

## **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?

N/A

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

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 advertising in relation to impacts on children and adults (including smokers and non-smokers)?**

'New rules on the advertising of e-cigarettes', a joint regulatory statement by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) came into force on 10 November 2014. "The rules add to those already in place, which ensure advertisements for e-cigarettes must not mislead, harm, offend or otherwise be socially irresponsible." Enforcement of the rules is a matter for the Advertising Standards Authority. We believe the Scottish Government should be guided by the new rules and should wait until B/CAP has conducted a formal review of the effect of the rules (after November 2015) before considering different rules or legislation.

**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?**

Excessive regulation on advertising will inevitably compromise the ability of businesses to market and sell a product that could have a significant impact on public health if it helps smokers switch from combustible products to electronic cigarettes. This in turn will have an impact on those consumers who wish to quit smoking and want to use a product that mimics the act of smoking without burning tobacco.

There is no evidence e-cigarettes are harmful (beyond satisfying a desire for nicotine which, on its own, is no more harmful than caffeine). There is also very little evidence that non-smokers, including children, are using e-cigarettes as a gateway to tobacco.

Overwhelmingly, the vast majority of vapers are existing or ex-smokers, many of whom are using the products as a means to quitting smoking. If the Scottish Government is genuinely interested in harm reduction it would encourage smokers to switch to e-cigarettes. Excessive regulations on advertising will undoubtedly stop or reduce the rate at which that is currently happening. The inability to effectively market their products will also impact on the development by manufacturers of new and better e-cigarettes in the future.

#### **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?**

Electronic cigarettes do not contain tobacco and using them is not smoking so there is no reason for retailers selling e-cigarettes to register on the Scottish Tobacco Retailers Register.

With regard to offences and penalties, while the health risks associated with smoking are well known, there is no evidence of harm to the consumer as a result of using e-cigarettes. It is essential that any penalties take this into account because they must be proportionate to the offence.

#### **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?**

N/A

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

We acknowledge there are serious health risks associated with primary smoking, although their nature and the degree of risk remains debatable, but the risks to non-smokers as a result of so-called 'passive smoking' has, we believe, has been greatly exaggerated to justify increasing interventions in the lives of adult smokers. Introducing similar legislation to combat the use of electronic cigarettes makes no sense on a number of levels.

As already stated, there is no evidence that vaping is harmful. At worst the health risks of vaping are significantly less than the health risks associated with smoking. There is also no evidence that bystanders are at any risk from exposure to the vapour exhaled by consumers. We therefore object strongly to nationally imposed restrictions on the use of e-cigarettes in enclosed public places. Vapers are almost exclusively smokers who wish to cut down or quit or are looking for an alternative nicotine delivery system in places where smoking is banned. Given the lack of evidence that the use of electronic cigarettes is harmful to (a) the user and (b) bystanders and the



significant uptake in vaping among smokers, many of whom are using the product in an attempt to cut down or quit smoking, it would be hugely counterproductive to the stated aims of tobacco control to discourage the use of e-cigarettes in public places.

FOREST supports consumer choice and evidence-based policy and to penalise vapers in the unsubstantiated belief that it 'normalises' smoking is self-defeating and immature. It also ignores the important point that the success of e-cigarettes compared to other smoking cessation aids is due largely to the fact that vaping mimics the physical act of smoking. This is crucial because it's the main reason why many smokers find electronic cigarettes a more effective and appealing smoking cessation aid than nicotine patches or other forms of nicotine therapy. Without that USP it's highly unlikely that e-cigarettes would have been so successful so quickly.

The logical position is that if tobacco controllers want to reduce the number of smokers, and vaping helps achieve that goal, there is no good reason to restrict the use of e-cigarettes in public places, enclosed or otherwise. Given current evidence it makes far more sense to leave things as they are until such time as further evidence becomes available.

**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 exhalation or smell of vapour may, in a small enclosed space, be offensive to some people but to the best of our knowledge there is no evidence that the use of electronic cigarettes in enclosed public places is harmful to anyone. Landlords, proprietors and businesses must be allowed therefore to decide a policy on e-cigarettes that best suits their business, including the interests of staff and customers. In terms of evidence, we draw your attention to the ASH (London) briefing paper on e-cigarettes (November 2014) that declares: "In the UK smokefree legislation exists to protect the public from the demonstrable harms of secondhand smoke. ASH does not consider it appropriate for electronic cigarettes to be subject to this legislation, but that it should be for organisations to determine on a voluntary basis how these products should be used on their premises." We do not agree with ASH about the alleged dangers of secondhand smoke, which we believe have been greatly exaggerated. We do however agree that banning the use of e-cigarettes in enclosed public places would be highly inappropriate and, in our opinion, counter-productive if the Government's aim is to reduce the number of people who smoke.

**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?**

N/A

**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?**

We do not support the introduction of a ban on smoking in cars carrying children but if legislation is introduced we believe enforcement should be a matter for environmental health officers not the police who, in our opinion, have far more important things to do fighting genuine crime. Frankly, so few adults smoke in cars with children these days it will be like looking for a needle in a haystack and a complete waste of police time and money. Currently the overwhelming majority of adult smokers self regulate when it comes to smoking in cars with children. With or without a law they will continue to self regulate, hence we believe legislation is a gross over-reaction to a very small problem.

**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?**

There is no justification, in our view, for government to ban smoking in ANY private vehicle, with or without children. Attached to this response is our submission to Jim Hume's consultation on a Proposed Smoking (Children in Vehicles) (Scotland) Bill. It includes the following sections: Why legislation is unnecessary; The health argument; How reliable is the 'evidence' for a ban; the road safety argument; Slippery slope – what next?; and Enforcement. To summarise some of the main points:

(a) FOREST neither encourages nor condones smoking in cars carrying children but a ban is out of all proportion to the problem.

(b) In practice very few adults still light up in cars carrying children. The vast majority have changed their behaviour voluntarily without government intervention and should be applauded, not demonised with unnecessary



legislation that even its supporters accept will be difficult to enforce. Education is always better than coercion.

(c) If smoking is prohibited in cars carrying children FOREST expects a gradual but persistent clamour for smoking to be banned in every private vehicle. The British Medical Association, for example, wants a ban on smoking in all cars, regardless of who is in them.

(d) Some anti-smoking campaigners also argue that smoking whilst driving is a threat to other road users. Major international studies show that smoking whilst driving is one of the least distracting activities for a driver. Far more distracting are chatting with passengers, activity outside the vehicle, changing a CD or retuning the radio. Should we ban those as well?

(e) Banning smoking in a private vehicle, with or without children, represents a serious invasion of a citizen's private space. For many people this is a worryingly illiberal step. What next? A ban on smoking in the home if children are present?

(f) We believe education is always better than legislation and we would welcome the opportunity to work with the Scottish Government to encourage the small number of adults who still smoke in cars carrying children to change their behaviour without the need for heavy-handed legislation that a hard-pressed police force (or other agency) would find very difficult to enforce.

Note: since we submitted our response to Jim Hume's consultation in 2013, Action on Smoking and Health (London) has joined the British Medical Association in calling for a comprehensive ban on smoking in private vehicles.

According to CEO Deborah Arnott (Daily Mirror, 17 December 2014): "We are delighted that the (Westminster) Government is to press ahead with regulations to prohibit smoking in cars containing children. As with the smoke-free public places law, this is a popular measure that will largely be self-enforcing. However, secondhand smoke is just as harmful to adults as children and it makes it more difficult to enforce if it only applies to some cars, not all. Seatbelt laws don't just apply to children, why should smoke-free car laws?"

This comment is significant because it demonstrates the fallacy that campaigners only want to ban smoking in cars with children and there is no 'slippery slope'. Clearly, banning smoking in cars carrying children is part of a wider, more illiberal plan to control the behaviour of adult smokers to the point where they can no longer smoke in their own private vehicles even when they are on their own.



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

As we made clear in our submission to Jim Hume's Proposed Smoking (Children in Vehicles) (Scotland) Bill consultation, FOREST does not condone smoking in cars carrying children. We believe it is inconsiderate at best and adults should err on the side of caution when it comes to small children in particular.

However, just as it is extremely difficult if not impossible to prove that someone has become ill as a result of 'passive' smoking (when there are so many factors that must be taken into consideration), it is also very difficult to prove that the health of a child has been put at serious risk or damaged through exposure to tobacco smoke in a car.

A reasonable defence would therefore point out that evidence of direct harm caused by exposure to tobacco smoke in a car is very hard to find. For example, a claim often repeated is that second-hand smoke is "23 times more toxic in a vehicle than in a home [or smoky pub]". Yet in 2010 an article by respected Australian public health researchers in the Canadian Medical Association Journal argued there is no scientific evidence to support this argument.

Factors that would have to be taken into consideration include the length of time a child had been exposed to tobacco smoke in a car; the frequency; was the window open or closed; etc etc. A reasonable defence would focus on these factors, the disproportionate nature of the law and the penalties it would trigger.

It would also be reasonable to point out that, in this instance, a car is a private (not a work) vehicle and while smoking in cars carrying children may be neither sensible nor considerate, the state should not make it a crime punishable with fines and other penalties.

Far better that the small number of smokers who still smoke in cars carrying children are educated to be more considerate to their young passengers. If the Scottish Government were to launch such a campaign FOREST would happily endorse and support it in an effort to change those people's behaviour.

**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

N/A

**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)?**

N/A

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

N/A

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

N/A

**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?**

Smoking in the open air presents no risk to the health of non-smokers so a comprehensive ban on smoking on NHS grounds is disproportionate to the problem. Some patients may be in hospital for weeks or even months. If they are long-term smokers it is cruel not to allow them to smoke anywhere in the grounds of the hospital (as long as they don't inconvenience non-smokers). The size and location of hospital grounds can vary enormously so it should be left to individual hospitals to decide on a policy rather than having a national one-size-fits-all policy forced upon them.



### **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 35, 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**

N/A

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

Curiously there is no box that allows us to explain why we are against more action to make children's areas tobacco free. We will therefore use this section to do so.

First, it is important to stress that FOREST does not condone smoking in children's outdoor areas but we believe a national ban is heavy-handed and unnecessary. Relatively few adults still do it and there is no evidence that those who do light up in open air play areas pose any health risk to those around them, including children.

It has become fashionable for anti-smoking campaigners to say that adults must be role models for children and not smoke in view of them, but there is no evidence that the sight of a stranger smoking influences children to start smoking. Instead research suggests that by far the greatest influence on children are their peers and family members. Banning smoking in children's outdoor areas will therefore make little or no difference. It is gesture politics at best and is designed merely to stigmatise the consumers of a legal product.

In general adult smokers know how to behave when it comes to smoking around children and they don't need yet another law telling them what to do. It is not the job of government to micromanage people's lives, especially when the overwhelming majority of smokers have already taken steps to change their behaviour voluntarily. (See also smoking in cars with children.)



We are concerned that legislation will result not only in the further stigmatisation of smokers but will lead inevitably to a ban on smoking in other outdoor spaces where children might conceivably be present, even though there will be no threat to their health if someone lights up.

At best this is a local issue that should be left to local authorities. It is not a matter for national government.

**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-medicinal 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?**

Any adult recognised as the line manager on duty.

**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)?**

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

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

## **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?**

There are no financial implications to our organisation but we are concerned that these proposals further the denormalisation of the adults we represent. The ban on smoking in enclosed public places has had a huge and negative impact on a great many smokers.

Tobacco is a legal product and smokers pay a huge amount in tobacco taxation (£12b per year to the Treasury in Westminster). When the health risks are so well known it is wrong to stigmatise adults who have made an informed choice to smoke, nor is it right to coerce or bully them to quit.

Having banned smoking in all enclosed public places and forced them outside it is also wrong to actively prohibit them from smoking in outdoor areas (with the threat of fines and other penalties) where they are a risk to no-one but themselves.

The threat of a comprehensive ban on the use of e-cigarettes in enclosed public places is as bad if not worse. For smokers who have taken the decision to cut down or quit smoking and have found e-cigarettes to be a useful smoking cessation aid, legislation to ban vaping indoors would be the final straw. It would confirm that the Scottish Government has little interest in public health or evidence based policies but is merely interested in controlling people's behaviour to the nth degree.



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

N/A

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

N/A

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

None

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.

Forest is supported by British American Tobacco, Imperial Tobacco Limited and Gallaher Limited (a member of the Japan Tobacco Group of Companies). However the views expressed on our websites and in this consultation response are those of Forest alone.

In view of the threat that e-cigarettes pose to other nicotine delivery systems such as nicotine patches and gum we are disappointed the Scottish Government has not asked respondents to disclose whether they have any direct or indirect links to, or receive funding from, the pharmaceutical industry.

For the sake of transparency we believe you should also have asked respondents to disclose whether they receive public funding, given that this sometimes results in a phenomenon known as "government lobbying government".