers if they smoke less as a result of this measure. A change in culture could also lead to voluntary behaviour change to limit smoking in the home around children. In 2012 the Scottish Health Survey⁷³ reported that 12% of children and young people under the age of 16 said they were exposed to second-hand smoke in the home. There could be a reduction in the number of children who go on to smoke tobacco due to a reduction in exposure to smoking behaviours. There could be additional benefits to government from the collection of fines as an extra revenue source.

⁷² <http://www.scotss.org.uk/reference/etsep2014.pdf>

⁷³ <http://www.scotland.gov.uk/Resource/0043/00434590.pdf>

Costs

Option 1: This option would result in costs to Government and society from second-hand smoke related illness suffered by children and young people and associated treatment. It is possible that in later life this could result in a reduction in work related activity due to ill health.

Option 2: This option will result in costs associated with enforcement and to individuals who don't comply with the law through payment of fines. We anticipate costs will be minimal as enforcement of this policy is likely to be an extension of existing arrangements.

There could be costs to individuals from a reduction in utility by being prevented from smoking in cars. There is already smoke-free legislation covering vehicles used for business purposes. These include light and heavy goods vehicles, and public transport such as taxis, buses, trains and ferries, but exclude cars (private or company-owned). It is possible, therefore, that some businesses could be required to comply with the legislation if they transport children. There could be costs associated with familiarisation with the legislation and implementation of smoke-free policies.

Proposal 6 - Introduction of national legislation for smoke-free NHS grounds

Options

Option 1 - Do nothing.

Option 2 – Introduce legislation to make it an offence to smoke in health grounds

Option 3 – introduce further voluntary measures to assist with enforcement of voluntary policies already implemented by NHS Boards.

Sectors and groups affected

NHS Boards – premises, staff, patients and visitors, government, people who smoke.

Benefits

Option 1: This option provides no further benefits to local authorities, government or society over and above the policies already adopted by NHS Boards.

Option 2: This option will support compliance with, and enforcement of, existing NHS Board policies. The Scottish Household Survey (2013) reports that the adult smoking rate in Scotland is still 23.1%. It will provide a consistent approach across Scotland and supports the vision, aims and objectives set out in Scottish Government's Tobacco Control Strategy to reduced tobacco consumption and related harm. Option 2 would also result in less tobacco related litter within NHS grounds.

Option 3. Detailed proposals for this option will only be formulated following analysis of the consultation responses.

Costs

Option 1: This option will result in continued costs to NHS Boards to clear up tobacco related litter.

Option 2: This option could result in costs for additional signage, if it is required, over and above existing signage already in place across NHS grounds. We do not anticipate that enforcement costs to the NHS would be significant for those Boards who already implement voluntary smoke-free policies. There would be costs for enforcement agencies. There will be costs to Government associated with awareness raising. There could be costs to individuals (patients, visitors and staff) from a reduction in utility by being prevented from smoking in the grounds of NHS premises. We do not anticipate any direct or indirect costs to business.

Option 3: Detailed proposals for this option will only be formulated following analysis of the consultation responses.

Proposal 7 - Children and Families Smoke-free outdoor areas

Options

Option 1 - Do nothing. It will remain possible, as occurs at present, for there to be voluntary measures to reduce children's exposure to smoking behaviour and tobacco related litter.

Option 2 – Introduce legislation to make designated outdoor areas smoke-free to reduce children's exposure to smoking behaviours and tobacco related litter.

Sectors and groups affected

Local Authorities, Government, society, people who smoke.

Benefits

Option 1: This option provides no benefits to local authorities, government or society.

Option 2: This option provides benefits to society and government by reinforcing the message that smoking around children is unacceptable, resulting in children and young people being exposed to less smoking behaviour. There are over a million young people in Scotland under the age of 18. This proposal could lead to fewer children who go on to smoke and therefore result in fewer smoking related diseases. A change in culture could lead to increased quit attempts in adults resulting in fewer smoking related diseases. There could be savings to Local Authorities in clearing up smoking related litter. This option would support Local Authorities who have already implemented smoke-free outdoor areas on a voluntary basis.

Costs

Option 1: This option could lead to indirect costs to government and society resulting from not implementing measures that would otherwise have reduced smoking related illness and exposure to second-hand smoke, the resulting treatment costs to the NHS and loss in work related productivity.

Option 2: This option would result in costs to government and local government associated with enforcement, signage and awareness raising. There would be an indirect reduction in costs to society and government from a reduction in uptake of smoking and culture change resulting in increased quit attempts. Any reduction in smoking prevalence could result in a fall in tobacco related revenue for retailers. In line with government guidance it is assumed that any reduction in consumer expenditure on tobacco would be offset by an increase in expenditure elsewhere in the economy with broadly similar macroeconomic effects.

Proposal 8 - Age verification policy for tobacco and e-cigarettes

Options

Option 1 - Do nothing.

Option 2 - Create an age verification policy (require proof of age for sales to anyone who appears under age 25) for tobacco products and e-cigarettes akin to alcohol licensing legislation.

Sectors and groups affected

Young adults, businesses, including, Small Medium Enterprises, micro businesses, big retailers and specialist high street retailers, government and society will be affected.

Benefits

Option 1: This option provides no benefits.

Option 2: This option will support businesses and staff to ensure compliance with age restriction legislation by providing a consistent recognisable policy for requiring ID across all retailers. It would also provide a more consistent approach across alcohol, tobacco and e-cigarettes. By increasing compliance with age-restriction legislation, this option will help reduce access to tobacco and e-cigarettes. This could contribute to a reduction in the number of young people who take up smoking and therefore smoking related illness. This option also supports **proposal 1** and the benefits associated with that proposal.

The ASH survey of 2014 identified 2% of young people (11-18) as weekly or monthly users of e-cigarettes. Applying this to the Scottish population suggests around 8,000 young people could currently be possible customers, even if only occasionally. This would make it even less likely that these young people could continue to access e-cigarettes from retailers.

Costs

Option 1: This option will not result in any direct costs to businesses or Government. There could be limited indirect health costs associated with illness as a result of children and young people accessing, and consuming, tobacco or e-cigarettes. The ASH survey of 2014 identified 2% of young people (11-18) as weekly or monthly users of e-cigarettes. Applying this to the Scottish population suggests around 8,000 young people could currently be possible customers, even if only occasionally. This could lead to a reduction in work related productivity later in life if serious illness develops.

Option 2: This option will result in small direct costs to business in terms of staff training and customer awareness. This is already a requirement in statute for certain alcohol sales and some businesses already apply this policy voluntarily to the sale of tobacco. We therefore consider that this will have a very small impact on businesses but in the absence of data on the e-cigarette retail market, it is not possible to quantify this.

The consultation will allow businesses retailing e-cigarettes to provide the Scottish Government with information and data which can be taken into consideration when preparing the final Business and Regulatory Impact Assessment.

There will be small direct costs to Government and enforcement agencies associated with raising awareness of and enforcing of this measure.

Proposal 9 – Unauthorised sale of tobacco and e-cigarettes by a young person under the age of 18

Options

Option 1 - Do nothing

Option 2 – Prohibit young people under the age of 18 from selling tobacco products and e-cigarettes unless they are authorised by someone over the age of 18.

Sectors and groups affected

Young people under the age of 18, businesses, including, Small Medium Enterprises, micro businesses, big retailers and specialist high street retailers, government and society will be affected

Benefits

Option 1: This option would benefit businesses which are run by people under the age of 18, or employ under 18 year olds without supervision, as they would not be required to take additional action. There are no benefits to government or society resulting from option 1.

Option 2: This option could benefit businesses by providing more consistency with the retail of tobacco, e-cigarettes and alcohol. This legislative requirement is already in place for the sale of alcohol. This would support businesses and individual staff to comply with the requirement to ensure someone attempting to purchase tobacco or e-cigarettes are over 18. In particular, it will encourage appropriate training and support for staff to refuse a sale or challenge a customer who might be close to them in age or older.

Costs

Option 1 would result in no direct costs to government or businesses.

Option 2 could result in direct costs for businesses associated with familiarisation with the new legislation and training of staff. Although, premises licences for alcohol are already required by law to have such a policy in place. There are currently 9,803 businesses on the tobacco register which will be affected by this proposal. We do not have data on the number of premises that retail e-cigarettes.

There will be a small direct cost to government and enforcement agencies associated with raising awareness and enforcement. This is difficult to quantify in the absence of data on the number of retail outlets for e-cigarettes.

The consultation will allow businesses retailing e- cigarettes to provide the Scottish Government with information and data which can be taken into consideration when preparing the final Business and Regulatory Impact Assessment.

Scottish Firms Impact Test

We will seek to meet with key stakeholders and business throughout the consultation period to better understand impacts on and to inform the development of the policy proposals and final Business and Regulatory Impact Assessment.

Competition Assessment

We do not anticipate that any of these proposals disproportionately impact any supplier but will seek further information on this issue as part of the consultation.

Test run of business forms

We do not anticipate that the proposals will result in any new business forms. However, should any new forms come out of these proposals then we will fully test with business to ensure that they are simple and easy to use.

Legal Aid Impact Test

The proposals suggest introduction of a number of new offences some of which could be incurred by members of the public. We know from tobacco legislation already in place that the majority of these offences are dealt with as fines from enforcement officers (currently Environmental Health Officers). However, an

individual can refuse to pay a fine and which could result in the case being referred for prosecution.

Some of the proposals suggest the introduction of a number of offences for which businesses would be liable for. We know from tobacco legislation already in place that the majority of these offences are dealt with as fines from enforcement officers (currently Environmental Health and Trading Standards Officers). However, a Business can refuse to pay a fine which could result in the case being referred for prosecution.

No final decision has been made as to who will be responsible for the enforcement of the proposed measures. However, we do not envisage the creation of new procedure or right of appeal.

Enforcement, sanctions and monitoring

This section will be completed post consultation at final Business and Regulatory Impact Assessment stage.

Implementation and delivery plan

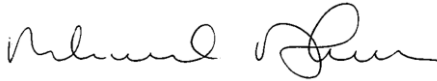
This section will be completed post consultation at final Business and Regulatory Impact Assessment stage.

Summary and recommendation

This section will be completed post consultation at final Business and Regulatory Impact Assessment stage.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact will be assessed with the support of businesses in Scotland.

Signed:**Date: 10th October 2014****Michael Matheson
Minister for Public Health****Scottish Government Contact point:
Tobaccocontrolteam@scotland.gsi.gov.uk; 0131 244, 4387**

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same. Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses.

Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565). All Scottish Government consultation papers and related publications (e.g. analysis of response reports) can be accessed at: [Scottish Government consultations \(<http://www.scotland.gov.uk/consultations>\)](http://www.scotland.gov.uk/consultations).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals;
- be used to inform draft legislation before it is introduced to Parliament.

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

RESPONDENT INFORMATION FORM

Please Note this form must be returned with your response to ensure that we handle your response appropriately. If your response is longer than the answer space provided please use additional sheets and number each response accordingly. Please do not submit responses which are longer than 25 pages.

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
Postcode	Phone	Email

3. Permissions – I am responding as...

Individual <input type="checkbox"/>	/	Group/Organisation <input type="checkbox"/>
<i>Please tick as</i>		

- (a) Do you agree to your response being made available to the public (in Scottish Government library)
- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis
Please tick ONE of the following boxes
- Yes, make my response, name and address all available

Or

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library)
Are you content for your **response** to be made available?

Please tick as appropriate
 Yes No

Yes, make my response available, but not my name and address

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

CONSULTATION QUESTIONS

Age restriction for e-cigarettes

1. Should the minimum age of sale for e-cigarette devices, refills (e-liquids) be set at 18?

Yes No

2. Should age of sale regulations apply to:

a. only e-cigarette devices and refills (e-liquids) that contain nicotine or are capable of containing nicotine, or

b. all devices / refills (e-liquids) regardless of whether they contain or are capable of containing nicotine?

a b

3. Whom should the offence apply to:

a. the retailer selling the e-cigarette

a

b. the young person attempting to purchase the e-cigarette

b

c. both

c

4. Should sales of e-cigarettes devices and refills (e-liquids) from self-service vending machines be banned?

Yes No

5. Should a restriction be in place for other e-cigarette accessories?

Yes No

6. If you answered “yes” to question 5, which products should have restrictions applied to them?

Comments

Proxy purchase for e-cigarettes

7. Should the Scottish Government introduce legislation to make it an offence to proxy purchase e-cigarettes?

Yes No

Domestic advertising and promotion of e-cigarettes

8. Should young people and adult non-smokers be protected from any form of advertising and promotion of e-cigarettes?

Yes No

9. In addition to the regulations that will be introduced by the Tobacco Products Directive do you believe that the Scottish Government should take further steps to regulate domestic advertising and promotion of e-cigarettes?

Yes No

10. If you believe that regulations are required, what types of domestic advertising and promotion should be regulated?

- | | |
|--|----------------------------|
| a. Bill boards | a <input type="checkbox"/> |
| b. Leafleting | b <input type="checkbox"/> |
| c. Brand-stretching (the process of using an existing brand name for new products or services that may not seem related) | c <input type="checkbox"/> |
| d. Free distribution (marketing a product by giving it away free) | d <input type="checkbox"/> |
| e. Nominal pricing (marketing a product by selling at a low price) | e <input type="checkbox"/> |
| f. Point of sale advertising (advertising for products and services at the places where they were bought) | f <input type="checkbox"/> |
| g. Events sponsorship with a domestic setting | g <input type="checkbox"/> |

11. If you believe that domestic advertising and promotion should be regulated, what, if any, exemptions should apply?

Comments

12. Are you aware of any information or evidence that you think the Scottish Government should consider in relation to regulating domestic advertising in relation to impacts on children and adults (including smokers and non-smokers)?

Comments

13. Are you aware of any information or evidence that you think the Scottish Government should consider in relation to regulating domestic advertising in relation to impacts on business, including retailers, distributors and manufacturers?

Comments

Inclusion of electronic cigarettes on the Scottish Tobacco Retailer Register

14. Do you agree that retailers selling e-cigarettes and refills should be required to register on the Scottish Tobacco Retailers Register?

Yes No

15. Do you agree that the offences and penalties should reflect those already in place for the Scottish Tobacco Retailers Register?

Yes No

16. If you answered 'no', to question 15, what offences and penalties should be applied?

Comments

E-cigarettes – use in enclosed public spaces

17. Do you believe that the Scottish Government should take action on the use of e-cigarettes in enclosed public spaces?

Yes No

18. If you answered 'yes' to Question 17, what action do you think the Scottish Government should take and what are your reasons for this?

Comments

19. If you answered, 'no' to Question 17, please give reasons for your answer.

Comments

20. Are you aware of any evidence, relevant to the used of e-cigarettes in enclosed spaces, that you think the Scottish Government should consider?

Comments

Smoking in cars carrying children aged under 18

21. Do you agree that it should be an offence for an adult to smoke in a vehicle carrying someone under the age of 18?

Yes No

22. Do you agree that the offence should only apply to adults aged 18 and over?

Yes No

23. If you answered 'no' to Question 22, to whom should the offence apply?

Comments

24. Do you agree that Police Scotland should enforce this measure?

Yes No

25. If you answered 'no' to Question 24, who should be responsible for enforcing this measure?

Comments

26. Do you agree that there should be an exemption for vehicles which are also people's homes?

Yes No

27. If you think there are other categories of vehicle which should be exempted, please specify these?

Comments

28. If you believe that a defence should be permitted, what would a reasonable defence be?

Comments

Smoke-free (tobacco) NHS grounds

29. Should national legislation be introduced to make it an offence to smoke or allow smoking on NHS grounds?

Yes No

30. If you support national legislation to make it an offence to smoke on NHS grounds, where should this apply?

- a. All NHS grounds (including NHS offices, dentists, GP practices) a
b. Only hospital grounds b
c. Only within a designated perimeter around NHS buildings c
d Other suggestions, including reasons, in the box below

Comments

31. If you support national legislation, what exemptions, if any, should apply (for example, grounds of mental health facilities and / or facilities where there are long-stay patients)?

Comments

32. If you support national legislation, who should enforce it?

Comments

33. If you support national legislation, what should the penalty be for non-compliance?

Comments

34. If you do not support national legislation, what non-legislative measures could be taken to support enforcement of, and compliance with, the existing smoke-free grounds policies?

Comments

Smoke-free (tobacco) children and family areas

35. Do you think more action needs to be taken to make children's outdoor areas tobacco free?

Yes No

36. If you answered 'yes' to Question 25, what action do you think is required:

a. Further voluntary measures at a local level to increase the number of smoke-free areas a

b. Introducing national legislation that defines smoke-free areas across Scotland b

c. That the Scottish Government ensures sufficient local powers to allow decisions at a local level as to what grounds should be smoke-free c

d. Other actions. Please specify in the box below

Comments

37. If you think action is required to make children's outdoor areas tobacco-free, what outdoor areas should that apply to?

Comments

Age verification policy 'Challenge 25' for the sale of tobacco and electronic cigarettes

38. Do you agree that retailers selling e-cigarettes, refills and tobacco should be required by law to challenge the age of anyone they believe to be under the age of 25?

Yes No

39. Do you agree that the penalties should be the same as those which are already in place for selling tobacco to someone under the age of 18?

Yes No

Unauthorised sales by under 18 year olds for tobacco and electronic cigarettes

40. Do you agree that young people under the age of 18 should be prohibited from selling tobacco and non-medicinal e-cigarettes and refills unless authorised by an adult?

Yes No

41. Who should be able to authorise an under 18 year old to make the sale, for example, the person who has registered the premises, manager or another adult working in the store?

Comments

42. Do you agree with the anticipated offence, in regard to:

a. the penalty

a

b. the enforcement arrangements

b

Equality Considerations

43. What issues or opportunities do the proposed changes raise for people with protected characteristics (age; disability; gender reassignment; race; religion or belief; sex; pregnancy and maternity; and sexual orientation)?

Comments

44. If the proposed measures are likely to have a substantial negative implication for equality, how might this be minimised or avoided?

Comments

45. Do you have any other comments on or suggestions relevant to the proposals in regard to equality considerations?

Comments

Business and Regulatory Impacts Considerations

46. What is your assessment of the likely financial implications, or other impacts (if any), of the introduction of each of these proposals on you or your organisation?

Comments

47. What (if any) other significant financial implications are likely to arise?

Comments

48. What lead-in time should be allowed prior to implementation of these measures and how should the public be informed?

Comments

49. Do you have any other comments on or suggestions relevant to the proposals in regard to business and regulatory impacts?

Comments

As a party to the World Health Organization's Framework Convention on Tobacco Control (FCTC), Scotland has an obligation to protect the development of public health policy from the vested interests of the tobacco industry. To meet this obligation, we ask all respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. We will still carefully consider all consultation responses from the tobacco industry and from those with links to the tobacco industry and include them in the published summary of consultation responses.

Comments



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