

## **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**

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

**c. both**

a ☒  
b ☐  
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?

All e-cigarette accessories should have 18 as the minimum age of sale ie those that are on the market now and also any that may be developed in the future.

#### **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 checked="" type="checkbox"/> |
| b. Leafleting  | b <input checked="" 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 checked="" type="checkbox"/> |
| d. Free distribution (marketing a product by giving it away free)  | d <input checked="" type="checkbox"/> |
| e. Nominal pricing (marketing a product by selling at a low price)   | e <input checked="" type="checkbox"/> |
| f. Point of sale advertising (advertising for products and services at the places where they were bought)                | f <input checked="" type="checkbox"/> |
| g. Events sponsorship with a domestic setting  | g <input checked="" type="checkbox"/> |

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

In broad terms, our response to this and to every question within the consultation document on e-cigarettes is informed by our view that the regulation of e-cigarettes should facilitate their potential contribution to harm

reduction at an individual level, while minimising risks at a population level (including both renormalisation of cigarettes, and the potential inclusion of the tobacco industry in health policy in conflict with Article 5.3 of the WHO Framework Convention on Tobacco Control). On this basis, we strongly support an approach via which e-cigarettes become regulated in the same way as cigarettes with regard to: restrictions on advertising and promotion; the legal limits on age of purchase (including via proxy purchases); and restrictions on use of e-cigarettes in enclosed public spaces. Importantly, such measures do not preclude e-cigarettes being used as aids to harm reduction or smoking cessation in the same way as other nicotine replacement products, with the exception of use in enclosed public spaces (which should not be permitted for e-cigarettes due to the risks of cigarette renormalisation). We also believe that the harmonisation of e-cigarette and tobacco regulations with respect to advertising, purchase and areas of permitted use will help simplify the implementation and enforcement of regulations.

**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)?**

The first systematic audit and thematic content analysis of the marketing of e-cigarettes in the UK was published by CRUK in 2013 (1, 2). It concluded that the promotion of e-cigarettes as lifestyle accessories – using a combination of evocative advertising on television and in traditional, digital and social media outlets, sponsorship and celebrity endorsements – has an obvious appeal to young people. It also noted that e-cigarette companies are frequently disregarding the Advertising Standards Authority (ASA) advertising rules and making unsubstantiated claims about their products. The complexities of monitoring advertising activities have become all the greater with the advent of digital marketing, social media and user-generated content. While the CAP Code covers adverts in new media and marketing communications on marketers' own websites, the report and peer-reviewed paper (1,2) illustrate how difficult it is to monitor these platforms and how easily the Code can be breached or circumvented.

A study published in February 2014 on the characterisation of online tobacco and e-cigarette advertising concluded that 'online/banner advertising is a tactic mainly used to advertise e-cigarettes and cigars rather than cigarettes, some with unproven claims about benefits to health. Given the reach and accessibility of online advertising to vulnerable populations such as youth and the potential for health claims to be misinterpreted, online advertisements need to be closely monitored' (3). The ASA's new rules on the marketing of e-cigarettes have since come into effect (4). Within days, concerns were raised (by ASH and others) that the first television advertisement glamorised and sexualised e-cigarette use and did not make it clear that the products are for smokers (5). According to complainants, the advertisement was cleared for broadcasting despite being in breach of the newly established Code. Notwithstanding regulations on e-cigarette advertising, the ASA received 23 complaints and banned a poster ('Smoking, Redefined') for indirectly promoting smoking, as it was not clear (especially to children) that the product was an e-

cigarette (6).

A recently completed project funded by NHS Fife, which explored the impact of primary and secondary school tobacco education interventions, gathered insights into teenagers' (aged 14 – 17) perceptions of e-cigarettes. Even though the products were not included in the study design as they did not feature in school interventions, e-cigarettes were raised unprompted in discussions in all seven participating schools. This stimulated debate on e-cigarette advertising (some named e-cigarette brands), availability (especially online and in local shops), nicotine and addiction, flavours, safety and efficacy, the smoking ban and secondhand smoke (7).

Prior to the UK ban on tobacco promotion, the existence of the Committee for Monitoring Agreements on Tobacco Advertising and Sponsorship (COMATAS) did not prevent the recurrence of notified advertising breaches for traditional cigarettes. Systematic and opportunistic surveys concluded: 'Breaches of the UK voluntary agreement are common but monitoring is generally non-existent. A voluntary agreement does not provide adequate protection for children'. It was noted that even those knowledgeable of the Voluntary Agreement did not complain to COMATAS or other bodies as they were 'cynical after a decade of dismissed complaints and inaction over repeated breaches' which offered only a 'façade of action' (8). There is currently no evidence to suggest that controls on advertising content are effective. The extensive peer-reviewed research on tobacco (9), food (10) and alcohol (11) promotion shows that it is advertising per se that encourages young people into the market, not particular channels of advertising or types of message.

- (1) de Andrade M, Hastings G, Angus K, Dixon D, Purves R (2013). The Marketing of Electronic Cigarettes in the UK. Cancer Research UK: London. [www.cancerresearchuk.org/prod\\_consump/groups/cr\\_common/@nre/@pol/documents/generalcontent/cr\\_115991.pdf](http://www.cancerresearchuk.org/prod_consump/groups/cr_common/@nre/@pol/documents/generalcontent/cr_115991.pdf)
- (2) de Andrade M, Hastings G, Angus K (2013) The Marketing of E-Cigarette Marketing: Tobacco Marketing reinvented? British Medical Journal, 2013;347 doi: <http://dx.doi.org/10.1136/bmj.f7473>
- (3) Richardson A, Ganz O, Vallone D (2014) Tobacco on the web: surveillance and characterisation of online tobacco and e-cigarette advertising. Tobacco Control, Feb 14. doi: 10.1136/tobaccocontrol-2013-051246
- (4) New Rules for the Marketing of E-cigarettes, CAP and BCAP's Joint Regulatory Statement. <http://www.cap.org.uk/News-reports/Media-Centre/2014/~media/Files/CAP/Consultations/ecig%20consultation/Regulatory%20Statement.ashx>
- (5) Buchanan, 10 Nov 2014, The Independent, First e-cigarette vaping advert to be shown on TV criticised for being highly sexualised.
- (6) ASA Adjudication on E-Cig Ltd, 12 November 2014. [http://www.asa.org.uk/Rulings/Adjudications/2014/11/E\\_Cig-Ltd/SHP\\_ADJ\\_278009.aspx#.Vlq8v51FDcs](http://www.asa.org.uk/Rulings/Adjudications/2014/11/E_Cig-Ltd/SHP_ADJ_278009.aspx#.Vlq8v51FDcs)
- (7) de Andrade M (2014). The Impact of Tobacco-Education Interventions in Fife Schools: Asset-Based Approaches, Co-Production and Innovative Engagement. Stirling: Institute for Social Marketing, University of Stirling & The Open University; September [report and publication forthcoming].
- (8) Mindell JS (1993). The UK voluntary agreement on tobacco advertising: a comatose policy? Tobacco Control, 2, 209-214. doi:10.1136/tc.2.3.209.
- (9) Lovato C, Watts A, Stead LF (2011). Impact of tobacco advertising and promotion on increasing adolescent smoking behaviours. The Cochrane Database of

- Systematic Reviews, 10: CD003439. doi:10.1002/14651858.CD003439.pub2.
- (10) Cairns G, Angus K, Hastings G, Caraher M (2013). Systematic reviews of the evidence on the nature, extent and effects of food marketing to children. A retrospective summary. *Appetite*, 62, 209-215. doi:10.1016/j.appet.2012.04.017.
- (11) Anderson P, de Bruijn A, Angus K, Gordon R, Hastings G (2009) Impact of alcohol advertising and media exposure on adolescent alcohol use: a systematic review of longitudinal studies. *Alcohol & Alcoholism*, 44, 229-243. doi:10.1093/alcalc/agn115.

**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?**

None.

**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?**

We answered Yes to Q15, but with respect to registration of retailers selling e-cigarettes and associated products (Q14) we note that the current Tobacco Control Strategy includes a commitment to a review of the Scottish Tobacco Retailers' Register in 2015. We would strongly support consideration of registration of retailers selling e-cigarettes within the terms of the review.

**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?**

As set out in our response to previous questions on e-cigarettes, we strongly support a precautionary principle approach where e-cigarettes are regulated in the same way as cigarettes so as to reduce the risk of cigarette smoking renormalisation, particularly among young people. Therefore the same legislative rules that apply to tobacco smoking in enclosed public spaces should apply to e-cigarettes.

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

NA

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

The Scottish Government may be interested in what action is being taken on this issue in other jurisdictions eg in Utah US (Indoor Clean Air Act) [http://www.tobaccofreeutah.org/pdfs/shs\\_hookah-e-cigarette.pdf](http://www.tobaccofreeutah.org/pdfs/shs_hookah-e-cigarette.pdf) and Nova Scotia, Canada: <http://www.cbc.ca/news/canada/nova-scotia/e-cigarettes-to-be-banned-in-public-indoor-places-in-nova-scotia-1.2811355>

The WHO has also made recommendations on this issue:  
[http://apps.who.int/gb/fctc/PDF/cop6/FCTC\\_COP6\\_10-en.pdf](http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_10-en.pdf)

**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?**

We have not submitted responses to Q21- 28.

**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?

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?

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

**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

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?

NA

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

NA

**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?**

We agree that in principle NHS premises should be smokefree where possible. However, we are concerned about imposing legal penalties on what will often be vulnerable groups of people, who may already feel stigmatised for being smokers. Therefore, we do not think that legislation at this time is appropriate. Rather we support further training and resources for NHS staff to support the enforcement of non-legislative measures that are sensitive to the circumstances of patients and visitors.

**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

The Scottish Government should support the development of local policies based on a community empowerment approach. Local communities should be consulted about and participate (co-produce) in the development of such policies that are appropriate to local circumstances eg identification of relevant settings/locations. This assets based approach is more likely to achieve community ownership of these policies, and effective



implementation and sustainability through community self-enforcement. However, there is a risk that this approach may increase inequalities in that more affluent communities may be more likely to respond to this approach (as has been seen more widely internationally with respect to the SES coverage of voluntary smokefree policies in public places). Therefore some mechanism should be implemented to ensure that the development and coverage of such policies reduces rather than increases inequalities in coverage.

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

These should be identified by local communities and would be likely to include public playgrounds, play areas and areas in the vicinity of schools, pre-schools and nurseries.

**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-medical 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?**

The same regulations should apply as those for the sale of alcohol ie an

adult member of staff should be required to authorise the sale.

**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)?**

See response to Q45.

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

See response to Q45.

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

Tobacco use in Scotland is strongly patterned by socioeconomic position. Alongside other tobacco control measures, the systematic regulation of e-cigarettes and the promotion of smoke-free places offers opportunities for helping to address health inequalities in Scotland (a key Scottish Government priority). Failure to restrict e-cigarettes and places where people can smoke will almost certainly lead to greater disparities in smoking across socioeconomic groups, leading to widening health inequalities. While this highlights the importance and value of effective tobacco control measures for lower socioeconomic groups, it also reinforces the need to consider how new regulations may unintentionally stigmatise or otherwise constrain already vulnerable groups. This is particularly relevant in the case of mothers (particularly lone mothers) who are smokers, and for whom there may be limited alternatives to smoking in front of their children. In general, we support measures that restrict the activities of the tobacco industry, reduce smoking uptake in young people, and support smokers to quit. Where regulations are aimed at reducing adult role-modelling of smoking or limiting exposure to secondhand smoke, we believe there is a particular need to be sensitive to the risks of stigmatising or potentially 'blaming' smokers from lower socio-economic groups (eg through inappropriate media and/or health care messages), bearing in mind that these unintended consequences also pose risks to the health of these groups (including

children growing up with a smoking parent).

### **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?**

None.

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

Unknown.

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

The same as is usual for this type of legislation.

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

In considering potential business or regulatory impacts of any proposed regulations, it will be important for the Scottish Government to honour the UK's commitments under Article 5.3 of the WHO FCTC (reiterated in the 2013 Tobacco Control Strategy for Scotland) "to protect [public health] policies from commercial and other vested interests of the tobacco industry". Tobacco companies (including e-cigarette producers owned by tobacco companies) must not be allowed to influence the development of health policy, including via attempts to challenge the economic or legal basis of proposed regulation. The Scottish Government has shown impressive commitment to this principle in its pursuit of measures such as the ban on point-of-sale displays, and we urge the Government to maintain this commitment in developing regulations on e-cigarettes. In this context, we note the recent decision by the Conference of Parties to the FCTC highlighting the importance of protecting tobacco control from "vested interests" in e-cigarettes and other electronic nicotine delivery systems, and their recognition that such interests extend beyond those of the tobacco industry (Decision FCTC/COP6(9). Electronic nicotine delivery systems and electronic non-nicotine delivery systems. Sixth Session; 13-18 October; Moscow, Russian Federation 2014. [http://apps.who.int/gb/fctc/E/E\\_cop6.htm](http://apps.who.int/gb/fctc/E/E_cop6.htm))

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.

No direct or indirect links to, nor have received funding from, the tobacco industry.