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Delegated Powers and Law Reform Committee

Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

- a. any—
 - i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - ii. [deleted]
 - iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- c. general questions relating to powers to make subordinate legislation;
- d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
- f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
- g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.



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Introduction

1. At its meetings on 1, 22 and 29 September 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill at Stage 1 (“the Bill”)¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

Overview of the Bill

3. The Bill was introduced on 4 June 2015, by Shona Robison, Cabinet Secretary for Health, Wellbeing and Sport.
4. The Bill across its 3 Parts covers 3 distinct policy areas: non-medicinal “nicotine vapour products” (NVPs) and further tobacco control, an organisational “duty of candour”, and an offence of ill-treatment and wilful neglect.
5. In relation to Part 1, the Bill includes measures designed to: limit the availability of NVPs to young people; reduce the appeal of NVPs to young people and non-smokers; reinforce the under-18 age restriction for tobacco products; and to create statutory smoke-free perimeters around NHS hospital buildings.
6. The Bill is combined with the Government’s latest tobacco control strategy issued in March 2013- “Creating a Tobacco-Free Generation”. The strategy aims to reduce smoking prevalence rates to 5% or less, by 2034. The minimum age of sale for tobacco products was increased from 16 to 18 in 2007. Tobacco sales from vending machines were banned in April 2013, alongside the introduction of a tobacco display ban in large shops. From April 2015, tobacco displays were banned in smaller retail premises.
7. On the “duty of candour” in Part 2, the proposals follow on from the “Francis Report” of the Mid Staffordshire NHS Foundation Trust Public Inquiry. The Report included recommendations in support of an essential aim of ensuring openness, transparency and candour throughout the health system, about matters of concern. The Scottish Government consulted on proposals for an organisational “duty of candour”, between October 2014 and January 2015.
8. The proposals in Part 3 on ill-treatment and neglect also follow on from the Francis Report. One of the recommendations was to create an offence to place wilful neglect or ill-treatment of all NHS patients on a par with the offence that currently applies only to mental health patients in England and Wales. In November 2013, the First Minister announced in Parliament the intention to examine the best way to legislate for a similar offence in Scotland.

Delegated Powers Provisions

9. The Committee considered the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:
- Section 2(1) (inserting section 4A(4)(c) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (“the 2010 Act”) – Sale of nicotine vapour products to persons under 18
 - Section 3(1) (inserting section 4B(4) of the 2010 Act)– Age verification policy
 - Section 4 (inserting new section 4C(5) of the 2010 Act) – Sale of tobacco or nicotine vapour products by persons under 18
 - Section 7(1)– Extension of vending machine prohibition
 - Section 9(1)(a) – Application for registration and addition of premises etc.
 - Section 10(5) – Tobacco and nicotine vapour product banning orders
 - Section 13 – Power to exclude certain premises
 - Section 20(2) (inserting section 4C(4) of the Smoking, Health and Social Care (Scotland) Act 2005 (“the 2005 Act”)) – Display of warning notices in hospital buildings and on hospital grounds
 - Section 20(2) (inserting section 4D(4) and (5) of the Smoking, Health and Social Care (Scotland) Act 2005)– Meaning of “no-smoking area outside a hospital building” and related expressions
 - Section 20(8)(e) – Smoking outside hospitals
 - Section 21(5) – Incident which activates duty of candour procedure
 - Section 31 – Penalty for ill-treatment and wilful neglect of mentally disordered person
 - Section 34 – Commencement
10. At its meeting on 1 September, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the Annexe. In light of the response received by the Scottish Government, the Committee agreed that it did not need to draw the power in section 3(1) of the Bill (inserting section 4B(5) of the 2010 Act– age verification policy), to the attention of Parliament.

Recommendations

11. The Committee's comments and recommendations on the remaining delegated powers in the Bill are detailed below.

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) (to specify the perimeter distance); negative if exercising the power in section 4D(2)(b)

Provision

12. 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. However, the area is limited to being within NHS hospital grounds. (Section 4D(3) defines “hospital grounds”, as land in the vicinity of the hospital and associated with it).
13. New section 4D(2)(a) enables the Ministers to make regulations to prescribe the specified distance of the perimeter.
14. New section 4D(2)(b) enables the Ministers to make further provision about determining the perimeter around a building. The DPM explains that for example detailed provision could be made on how to determine the starting point outside a building, from which the specified distance is to be measured, and to make provision allowing for a more regular shaped perimeter (as opposed to an irregular shape resulting from the shape of over-hanging roofs, parts of buildings, steps, etc.)
15. The DPM explains that the intention is (once the regulations under the Bill are in force) to have a consistent, easily understood prohibition of smoking around all buildings on NHS hospitals sites. It is important that the areas in which the smoking ban would operate are clearly defined, to ensure they are coherent and readily understood.

Comment

16. 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 of the DPM).

17. The Committee requested further explanation 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.
18. The Scottish Government's response (at paragraph 11 of the response in the Annexe) includes an explanation that the consultation analysis before the introduction of the Bill led to a decision on a legislative, rather than non-legislative, proposal. Given that choice, the Government has considered it desirable to consult on the perimeter distance that will apply, under the framework contained in section 20.
19. The Committee considers that ultimately, while the exercise of the power to specify the perimeter distance would be subject to the affirmative procedure, the policy which underlies the new section 4D(2)(a) is to clearly and simply propose by regulation a perimeter distance from NHS hospital buildings that will apply for the purposes of the no-smoking ban. There are various further powers proposed in section 4D(2)(b) and (4) to refine the detail of how the perimeter of buildings will be worked out, to seek to achieve a "consistent and easily understood approach".
20. **The DPM states that the perimeter distance from hospital buildings to be prescribed under the proposed new section 4D(1)(b) of the Smoking, Health and Social Care (Scotland) Act 2005 could for example be set at between 10 to 15 metres.**
21. **The Committee considers in principle that an initial distance could be proposed on the face of the Bill (for approval by Parliament) after consideration during Stage 1, and so inserted by amendment at Stage 2. An initial distance might, in principle, be variable by regulations (subject to affirmative procedure as the Bill provides).**
22. **The Committee recommends therefore that the Health and Sport Committee considers this further.**

Section 22 – Duty of candour procedure

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

Provision

23. 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.
24. 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 as set out in section 22.

Comment

25. The Committee sought an explanation of—

(a) 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

(b) examples of how this power might be exercised to set out specific procedures, and requirements on a “responsible person”.

26. The Scottish Government’s response to those questions is contained in paragraphs 14, and 15 to 18, of the response in the Annex. The response seeks to provide some reassurance that the Scottish Government intends that the powers will be exercised to set out what are largely procedural matters:

” “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.”

27. Ultimately however (as the Scottish Government’s response recognises at paragraph 14) the powers propose a framework for the “duty of candour” procedures, and give only some details within section 22(2) as to what the procedures will involve. Different procedures, actions, steps etc., might (in principle) be proposed in future by different administrations. While the Scottish Government intends that various procedures would be set out, parts of section 22(2) are not prescriptive as to the actions to be taken by the “responsible person” (in particular) following a meeting with the person affected, or following a review of

the incident. It appears to the Committee that matters such as, for example, any support for a person which would be prescribed following an incident or a review could have financial implications for Health Boards and other “responsible persons”. The implications would depend on the various actions and steps to be prescribed in the regulations.

- 28. The Committee considers accordingly that the regulations which would set out the whole detail of the “duty of candour” procedure under section 22 should be subject to the affirmative procedure.**

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

Provision

29. 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.
30. Subsection (2) provides that regulations made under subsection (1) may modify any enactment (including this Act).

Comment

31. The Committee has seen in earlier Bills that there are differences in the wording of ancillary powers in the nature of section 33 of this Bill. 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.”

32. The wording of section 33 of this Bill differs from, for example, that in section 97(1) of the Community Empowerment (Scotland) Bill (as passed). Section 97(1) provides:

” “The Scottish Ministers may by order make such incidental, supplementary, consequential, transitional or transitory provision or savings as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.”

The final words in section 33(1) of this Bill differ:

” “..for the purposes of, or in connection with, any provision made by or under this Act.”

33. The Committee therefore asked the Scottish Government to explain why the different formulation used in section 33 is appropriate, and what the effect of the provision is. In its written response the Scottish Government states that consistency is one of the things it considers desirable in Bills. But the main goal is achieving certainty of legal effect in the clearest language possible.
34. The Government’s response also confirms that a drafting policy document on ancillary provision sections is being considered, and whether and to what extent the drafting of such sections can be standardised remains to be determined. The view is taken that in the absence of agreed standardised wording, minor variations of wording “do not necessarily signify differences of legal effect”. The response comments further that not all ancillary provisions are intended to achieve the same effect. The extent of the proposed ancillary powers may depend on the proposed scope or length of a particular Bill.
35. The Government’s response does not explain the effect of the differences in wording which are indicated above, between for example the ancillary powers in this Bill and the Community Empowerment (Scotland) Bill, or why in that respect particular wording has been chosen. That wording concerns the consideration which the Scottish Ministers must undertake before making any ancillary provision (for example, whether it is considered to be necessary, or expedient, or appropriate, for the purposes of provision in the Bill). The wording also concerns how any ancillary provisions which might be proposed under the Bill must relate, or connect to, or be in consequence of, the provisions within the Bill.
36. The Committee’s recommendations here are similar to those for the ancillary provision in section 25 of the Succession (Scotland) Bill, in the Committee’s report on the delegated powers in that Bill at Stage 1³.
37. **In relation to section 33, the Committee accepts in principle that an ancillary powers provision is appropriate within this Bill. It is also content that the exercise of the powers is subject to the affirmative procedure, where the provision would textually amend primary legislation, and otherwise the negative procedure would apply.**
38. **In relation to the general issue of the consistency of drafting of ancillary powers however, the view of the Committee remains the same as reported**

(some time ago) in relation to the ancillary powers in the Tribunal (Scotland) Bill at Stage 1.

- 39. The Committee acknowledges that there may be reasons, relative to a specific bill, why the ancillary powers should be framed in a particular way. It may also be appropriate on occasion that there should be differences in the effect of ancillary powers, as between particular bills. However, where the Parliament is being asked to grant ancillary powers which are expressed in different ways, the effect of the drafting which is proposed ought to be explained, setting out why that drafting is appropriate for the bill in question. Where the effect is intended to be the same, there should be consistency in drafting.**
- 40. The Committee welcomes that the Scottish Government is working on a drafting policy document on ancillary powers provisions, and recommends that the work on this document is expedited.**

Annexe

Correspondence with the Scottish Government—

On 2 September 2015, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

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.**

On 15 September, the Scottish Government responded as follows:

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.

¹ The Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill as introduced is available at the following website:

http://www.scottish.parliament.uk/S4_Bills/Health%20Tobacco%20Nicotine%20etc.%20and%20Care%20Scotland%20Bill/b73s4-introd.pdf [Accessed September 2015]

² The Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill Delegated Powers Memorandum is available at the following website:

http://www.scottish.parliament.uk/S4_Bills/Health%20Tobacco%20Nicotine%20etc.%20and%20Care%20Scotland%20Bill/Delegated_Powers_Memorandum_-_4_June.pdf [Accessed September 2015]

³ Delegated Powers and Law Reform Committee's report on the Succession (Scotland) Bill at Stage 1 can be found at the following website:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/92502.aspx> [Accessed September 2015]

