

Deborah Cook
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Delegated Powers and Law Reform Committee
The Scottish Parliament

15 September 2015

Dear Deborah,

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

1. I am writing in response to your letter dated 3rd September 2015 asking for more information regarding the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill. The Committee's questions are in bold.

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

The Committee 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. Currently retailers are free to operate any policy they wish, the insertion of 'or such older age as may be specified in the policy' at subsection (3) allows the discretion of the retailers to continue, provided the policy is at least up to age 25.

(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. It is not the intention at this point that the guidance issued by Ministers will include guidance on determining an older age. However, the guidance would still apply to retailers who have chosen to use an older age as the methods, such as being shown appropriate identification, training etc. will apply equally to them.

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

4. See above responses – we feel that new section 4B is sufficiently clear.

Section 17(1) – Advertising and brand-sharing

The Committee 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;

5. We consider that the regulations are likely to cover the activity set out in sections 2 to 3A of the Tobacco Advertising and Promotion Act 2002. However, it is desirable to consider how the regulations restricting advertising in the UK resulting from the revised EU Tobacco Products Directive (TPD) are set. We consider that ‘prohibiting or restricting an activity, in the course of a business which relates to a nicotine vapour product advert and nicotine vapour product brandsharing’ provides flexibility to provide consistency in approach, where that is appropriate, ensuring that the regulations fit together.

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

6. We consider that the activities set out in sections 2 to 3A of the Tobacco Advertising and Promotion Act 2002 are likely to be within scope.

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

7. A related activity might be an activity which causes the advertising of an NVP or related product. For example, distributing, printing or devising adverts for billboards, product displays, bus stops, posters, leaflets, banners, brochures and certain published material in Scotland (this list is not exhaustive).

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)?

8. It will be necessary to tailor the defences to the specific offences prescribed in the regulations. Since the offences, prohibitions and restrictions have yet to be set; it is not possible to list the defences at this point. Likewise, since the offences, prohibitions and restrictions will be prescribed in regulations, it would not make sense to set out an exemption for point of sale advertising or make other exemptions in section 17 in the absence of detail about the offences etc. We have made clear that our intention is not to prohibit certain advertising at point of sale but there are several different ways in which this may be achieved in the regulations. Depending on how the offences, prohibitions and restrictions are framed, a specific exemption in the regulations may not be necessary, since, for example, point of sale advertising might not be captured by an offence, prohibition or restriction.

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.

9. It is the intention that enforcement arrangements will be similar to those in the 2010 Act as this will provide consistency for enforcement agencies. The enforcement arrangements are not dependent on how the offences are framed, therefore the inclusion of the provisions set out in 17(2)(d) and (e) are intended to provide transparency about the intended approach. However, whilst the arrangements will be similar, it is possible that they will be tweaked slightly to align with the implementation of the TPD.

Section 18 – Free distribution and nominal pricing and Section 19 – Sponsorship

The Committee asks the Scottish Government to explain:

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)?

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.

10. Please see answers in paragraphs 7-9.

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

The Committee asks the Scottish Government for an explanation of the following matters:

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.

11. The consultation that preceded the Bill provided a number of options to support smoke-free outdoor policies already adopted by NHS Boards, including non-legislative options. The consultation analysis demonstrated 67% support for a legislative approach. The Bill provides a clear framework for implementing a smoke-free area around buildings on NHS hospital sites, it sets provisions for the offences and to whom they will apply, defences and enforcement. The accompanying documents also provide examples of how the perimeter will be applied, making it clear that it should be a set distance across all sites, for example 10/15 meters from the building. It is desirable to consult on the perimeter now that a framework has been set by the Bill. Whilst the distance is a key tenet of the legislation, we believe it is important that this is considered alongside the other powers, which will define how that distance is measured, and whether buildings, hospitals or land is excluded from no-smoking areas. These matters could impact on the distance that is agreed. It is important that we are able to consult with Health Boards on these matters collectively as each hospital site is different and it will be important to consider these technical and operational

differences in detail in order to achieve a comprehensive, consistent and easily understood approach.

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?

12. Please see response at paragraph 11.

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.

13. The policy intention is to achieve a perimeter of the same distance regardless of the hospital site or building size. However, as highlighted above determining the distance of the perimeter and how it is applied will be subject to considering, how that distance should be measured and any exempt land or buildings. Those matters will be the subject of consultation. In exceptional circumstances, it may be desirable to exclude land that would otherwise have been considered within the defined no-smoking area perimeter. This might be, for example, where the land of an exempted building overlaps with a no-smoking area. It is therefore necessary to retain the flexibility that applies by virtue of the ancillary powers in section 32(1).

Section 22 — Duty of candour procedure

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

(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

14. The Bill provides the framework for the duty of candour procedure and gives some detail, within section 22(2), as to what that procedure will involve. Having the power to make regulations to set out that procedure in further detail will allow for more detailed consultation with stakeholders and we have established stakeholder groups in order to do that. In addition, it is anticipated that the procedure will contain a level of detail more suited to secondary legislation (see examples given in relation to question (2) below).

(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)?

15. *Section 22(2)(d) the actions which must be taken at, and following such a meeting -* Examples of the type of actions, steps and requirements that might be required of a responsible person in relation to a meeting (and following a meeting) might include the provision of the details of a named support contact in the organisation; and requirements to provide an opportunity for the relevant person to submit a list of issues or questions they would like to see covered in any review or investigation of the unexpected or unintended incident. Actions, steps and requirements under section 22(2)(d) are those focused on the

involvement and support of the relevant person, distinct from further steps to be taken under section 22(2)(e) in which the intention is to relate to information to be given to the relevant person about the incident and actions to be taken following the responsible person's review of the incident.

16. *Section 22(2)(g) the circumstances in which the responsible person is to make available, or provide information about, support to persons affected by the incident, -*

The responsible person might be required to have in place procedures to consider the impact of the unexpected or unintended incident on the people involved and specify the type of information that should be provided in respect of ongoing support by relevant clinical or care teams in specific circumstances. The responsible person might be required to provide specific support to persons affected by the incident, for example counselling.

17. *Section 22(2)(i), (i) steps to be taken by the responsible person, (i) to review the circumstances leading to the incident, and(ii) following such a review, -*

Regulations could, for example, make provision on the approach to be taken to the analysis of contributory factors, including the application of recognised approaches to review and investigation of unexpected incidents resulting in harm, thus ensuring a robust and consistent approach to such reviews across health and social care.

18. Following such a review, regulations could detail the steps to be taken by the responsible person to provide support to have the findings reviewed and consider whether the relevant person's questions have been addressed. The regulations could also require the provision of any further relevant information to the relevant person, and involvement in the resulting organisational process of learning and improvement following the review.

Section 33– Ancillary provision

The Committee 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).

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.

19. The Committee raise a question about the consistency of the drafting approach adopted in this section compared with the drafting of similar provisions in other Bills currently before Parliament and in past Bills.

20. Consistency is one of the things the Scottish Government considers desirable in Bills. But it is not the only, or even the main, goal – which is achieving certainty of legal effect in the clearest language possible. The importance of consistency is that it can assist in achieving certainty and clarity.

21. Where possible, the Scottish Government aim to avoid unnecessary differences in the drafting of common provisions. As the Committee may be aware, “drafting policies” on provisions setting out short titles and conferring powers to make subordinate legislation have been prepared and made available to interested parties, including the Parliament's Non-Government Bills Unit and the Parliament's own legal advisers. These policies seek to standardise, where appropriate, the drafting of the provisions to which they relate.

22. A drafting policy on ancillary provision sections is being considered. That work is ongoing, and whether and to what extent the drafting of such sections can be standardised remains to be determined. In the absence of agreed standardised wording, however, minor variations – such as those the Committee identifies in the Bills presently under consideration – do not necessarily signify differences of legal effect.

23. It is also the case that not all ancillary provision sections are intended to achieve the same effect. The powers in some Bills have been wider or narrower than the powers in other Bills. In other Bills, no ancillary provision is included where it is considered unnecessary. In this Bill, we anticipate that we may need to make use of all the “ancillary” elements of the power, so have included them all.

24. While powers to make ancillary provisions are commonly included in Bills, the extent of the power conferred in each case depends largely on the rest of the Bill to which the power is ancillary. In a comparatively short Bill such as the Succession Bill, what can be done is determined by the limited area of law dealt with by that Bill. In the case of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill, the power is wider, given the wide number and range of topics in this Bill.

25. To conclude, we consider the formulation of the power in section 33 of this Bill to be appropriate in the context of this Bill and we will continue to liaise with interested parties, including the Parliament to establish the extent to which the drafting of ancillary provisions can be standardised.

Yours sincerely

Claire McDermott

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