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Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 1 September and seeks an explanation of the following matters:

Section 3(1) (inserting section 4B(5) of the 2010 Act)– Age verification policy

Power conferred on:	the Scottish Ministers
Power exercisable by:	guidance
Parliamentary procedure:	none, but published

2. Subsection (1)(b) of new section 4B of the 2010 Act (inserted by section 3(1) of the Bill) refers to the requirement for a person to operate an age verification policy in respect of premises at which the person carries on a tobacco or nicotine vapour product (NVP) business. Subsection (3) of that new section enables an older age than 25 to be specified in a policy, for the purposes of the circumstances set out in that subsection.

3. Subsection (5) of the new section lists various matters on which the Scottish Ministers may publish guidance relating to age verification policies. It appears that other matters than those listed might be included in guidance, but the list does not include guidance as to what should be considered before any person decides to specify any age older than 25 in their policy. A person must have regard to guidance when operating an age verification policy.

4. **The Committee therefore asks the Scottish Government:**

(1) to clarify whether it is intended that a person operating an age verification policy in relation to a tobacco or NVP business should have complete

discretion to determine any age older than 25 that may be specified in their policy for the purposes of subsection (3) of section 4B;

(2) to clarify whether it is intended that the guidance issued by Ministers under subsection (5) should (or should not) include guidance on how any such older age may be determined;

(3) whether therefore the new section 4B could be clearer in providing for the intentions which underlie the provisions?

Section 17(1) – Advertising and brand-sharing

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative

5. Section 17(1) enables the Ministers by regulations to make provision prohibiting or restricting “an activity, in the course of a business, which relates to” a nicotine vapour product (NVP) advert or NVP brand-sharing. The Delegated Powers Memorandum (DPM) acknowledges that this power is widely drawn.

6. The Committee notes that, in relation to tobacco advertising, sections 2 to 3A of the Tobacco Advertising and Promotion Act 2002 define the activities in the course of business related to a tobacco advertisement which are prohibited (for example, publishing an advert or causing its publication.) In relation to tobacco brand-sharing, the power in section 11 of the 2002 Act allows regulations to prohibit or restrict the use of brand-sharing in connection with a tobacco product, rather than enabling the regulation of activities which “relate to” brand-sharing.

7. **The Committee therefore asks the Scottish Government to explain:**

(a) why it considers that the wide power in section 17(1) to make provision prohibiting or restricting “an activity, in the course of a business, which relates to” an NVP advert or NVP brand-sharing is appropriately drawn, and could not be framed more transparently or narrowly, to provide a description or list of activities related to NVP advertising or brand-sharing which may be included within the regulations;

(b) what related activities it considers would be potentially within the scope of this power; and

(c) examples of the activities which the Scottish Government intends could be covered by the regulations?

8. Subsection (2)(b) and (c) of section 17 enables the regulations under subsection (1) to provide for exceptions and defences to offences specified in the regulations.

9. The DPM states that the Scottish Government intends that exemptions will cover point of sale advertising and promotion. Other exemptions may also be made, e.g. for advertising within trade shops which is not visible outside the shop (paragraph 55).

10. In relation to defences, the DPM states that it is envisaged that the defences provided to offences will be similar to those set out in sections 5 and 6 of the Tobacco Advertising and Promotion Act 2002 (paragraph 56). However section 17(2) does not specify that such provisions for exceptions and defences may be included in the regulations.

11. **Could therefore the power in section 17(2)(b) and (c) be drawn more transparently or precisely, to include a description or list of exceptions or defences to offences which may be included in the regulations, in accordance with the Scottish Government's intentions (albeit that an initial description or list might in future be modified by regulation)?**

12. **Otherwise, please explain why it has been considered appropriate to include the provisions in section 17(2)(d) and (e) on enforcement, but not include further provision as to exceptions and defences as outlined above.**

13. Questions on the powers in sections 18 and 19 are combined below.

Section 18 – Free distribution and nominal pricing

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative

14. Section 18(1) of the Bill enables the Ministers to make regulations to prohibit or restrict, in the course of a business, the giving away of NVPs (and coupons for those products) for free, including retailing them for a nominal sum.

15. Section 18(2) contains a non-exhaustive list of the kind of provision which may also be made in regulations, covering enforcement, offences and penalties, defences and exceptions. Further provision could be made on the circumstances in which a product or coupon is to be treated as being made available for a nominal sum.

Section 19 – Sponsorship

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative

16. Section 19(1) enables regulations to prohibit or restrict a person in the course of a business entering into a sponsorship agreement, where the purpose or effect of anything done as a result of the agreement promotes a NVP.

17. Subsection (4) defines “sponsorship agreement”, as an agreement under which a party to it makes a contribution towards something, whether in money or taking any other form (for example the provision of services or of contributions in kind). It may include the sponsorship of an event, activity or person in, or in connection with, Scotland.

18. Section 19(2) contains a non-exhaustive list of the kind of provision which may also be made in regulations, covering enforcement, offences and penalties, defences and exceptions.

19. **The Committee asks the Scottish Government to explain the following matters:**

20. **Subsection (2)(b) and (c) of sections 18 and 19 (amongst other things) enable the regulations under subsection (1) of each section to provide for exceptions and defences to offences specified in the regulations.**

21. **In relation to section 18, the Delegated Powers Memorandum (DPM) states it is envisaged that defences which could be available to the prohibition or restriction of free distribution and nominal pricing of NVPs would mirror those made under section 17 for advertising and brand-sharing. It is also stated that it is envisaged that the defences provided to offences will be similar to those set out in section 5 and 6 of the 2002 Act.**

22. **Similar statements are made in the DPM in connection with the powers in section 19 to prohibit or restrict a person in the course of business entering into a sponsorship agreement, to promote an NVP.**

23. **As for the powers in section 17(2)(b) and (c) therefore, could sections 18(2) and 19(2) be drawn more transparently or precisely, to include a description or list of exceptions or defences to offences which may be included in the regulations, in accordance with the Scottish Government's intentions (albeit that an initial description or list might in future be modified by regulation)?**

24. **Otherwise, please explain why it has been considered appropriate to include the provisions in sections 18(2)(e) and (f) and 19(2)(d) and (e) on enforcement, but not include further provision as to exceptions and defences as outlined above.**

Section 20(2) (inserting section 4D(2)(a) and (b) of the 2005 Act) – Meaning of “no-smoking area outside a hospital building” and related expressions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative, if exercising the power in section 4D(2)(a); negative if exercising the power in section 4D(2)(b)

25. Section 20 inserts section 4D into the 2005 Act. Section 4D(1) defines the meaning of “no-smoking area outside a hospital building”. It is an area lying immediately outside a hospital building, and bounded by a perimeter of a specified distance from the building.

26. New section 4D(2)(a) enables the Ministers to make regulations to prescribe the specified distance of the perimeter.

27. The Committee asks the Scottish Government for an explanation of the following matters, in relation to the power in section 20(2) (inserting section 4D(2)(a) of the 2005 Act):

28. (1) The DPM explains that the perimeter distance to be specified under this power is a key aspect of the proposed policy, that the Scottish Government intend to consult with stakeholders before making the regulations, and that provision can only be made which specifies a distance (paragraphs 87 and 90).

29. Further explanation is sought as to why a proposed initial perimeter distance could not, following consultation on the proposals for the Bill, have been included in the proposed new section 4D of the 2005 Act, for consideration by Parliament and consultation with stakeholders during the Bill's stages.

30. It appears possible to have provision that such an initially proposed distance might be variable by means of regulations. Why has the Scottish Government considered it more appropriate for the distance to be proposed in regulations at a later stage?

31. (2) The DPM states that it is intended that the same perimeter distance of a proposed no-smoking area is to apply to all NHS hospital buildings, for consistency (paragraph 87). However, the proposed new section 4D(1) and (2) of the 2005 Act do not in terms provide that only one distance may be specified, for the purposes of all health service hospital buildings. The ancillary powers in section 32(1) enable the regulations to make different provision for different purposes.

32. The Scottish Government are therefore asked to consider whether the policy intention to prescribe a single perimeter distance could be made clearer in the provisions.

Section 22 – Duty of candour procedure

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

33. Subsection (1) of section 22 confers power on the Ministers to specify the actions which should be taken by the “responsible person” (the “duty of candour procedure”). A “responsible person” is one of the bodies (including Health Boards) as defined in section 25, who provide health, care or social work services.

34. Subsection (2) lists various matters that the regulations may, in particular, make provision about. Section 21(1) requires that the “responsible person” follows the duty of candour procedure set out in section 22.

35. The Committee asks the Scottish Government for an explanation of the following matters, in relation to the power in section 22-

36. The DPM states that this power “enables an outline of the detailed requirement of implementation to be provided, reflecting the principles outlined and reflecting the fact that this level of detail is more suited to regulations than primary legislation.”

37. The Committee recognises that a power to make regulations would enable the “duty of candour” procedures to be amended in future in the light of experience.

38. The Committee asks the Scottish Government to-

(1) explain why it has been considered more appropriate to set out the whole details of the “duty of candour” procedure in regulations, under the framework of particular matters that might be included, as set out in section 22(2)(a) to (k), and

(2) provide examples of how this power might be exercised to set out specific procedures, and requirements on a “responsible person”. In particular, could examples be provided of the types of actions, steps and requirements that might be required of a responsible person under section 22(2) (d), (g) or (i)?

Section 33– Ancillary provision

Power conferred on:	Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative, but affirmative where there is textual amendment of an Act

39. Subsection (1) provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, any provision made by or under the Bill.

40. The Committee has seen in some earlier bills a discrepancy in the wording of the ancillary powers. The differing approach to the drafting of ancillary powers can again be seen, by comparing the powers in this Bill, with those in section 97(1) of the Community Empowerment Bill, as passed.

41. The Committee therefore seeks an explanation from the Scottish Government in relation to the ancillary powers in section 33(1):

42. The Committee reported in the following terms in relation to the ancillary powers contained in the Tribunals (Scotland) Bill at Stage 1 (the powers now being contained in section 80 of the 2014 Act):

“The Committee observes that there appears to be a lack of consistency in the formulation of ancillary powers in Government Bills. That may well be justifiable but no explanation has been provided regarding how the Scottish Government selects which formulation to use in each case. Parliament is accordingly being asked to grant powers which are

expressed in different ways, and which presumably have different meanings, without a justification for that having been provided.”

43. The wording of the ancillary powers in section 33(1) differs from, for example, that in section 97(1) of the Community Empowerment (Scotland) Bill (as passed). Yet different wording is used in section 25 of the Succession (Scotland) Bill, which the Committee is also considering currently.

44. The Committee therefore asks the Scottish Government to explain why the different wording used in section 33(1) is appropriate, and what the effect of the provision is (in comparison with the formulations used in the Community Empowerment (Scotland) Bill and the Succession (Scotland) Bill).

45. The Committee observes that if it is intended that the effect of these ancillary powers is intended to be the same, then the same wording ought to be used, for consistency.

46. Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on **Tuesday 15 September.**

**Deborah Cook
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