## 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. During childhood and adolescence the human brain undergoes considerable changes in its anatomical structure and connectivity, and nicotine can cause long-term, potentially irreversible, harm. This is explained very clearly by Counotte et al 2011 (quoted in the DH Impact Assessment on age of sale for nicotine inhaling products):

*..the brain and specifically the prefrontal cortex continue to develop during adolescence, making the adolescent brain uniquely different from the adult brain. One of the differences is that adolescents are more sensitive to the rewarding effects of nicotine, which may be a reason that many people start to smoke during adolescence. Both prospective and longitudinal human studies suggest that adolescent exposure to nicotine has long-term effects, among which are 1) the risk to develop substance use disorder and 2) various mental health problems, the most prevalent ones relating to affective disorders such as anxiety and depression. In addition, inasmuch our animal studies can be extrapolated to humans, adolescent exposure to nicotine may lead to decreased attention performance and increased impulsivity on the long-term. The latter observation in turn might promote the maintenance of smoking behaviour. Based on studies in human subjects, it is difficult to determine whether adolescent smoking underlies these problems, or whether smoking and mental health disorders have a common origin that predisposes an enhanced risk to the development thereof. In order to understand the effects of drugs of abuse on motivational systems, it is important to gain a better understanding of their development in the adolescent brain.*

(Counotte, D. et al. (2011). Development of the motivational system during adolescence, and its sensitivity to disruption by nicotine. Developmental Cognitive Neuroscience; 2011; 1; pp.430-443.)

Setting the age of sale at 18 sends a clear message that these products are not appropriate for use by children and young people.

However, we are concerned that there is confusion about the relative risks of electronic cigarettes compared to smoking, not just amongst the general public but also amongst health professionals. See for example an article in the Daily Telegraph on 27th August 2014 headlined *'I thought my e-cigarette was a miracle. Turns out, I was smoking the equivalent of 40-a-day'*. 'I thought my e-cigarette was a miracle. Turns out, I was smoking the equivalent of 40-a-day' The author of the article in question says she was given this impression by her doctor.

This confusion could be exacerbated by the adoption of an age of sale of 18 which, because it is the same age as for cigarettes risks giving the erroneous message that electronic cigarettes are just as harmful as smoked tobacco.

To summarise *"Smokers smoke for nicotine but are killed by smoke, and despite uncertainty over the potential hazard to health from the nicotine vapour produced by e-cigarettes, any such hazard is evidently minimal in relation to that arising from inhaling tobacco smoke"* (Britton J, Bogdanovica I, Ashcroft R, McNeill A. Electronic cigarettes, smoking and population health. Clinical Medicine. Royal College of Physicians. 2014.) In addition the Cochrane Collaboration has recently published a review which finds emerging evidence that smokers who use electronic cigarettes can stop or reduce their smoking. (McRobbie H, Bullen C, Hartmann-Boyce J, Hajek P. Electronic cigarettes for smoking cessation and reduction. Cochrane Database of Systematic Reviews 2014, Issue 12. Art. No.: CD010216. DOI: 10.1002/14651858.CD010216.pub2.)

It is therefore crucial that at the same time that the regulations are introduced the Scottish Government also promote better understanding of the relative harm of electronic cigarettes and their potential benefit to smokers.

**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?**

We recommend that the Scottish Government use the same definition as that in the DH regulations for England of 'nicotine inhaling product'. This will ensure consistency and ensure that the definition is sufficiently flexible to cover new devices and products in this rapidly evolving market.

**3. Whom should the offence apply to:**

**a. the retailer selling the e-cigarette** a x☐

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

Option a – ASH (UK) does not support the Scottish regulations making it an offence for young people to buy tobacco, nor do we support making it an offence for young people to buy e-cigarettes.

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

Yes – prohibiting sale from vending machines is appropriate for all products with age of sale restrictions.

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

No. The definition of nicotine inhaling products is suf ficiently flexible to cover all relevant accessories.

**6. If y ou answ ered " yes" to quest ion 5, w hich products shoul d have restrictions applied to them?**

**Proxy purchase for e-cigarettes**

**7. Should the Scottish Government introdu ce legislation to ma ke it an offence to proxy purchase e-cigarettes?**

Yes. In the light of the potential harm to the child and adolescent brain which can be caused by nicotine, and concerns that e-cigarettes are more attractive to young people than licenced nicotine replacement therapy products, it is not appropriate for adults to buy e-cigarettes on behalf of children.

As in our answer to Q1 we are concerned that confusion about the relative harms of smoking compared to electronic cigarettes could be exacerbated by the adoption of an offence of proxy purchase of e-cigarettes in line with tobacco. It risks giving the message that electronic cigarettes are just as harmful as smoked tobacco and it is therefore essential that the Scottish Government also promote better understanding of the relative risks of electronic cigarettes compared to smoking.

**Domestic advertising and promotion of e-cigarettes**

**8. Should y oung people and adult non-smo kers be protected from any form of advertising and promotion of e-cigarettes?**

This could only be achieved by a complete prohibition of any advertising and we do not think this is proportionate.

**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?**

☐

ASH (UK) does not believe that ***statutory*** regulation of advertising in addition to the EU TPD would be proportionate.

Research so far on electronic cigarette use amongst young people is cross sectional rather than longitudinal so cannot be used to determine whether there is a gateway effect from e-cigarettes to smoking. However, if there were a significant gateway effect you would expect to see tobacco smoking starting to rise again among young people as electronic cigarette use grew most rapidly in the period from 2009/10 onwards. In November 2014 the Scottish Adolescent Lifestyles and Substance Abuse survey (SALSUS) results for 2013 were published which found that:

- The proportion of 13 and 15 year olds who reported being regular smokers in 2013 was the lowest since the survey series began in 1982 (2% of 13 year olds and 9% of 15 year olds).
- The majority of pupils reported that they were non-smokers (97% of 13 year olds and 87% of 15 year olds reported that they were non-smokers).
- The proportion of pupils who reported that they had never smoked increased from 45% in 2002 to 76% in 2013.

These results are consistent with the Smoking Drinking and Drug Use survey from England which found that the proportion of 11-15 year old smokers in 2013 were the lowest since records began in 1982 (1% of 13 year olds and 8% of 15 year olds) and continued to fall from 2009/10 onwards.

On electronic cigarette use the SALSUS survey found significant experimentation but, in line with research from England and Wales ( ASH YouGov survey , Health Survey for England Welsh CHET survey ) there is little evidence of widespread regular use among young people. Regular use was almost entirely confined to current smokers, as was experimentation.

However, the current non-statutory advertising rules could be strengthened. Advertising in Scotland, as in England, comes under the remit of the CAP and BCAP rules overseen by the self-regulatory organisation for the advertising industry in the UK, the Advertising Standards Authority. ASH (UK) submitted the following set of guiding principles in our response to the CAP consultation:

1. *Regulation of un-licenced electronic cigarettes and other nicotine containing products should be consistent with that for licenced products. For example, celebrity endorsement and free samples are not allowed for licenced nicotine containing products and should not be allowed for electronic cigarettes either.*
2. *Electronic cigarettes and other nicotine containing products should not be advertised or promoted in ways that could reasonably be expected to promote smoking of tobacco products.*

3. *As far as possible, electronic cigarettes and other nicotine containing products should be advertised as an alternative to smoking cigarettes or other tobacco products.*
4. *Electronic cigarettes and other nicotine containing products should not be advertised in ways or through channels that could reasonably be expected to make them appealing to non-tobacco users.*
5. *Electronic cigarettes and other nicotine containing products should not be advertised in ways or through channels that could reasonably be expected to make them appealing to children and young people.*

The revised rules came into force on Monday 10th November and already there have been a significant number of complaints, including by ASH (UK), some of which have been upheld.

CAP and BCAP have committed to conduct a review of the rules after 12 months to assess whether they are working as intended and whether the evidence base has developed in a way which requires the Committees to reconsider any of the rules or augment them. We will continue to monitor electronic cigarette advertising over the next year and would encourage the Scottish Government to do the same.

We have already identified weaknesses in the current rules which still permit celebrity endorsement and free samples which we believe should be prohibited. Also we believe that the code should require advertisers to target only adult smokers, which is not currently the case.

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

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

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

n/a

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

This is an evolving field and we would encourage the Scottish Government to commission a review of electronic cigarette advertising to inform any decisions it decides to make. For example the Institute for Social Marketing at the University of Stirling has expertise in this area and has already produced a report on electronic cigarette marketing for Cancer Research UK.

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

No

**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.

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

Yes

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

n/a

**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?**

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?**

n/a

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

ASH (UK) supports appropriate regulation of e-cigarettes, for example to ensure that their quality and efficacy is ensured, but we do not believe that statutory regulation of the use of e-cigarettes in enclosed public places would be proportionate.

The law to prohibit smoking in enclosed public places was implemented to protect people from exposure to tobacco smoke and thus reduce the toll of ill-health and premature death caused by secondhand smoke. The smokefree law has proven to be popular, has high levels of compliance, and has resulted in considerable health benefits.

In contrast, there is little evidence of any harmful effects from exposure to the vapour from electronic cigarettes among non-users. Therefore a ban on the use of electronic cigarettes in public places on health grounds would not be proportionate. Before taking steps to inhibit personal choice, legislators should be sure that any proposed measure would not lead to unintended consequences.

The dramatic rise in sales of electronic cigarettes in recent years has led some people to fear that their use in public places could undermine compliance with the smokefree law. However, to date, we have seen no evidence to support this hypothesis. Electronic cigarettes are very different from tobacco products. Although some are designed to look like tobacco cigarettes, the most distinctive characteristic of smoking is the smell of the smoke which travels rapidly, and the presence of ash. As these are absent from electronic cigarettes it is not clear how any such confusion would be sustained.

In fact, electronic cigarettes have more in common with licenced nicotine replacement products such as sprays and inhalers. There is no combustion and therefore no secondhand smoke from using electronic cigarettes.

However, while we do not support statutory regulation we do support the right of organisations and venues to determine their own policies, in the light of their own circumstances, with respect to the use of electronic cigarettes on their premises. ASH (UK) in conjunction with the Chartered Institute of Environmental Health has developed a briefing on "Developing an organisational approach to the use of electronic cigarettes on your premises" The Scottish Government might want to encourage organisations to use this briefing or could consider developing its own guidance on this issue.

**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?**

Concerns have been expressed that permitting use of e-cigarettes in enclosed public places helps to re-normalise smoking or make it easier for smokers to cope with non-smoking environments, reducing the likelihood that they will quit. However, research suggests that in fact users of e-cigarettes are almost exclusively smokers or ex-smokers who are using the devices to cut down or quit smoking, or in the case of ex-smokers to prevent relapse to smoking. To date, use by never-smokers is negligible.

(YouGov survey. Total sample size was 12,269. Fieldwork was undertaken between 5th and 14th March 2014. All surveys were carried out online. The figures have been weighted and are representative of all GB Adults (aged 18+). Health Survey for England, 2013 )

**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. In fact we would go further and urge the Scottish government to implement regulations prohibiting all smoking in vehicles.

Exposure to secondhand smoke in cars can reach levels far higher than levels experienced in buildings. A single cigarette smoked in a stationary car with its windows closed can produce a level of secondhand smoke eleven times higher than the level found in an average bar where smoking is permitted. In a moving car, the level of secondhand smoke produced by this single cigarette is still exceptionally high at seven times the average level of the smoky bar. Since smoking rates remain markedly higher among poorer social classes it follows that smoking in private vehicles is likely to be a significant contributor to health inequalities.

Evidence summarised in All Party Parliamentary Group on Smoking and Health: Inquiry into Smoking in Private Vehicles: 2011

There is particular concern about the harm caused by secondhand smoke exposure to adults with cardiovascular disease. The evidence from Scotland is that in the ten months after the smoke-free legislation was implemented the number of admissions to hospital for acute coronary syndrome decreased significantly with over 500 fewer admissions.
(Pell, JP et al. Smoke-free Legislation and Hospitalizations for Acute Coronary Syndrome. N Engl J Med 2008; 359:482-491 DOI: 10.1056/NEJMsa0706740)

Safety risks from driver distraction and inattentional blindness caused by smoking are recognised in the Highway Code which states in rule 148 that: *"Safe driving and riding needs concentration. Avoid distractions when driving or riding such as … smoking".*
The Annotated Highway Code: Rule 148

The Automobile Association's online guidance to motorists states that: *"if a driver's smoking behaviour is coupled with bad driving, or leads to an accident, a charge of careless driving, or not being in a position to control the vehicle becomes a distinct possibility."*
AA Legal Advice on Smoking and Driving
There is also evidence from other countries that smoking while driving causes safety risks. For example, studies from Australia have concluded that smoking while driving increases the risk of a motor vehicle crash.
(Collins D, Lapsley H. Economic aspects of drug taking and road safety. In: Enquiry into the effects of drugs other than alcohol on road safety in Victoria. First report. Melbourne: Road Safety Committee, Parliament of Victoria, 1995.)

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

No.

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

The law should apply to anyone of any age who is smoking in a vehicle.

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

Yes. Enforcement by the police is in line with other measures such as seatbelt laws and is proportionate. There is strong public support for this legislation so it is likely, just as with the existing smokefree laws, that it will be largely self-enforcing. Joint working between Environmental Health Officers and Police Scotland would seem to be the best means of ensuring effective enforcement. We would also encourage the Scottish Government to run a publicity campaign around the time of the introduction of the new legislation which will help ensure smooth implementation and reinforce the already strong public support.

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

n/a

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

Yes. The proposed Smoke-free (Private Vehicles) Regulations for England and Wales include an exemption for caravans that are being used as living accommodation. We would recommend that the Scottish government take a similar approach.

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

The regulations should relate to enclosed vehicles that are on the road. This would exclude motorbikes and convertible cars with the roof down. These exemptions would be in line with the draft regulations for England & Wales.

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

A defence could be considered if the driver, by reason of driving the vehicle, was unable to prevent another person from smoking in the car, and had made all reasonable efforts to prevent the offence.

**Smoke-free (tobacco) NHS grounds**

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

ASH supports the principle of smoke-free hospital estates. However, we believe that imposing legal sanctions on what will often be vulnerable populations in outdoor areas is insensitive and disproportionate. We would support an extension of the legislation to a designated perimeter around NHS buildings. However, this needs to be within the context of an enhanced and reinforced strategy of supporting smoking cessation among staff, patients and visitors. NICE has developed comprehensive guidance on 'Smoking cessation in secondary care: acute, maternity and mental health services' which we would commend to the Scottish Government.

We would also support the removal of exemptions for psychiatric hospitals and units in Scotland where smoking rooms for residents are still allowed.

**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 ☐x
**d Other suggestions, including reasons, in the box below**

Scotland should remove the exemption from the smokefree laws from psychiatric hospitals and units, where smoking rooms for residents are still allowed. The Royal College of Physicians and Royal College of Psychiatrists 2013 report, Smoking and Mental Health found that much of the substantially lower life expectancy of people with mental disorders relates to smoking, which is often overlooked during the management and treatment of their mental health condition. One in three of the UK's 10 million current smokers has a mental disorder. Although 20% of the general population smokes, the figure among people with mental health disorders is 40%, and is even higher in those with more severe mental disorders. Those

with mental disorders also smoke more cigarettes, are more addicted to nicotine, and find it harder to quit, than those without.

The report concluded that, *"It is likely that the persistent acceptance of smoking as a normal behaviour in primary and secondary care, and failure by health professionals to address smoking prevention as a health priority, drives and perpetuates the high prevalence of smoking in people with mental disorders."* The report went on to say that *"All healthcare settings used by people with mental disorders should therefore be completely smoke free."*

**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)?**

See above. There should be no exemptions for mental health facilities or facilities with long-stay patients. Instead much more support is needed for such patients to help them quit smoking.

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

Enforcement should be in line with existing smoke-free laws.

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

Penalties should be in line with penalties for the existing smoke-free laws.

**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?**

Enforcement of non-legislative smoking policies should be at the discretion of individual health boards.

**<u>Smoke-free (tobacco) children and family areas</u>**

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

Yes.

**36. If you answered 'yes' to Question 35, what action do you think is required:**

**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**

*With reference to option 'd'*

ASH (UK) supports the passing of regulations to require all ticketed venues to be completely smokefree. This would include sports stadia, many of which are already smoke-free, music events and other outdoor cultural activities and child-oriented attractions. We make a distinction between ticketed and non-ticketed venues as there are precedents for ticketed venues, there are clear boundaries and enforcement is much easier to ensure (smokers can be asked to leave).

*With reference to option 'c'*

For non-ticketed venues we would support clarification of the powers of local authorities to ensure that they are able to implement local regulations designating smokefree outdoor areas where appropriate. A good example would be smoke-free children's outdoor areas in play parks.

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

See above.

**<u>Age verification policy 'Challenge 25' fo r the sale of tobacco and electronic cigarettes</u>**

**38. Do y ou agree that retailers selling e-cigarettes, refills and tobacco should be required by law to challenge the age of anyone they believe to be u nder the age of 25?**
Don't Know. ASH (UK) believes more work is needed on whether this would be proportionate and effective.

**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?**

n/a

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

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

Yes.

**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?**

If the premises selling electronic cigarettes also sells tobacco it would be appropriate for the person named on the tobacco register to be responsible for authorising the sale. Otherwise the adult(s) working at the store at the time should be responsible.

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

**a. the penalty** a ☐
**b. the enforcement arrangements** b ☐

It would appropriate to have penalties and enforcement arrangements in line with other age-restricted products.

## 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)?**

We are recommending the removal of the exemption for psychiatric hospitals and units because of the high rates of smoking among people with mental ill health and the current relative lack of support to quit. Removal of this exemption and increased support to quit should significantly reduce smoking rates in this group thereby helping significantly reduce health inequalities.

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

Improving support to quit smoking among affected groups with high rates of smoking for example those with serious mental illness, the LGBT community, pregnant teenagers and ethnic groups with high rates of smoking would have a positive implication for equality

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

No.

**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?**

n/a

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

Comments

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

We would hope to see any new regulations implemented at the same time as implementation of the EU Tobacco Products Directive in May 2016.

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

No.

As a party to the World Health Organiza tion's Framework Conv ention on Tobacc o 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 discl ose whether they have any direct or indirect link s to, or receive fund ing from, the tobacco in dustry. We will still c arefully consider all cons ultation respons es from the tobacco industry an d from those with links to the tobacco industry and inc lude them in the published sum mary of consultation responses.

ASH (UK) is a health charity set up by the Royal College of Physicians in 1971 working towards the elimination of harm caused by tobacco. ASH receives core funding from the British Heart Foundation and Cancer

Research UK and has received project funding for work to support government tobacco strategy for England from the Department of Health. ASH does not have any direct or indirect links to, or receive funding from, the tobacco industry other than a small number of shares in BAT and Imperial Tobacco to enable us to vote and ask questions at the Annual General Meetings (we don't accept tobacco company dividends).