

ASH Scotland Consultation Response

Introduction

Tobacco is a uniquely damaging product. While the number of people who smoke has halved in the last 40 years, this still leaves 1 million people in Scotland with greatly increased risk of cancer, heart disease, stroke, dementia, arthritis and diabetes. Half of long-term smokers will die of a cause associated with their tobacco use, often after many years of debilitating illness, and tobacco is far and away the largest preventable cause of death.

ASH Scotland does not take a simplistic view either “for” or “against” electronic cigarettes. Our interest is in helping people improve their health by reducing the enormous harm caused by tobacco use and our approach to electronic cigarettes (and novel nicotine delivery devices generally) will be guided by that principle.

We believe that ‘vaping’ will prove to be much less harmful than smoking – but not harmless, as some supporters suggest. So for a smoker to switch from tobacco to electronic cigarettes will bring significant health benefits, but the best health outcomes will still come from being free of any addictive substance.

We broadly welcome the regulatory approach suggested in the consultation, which we believe represents progress towards a bespoke regulatory regime reflecting the unique characteristics of e-cigarettes and balancing the positive opportunity to help smokers to quit while reducing the potential for commercial interests to recruit a new generation into nicotine use.

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

Nicotine is addictive, to a degree similar to drugs such as heroin or cocaine¹ and therefore not appropriate for sale to children and young people under 18. Nicotine addiction is usually established within one year of experimenting with traditional cigarettes, which, for most life-long smokers, was before they were 16². Nicotine yields from automated smoking machines suggest that e-cigarettes deliver less nicotine per puff than traditional cigarettes, and clinical studies indicate that e-cigarettes deliver only modest nicotine concentrations to the inexperienced e-cigarette user. However, current e-cigarette users are able to achieve systemic nicotine and/or cotinine concentrations similar to those produced from traditional cigarettes³. We therefore support the proposal to set the minimum age of sale for these products at 18.

1. Royal College of Physicians. Nicotine addiction in Britain - A report of the Tobacco Advisory Group of the Royal College of Physicians. 2000. www.rcplondon.ac.uk/publications/nicotine-addiction-britain [Accessed 02 December 2014]

2. Ibid

3. Schroeder M J, Hoffman A C. Electronic cigarettes and nicotine clinical pharmacology. Tobacco Control 2014;23. http://tobaccocontrol.bmj.com/content/23/suppl_2/ii30 [Accessed 02 December 2014]

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

Yes, 'b', all devices. Because it is possible for non-nicotine containing e-cigarettes to look the same as nicotine containing e-cigarettes, and some types of e-cigarettes have user-replaceable parts and a choice of nicotine or non-nicotine fluid, exempting non-nicotine e-cigarette from these rules could make it easier to subvert any age restriction. It also creates the potential scenario where 'cigarette like' non-nicotine e-cigarettes sold to children act as "trainer" devices, forming habits and expectations which prime them to take up "the real thing" when it becomes available to them.

3. Whom should the offence apply to:

a. the retailer selling the e-cigarette

a

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

b

c. both

c

c. Both. While appreciating the far greater harm caused by tobacco products, in order to simplify the situation - for both retailers and enforcement agencies - we suggest the practical arrangements should reflect those already in place around current tobacco sales legislation. As we do not want to see the criminalisation of those who are children themselves we also recognise that before an offender under the age of 18 is referred to court or prosecuted, due consideration should be given as to whether or not it is in the public's interest to do so.

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

Yes No

Yes, because age restrictions cannot be verified in sales from self-service vending machines we believe that prohibiting such sales is an inherent part of enforcing an age restriction. This argument has already been accepted during the comprehensive scrutiny of the removal of self-service tobacco vending machines.

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?

Cartridges and pre-filled cartridges; tanks, atomisers, cartomisers and clearomisers; e-liquids and diluents; variable voltage kits, pass-throughs

and drop in modules; coils; drip tips; and e-cigarette wicking materials. In recognition of the fact that e-cigarettes and their modifiable variants are a rapidly evolving market the restrictions should have scope to add new accessories as they become available.

Proxy purchase for e-cigarettes

7. Should the Scottish Government introduce legislation to make it an offence to proxy purchase e-cigarettes?

Yes No

Yes. As discussed above these products are not suitable for people under 18 years of age, whether they purchase the product themselves or an adult makes the purchase for them so should therefore be subject to proxy purchase restrictions. We have heard the concern raised that this would penalise, for example, a parent attempting to help their child to quit tobacco use, however we believe that the consideration of public interest before proceeding with any prosecution is sufficient safeguard in such a scenario.

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

Yes. There should be no advertising which might encourage non-smokers of any age to use e-cigarettes nor ex-smokers to relapse but advertising to make the benefits of switching from lit tobacco to e-cigarettes clear to those who are current smokers should not be prohibited.

There is a strong need, and a public demand, for the provision of good information about e-cigarettes. However this is quite distinct from marketing, where the clear intention is to build the market for commercial products. This may involve information provision but is more likely to involve attractive or glamorising imagery.

We believe that 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. In particular addictive products, such as electronic cigarettes, should not be advertised in ways or through channels that could reasonably be expected to make them appealing to children and young people. The Tobacco Advertising and Promotion Act 2002 led to a banning of most conspicuous forms of tobacco advertising and promotion in the UK, however tobacco companies have shifted to 'below the line marketing' to promote their brands. This type of marketing typically includes public relations and sales promotions, point of sale displays and trade discounts for the promotion of particular brands. This latter technique known as "push promotion" involves advertising to sellers and wholesalers, giving retailers financial incentives and offering prizes and competitions around specific products. Other forms of below the line marketing include "buzz marketing" and "experiential marketing." The tobacco industry uses all of these methodologies and others to continue to promote tobacco despite the 2002 Act, and

e-cigarette companies (many of which are now owned by tobacco companies) may also seek to exploit this apparent loophole.

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

Yes. We propose:

1. Regulation of advertising of unlicensed electronic cigarettes and other nicotine containing products should be, as far as is possible, consistent with that for licensed products. For example, celebrity endorsement and free samples are not allowed for licensed nicotine containing products and should not be allowed for unlicensed 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. Electronic cigarettes and other nicotine containing products should be required to be advertised as an alternative to smoking cigarettes or other tobacco products for existing smokers only.
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.

We suggest that the production of statutory guidelines would be the best means of taking this forward and that these be amenable to rapid revision in light of emerging evidence surrounding what is a rapidly evolving class of products, or the impact of their marketing on the non-smoking population and particularly on people under 18.

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

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

a. Bill boards; YES. Billboard adverts are a non-discriminatory medium which reach the wider population and so targeting the advertising towards existing smokers can only occur through regulating the content and location of adverts.

b. Leafleting; YES, for the same reasons as for billboards, with regulation relating to distribution rather than billboard location.

c. Brand-stretching (the process of using an existing brand name for new products or services that may not seem related); YES

The possibility remains that e-cigarettes which resemble tobacco cigarettes could be used to implicitly or explicitly promote tobacco cigarette smoking. As an increasing number of e-cigarette companies are owned by tobacco companies (who have obvious commercial interests in the promotion of imagery that has the result of increasing interest in, maintaining the use of or encouraging the uptake of, tobacco smoking or maintaining the impression of existing brand-related intellectual property), this is an issue of great concern. Because of this, we believe that regulations should be strengthened to include a prohibition of any features of design, colour, imagery, or style that could reasonably be expected to confuse viewers between e-cigarettes and tobacco cigarettes or could reasonably be viewed as promotion of 'smoking' behaviour. Tobacco products should not be presented in ways which increase their appeal, and e-cigarettes should be subject to similar restrictions with a view to avoiding initiation.

d. Free distribution (marketing a product by giving it away free); YES, except in a tobacco amnesty or exchange scheme.

e. Nominal pricing (marketing a product by selling at a low price); YES

f. Point of sale advertising (advertising for products and services at the places where they are bought); No, requiring a focus on information, rather than broader advertising though, would remain a valid public health goal.

g. Events sponsorship within a domestic setting? YES

Events, such as those sponsored by E-lites (which has entered into partnership agreements with both Rangers and Celtic FC), should be monitored under the strict parameters of a code of practice.

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

There should be an exemption to allow current smokers to be made aware of products which are less harmful to use than lit tobacco. Such products could be advertised, for example, at point of sale of tobacco with an emphasis on informing smokers of the benefits of switching away from tobacco use. However, regulations should be used to promote cessation rather than recreational or dual use.

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)?

As the Scottish Government is aware, Cancer Research UK (CRUK) published the first systematic audit and thematic content analysis of the marketing of e-cigarettes

in the UK¹ and this remains the best source of information on the extent and diversity of e-cigarette advertising.

1. de Andrade M, Hastings G, Angus K, Dixon D and Purves R.

The Marketing of Electronic Cigarettes in the UK. Cancer Research UK: London 2013.

www.cancerresearchuk.org/prod_consump/groups/cr_common/@nre/@pol/documents/generalcontent/cr_115991.pdf [Accessed 02 December 2014]

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?

No. We currently have very little reliable information about the size and nature of the retail environment for e-cigarettes. However, awareness of electronic cigarettes is widespread among adults. A 2014 survey found that 95% of smokers and 90% of non-smokers had heard of electronic cigarettes. Regular use of the devices is confined to current and ex-smokers¹.

The companies selling e-cigarettes have a clear commercial interest to expand their market beyond existing smokers into the wider population, particularly the next generation. Tobacco companies in particular are a growing force in the e-cigarette market and have long experience of the profits to be had in creating a market for addictive products. So future profits will be limited by seeking to restrict e-cig use to current smokers, nevertheless this remains a valid public health goal.

1. Methodology: Calculations are by ASH in London. This was done by applying the proportions of e-cigarette use by smoking status in the 2014 YouGov survey to the most recent available ONS mid-year GB population estimates (2012).

Use of electronic cigarettes in Great Britain, ASH London, October 2014. Available from

www.ash.org.uk/files/documents/ASH_891.pdf [Accessed 11 December 2014]

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

Yes. We believe that the Tobacco Retailers Register should be extended to include those selling electronic cigarettes and accessories. The feedback from trading standards bodies has been that that Register has helped with understanding the tobacco retail market, with enforcement of regulations and with providing support and advice to retailers, without imposing a significant financial or administrative burden. We would look for similar benefits from the registration of e-cigarette retailers.

It would remain necessary to distinguish between the more and less harmful products and we believe that this would be best achieved by a move towards positive licensing of tobacco retail outlets as this would provide a stronger incentive for tobacco retailers to comply with the law compared to the banning orders under the current registration system.

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

Yes No

Yes, as discussed above this would help to simplify compliance and enforcement.

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?

Yes No

No, not at this point, based on current evidence. However, it is clear from the number of enquiries received by ASH Scotland that great confusion surrounds the use of e-cigarettes in enclosed public spaces. Whilst many organisations have developed their own policies, we believe the Scottish Government should create a guidance document setting out principles that will help others to do so.

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.

A legislative ban on using electronic cigarettes in enclosed public spaces should require the kind of established evidence base which underpinned legislation for smoke-free public spaces. This is not the situation at this time. However we support the right of organisations and venues to develop their own policy with regard to these devices and would support the provision of guidance and information to enable them to develop the most appropriate policy for their own situation.

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

E-cigarettes are a class of products (almost 500 products of varying quality and composition) and this makes it difficult to generalise about their effects. The use of e-cigarettes is potentially a new source for chemical and aerosol exposure in the indoor environment but there is as yet insufficient information available about the chemical characteristics of the released vapour.

The American Non-Smokers' Rights Federation maintains a list of published

evidence¹ on what they term 'second-hand aerosol'. However we consider that there is, at this point, insufficient evidence to justify a blanket legislative ban on the use of e-cigarettes indoors. The integrity of current smoke-free policies should not be compromised and national guidelines on developing individual policies would help to support this.

1. American Non-Smokers' Rights Federation, Electronic Smoking Devices and Secondhand Aerosol. <http://no-smoke.org/pdf/ecigarette-secondhand-aerosol.pdf> [Accessed 05 December 2014]

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

Action on Smoking and Health (ASH) Scotland is an independent Scottish charity taking action to achieve its vision of a healthier Scotland free from the harm and inequalities caused by tobacco. As such, two of our primary aims are to protect people from second-hand smoke and to limit the number of young people taking up smoking.

ASH Scotland therefore supports legislation to make it an offence to smoke in a private vehicle when children under the age of 18 are present. A 2014 YouGov poll revealed that 75% of Scottish adults (61% of smokers) agree that smoking should be banned in cars that are carrying children younger than 18 years old, making this a measure strongly supported by the public.¹

Smoking in cars causes harm both to the smoker and to others in the vehicle, because of health hazards posed by second-hand smoke (SHS), to which children are particularly vulnerable¹. Evidence of the harm of inhaling SHS is well established², and exposure to the pollutants and carcinogens in SHS increases the risk of acute and chronic health conditions, hospital admission, and death.³

The Royal College of Physicians estimates that each year in the UK exposure of children to second-hand smoke causes:

- over 20,000 cases of lower respiratory tract infection
- 120,000 cases of middle ear disease
- 22,000 new cases of wheeze and asthma
- 200 cases of bacterial meningitis
- 40 sudden infant deaths
- 300,000 GP consultations and 9,500 hospital admissions²

There are several studies which have investigated the level of tobacco smoke that accumulates in vehicles. A UK study⁴ measured concentrations of fine particulate matter – airborne particulate matter that is not visible to the naked eye that is present

in air pollutants – during everyday car journeys that were on average half an hour in duration.

Reference values of particulate levels measured in bars and pubs in Scotland and England prior to smoke-free legislation were used as a comparison for the data, revealing the average concentration of particulate matter in the vehicles to be around one-third of that found in Scottish pubs prior to smoke free legislation, and over half that found in English pubs and bars⁴. This study's average of particulate concentration exceeds WHO guidance for 24-hour exposure by several times⁵, and given the wide-variation in ventilation conditions, concentrations of particulate matter can rise much higher than this study's average.

Children and young people exposed to SHS in vehicles are at an elevated risk of harm to their health for several reasons: smaller airways, faster rates of breathing, and less developed immune systems all contribute their inhalation of larger quantities of particulates⁶. Children are also less likely to be able to choose whether or not someone else in the vehicle is smoking or to alter the ventilation in a car.

Lastly, there is the harm of children and young people modelling the smoking behaviour they witness by adult smokers. A New Zealand study⁷ investigated the association between exposure to smoking in cars and early stage smoking activity in pre-adolescent children.

After adjusting for the effects of other known predictors of smoking, reported exposure to smoking in cars was significantly associated with an increased risk of both current and initiated smoking (the increased risk of initiated smoking being increased by around two times, the increased risk of current smoking around three times). Therefore, reducing children and young people's exposure to smoking in vehicles will not only prevent them from the dangers of second-hand smoke, but may also reduce their propensity to take up smoking themselves.

1. All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 1064 adults. Fieldwork was undertaken between 5th and 14th March 2014. The survey was carried out online. The figures have been weighted and are representative of all Scotland adults (aged 18+).

2. Royal College of Physicians. 2010. Passive smoking and children. A report by the Tobacco Advisory Group. London: RCP. <http://bookshop.rcplondon.ac.uk/details.aspx?e=305> [Accessed 11 December 2014]

3. Scientific Committee on Tobacco and Health (SCOTH). 2004. Secondhand smoke: Review of evidence since 1998, updated of evidence on health effects of secondhand smoke. Department of Health.

www.smokefreeengland.co.uk/files/scoth_secondhandsmoke.pdf

[Accessed 11 December 2014]

4. Semple S, et al. Secondhand smoke in cars: assessing children's potential exposure during typical journey conditions. Tobacco Control, 2012 Jan 4. <http://tobaccocontrol.bmj.com/content/early/2012/01/04/tobaccocontrol-2011-050197.abstract> [Accessed 11 December 2014]

5. World Health Organisation International Agency for Research on Cancer. 2004. IARC Monographs on the Evaluation of Carcinogenic Risks to Humans - Volume 83: Tobacco Smoke and Involuntary Smoking. Lyon: IARC. <http://monographs.iarc.fr/ENG/Monographs/vol83/index.php> [Accessed 11 December 2014]

6. Thomson, G., Wilson, N. and Howden-Chapman, P. 2005. Smoky homes: a review of the exposure and effects of secondhand smoke in New Zealand homes. New Zealand Medical Journal 118(1213).

www.ncbi.nlm.nih.gov/pubmed/15843833 [Accessed 11 December 2014]

7. Glover M, Scragg R, Min S, Kira A, Nosa V, McCool J, Bullen C. 2011. Driving kids to smoke? Children's reported exposure to smoke in cars and early smoking initiation. Addictive Behaviors. Nov;36(11):1027-31.

www.ncbi.nlm.nih.gov/pubmed/21733632 [Accessed 11 December 2014]

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

Yes No

ASH Scotland suggests that by law, a person under the age of 18 should be liable for committing an offence of smoking in a vehicle with another person under 18 present. While the prohibition of behaviour that is harmful to a child should be clear in law, we are at the same time reluctant to criminalise those who are children themselves and recognise that before an offender under the age of 18 is referred to court or prosecuted, due consideration should be given as to whether or not it is in the public's interest to do so.

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

To any individual smoking when another person under the age of 18 is present. However, in the situation of the driver being under 18, smoking, and alone in the vehicle, the offence should not apply.

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

Yes No

Yes, ASH Scotland views the bulk of enforcement responsibility being upheld by local police officers as the preferable and reasonable choice. The highly effective performance of Scottish police forces in enforcing seat belt and mobile phone laws suggests that this can be done.

In the Scottish consultation for Jim Hume MSP's Proposed Smoking (Children in Vehicles) (Scotland) Bill, a retired Chief Superintendent with extensive experience and thorough expertise in traffic and road policing endorsed the likely ability of the Police Scotland in adding this offence to existing motoring offences.

While second-hand smoke in vehicles technically falls under the functions of Environmental Health Departments, Police Scotland has resources more appropriate to the enforcement of legislation. Joint working between Environmental Health Officers and Police Scotland to uphold regulations appears to be the best method of protecting the health of young people under the age 18 whilst in vehicles.

ASH Scotland suggests that a publicity campaign around the introduction of the new legislation is likely both to enhance smooth implementation and to increase public support. A study of Scottish smokers before and after the ban on smoking in public places found that both their attitudes and behaviours had changed; six months after the introduction of the ban there was a 20% increase in support for the ban and half the respondents reported cutting down on their daily cigarette consumption¹.

A publicity campaign which addresses not only the change in legislation but also the harmful effects of second-hand smoke could positively impact upon social expectations regarding drivers and smoking in vehicles with children present.

1. Musiello T. 2009. Ph.d thesis: 'An investigation into the effects of the Scottish smoking ban'. Queen Margaret University. <http://etheses.gmu.ac.uk/116/> [Accessed 11 December 2014]

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 No

For some people, their vehicle may also act as a home, for example a caravan or a motorhome (or motor caravan). The proposed regulations should apply to such vehicles when they are used as a vehicle but not when they act as a home or living accommodation. The proposed regulations should include an exemption for a caravan or motorhome that is stationary and not on the road. A road is defined as having the same meaning as in the Road Traffic Act and covers any highway where there is public access including verges, lay-bys and car parks if there is a public right of access. A vehicle stopped in a car park or grass verge would be considered to be on the road and so the proposed offences would apply in such circumstances.

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

We suggest several other exemptions regarding the categories of vehicles in which smoking while someone under the age of 18 is present would be an offence.

The regulations should relate to enclosed vehicles that are on the road. Enclosed means enclosed wholly or partly by a roof and by any door or window that may be opened. It does not include, for instance, a motorbike or a convertible car with the roof completely down. These exemptions would be in alignment with the proposals of England and Wales.

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

ASH Scotland believes that the focus of the offence should be on the person smoking. Were the focus of the offence to be on the driver, as is proposed in England, Northern Ireland and Wales, then there are several reasonable defences given that the driver's main responsibility is to drive safely rather than monitoring others' behaviour or engaging in debate.

This suggestion is consistent with the smoking in vehicles legislative proposals of Wales, England, and Northern Ireland, where a driver can present a defence that:

- a) the driver, by reason of driving the vehicle, was unable to prevent another individual from smoking in the car, and
- b) the driver 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?

Yes No

We support the principle of smoke-free hospital estates and welcome the opportunity to consider the best means of achieving this goal. Ensuring that the bulk of hospital estates are smoke-free could help to support non-smoking as the norm for patients who are trying to quit smoking, as well as protect others from second-hand smoke exposure.

We are aware of the frustrations expressed by health boards across Scotland who having struggled with voluntary enforcement have come to believe that legislative action would provide the necessary enforcement powers. However, we are concerned about imposing legal sanctions on what will often be vulnerable populations, who may already feel stigmatised for being addicted to tobacco. Therefore, we do not view a complete legislative ban as the most appropriate way forward at this time, preferring the use of defined smoke-free areas within given perimeters as the best way in which to protect hospital patients, staff and visitors from second-hand smoke, and establish a tobacco-free expectation.

The wording of 'NHS grounds' itself is rather vague, and an approach that restricts smoking to regulated perimeters could be more straightforward to enforce. Restricted smoke-free areas would need to be enforced by health boards, and incorporated into existing smoking cessation, harm reduction and enforcement strategies which extend the enforcement of smoking bans indoors to the relevant external areas.

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

With regard to option 'c' above:

We see this consultation as a chance to encourage legislation for delineated smoke-free areas rather than outright bans on smoking throughout NHS estates. The direction of tobacco control in Scotland should always be moving towards being smoke-free, but if an outside area is designated smoke-free, enforcement issues would be less complex and allow more scope for sensitive approaches to vulnerable patients and visitors in difficult situations that may not warrant prosecutions. Determining a legally binding, designated smoke-free external perimeter is the next progressive step to Scotland becoming smoke-free whilst retaining a compassionate and evidence-based approach to smoking outside. Of course devolving the decision to local areas means that a health board could still choose to designate the entire grounds of a facility, should that be deemed the desired approach.

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)?

ASH Scotland suggests that if each health board has the power to designate smoke-free perimeters that are reasonable for its grounds within their own context – for example, long-stay facilities with their own designated smoke-free perimeters – then the need for national exemptions is eliminated.

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

In line with the legislation which governs smoke-free enclosed public spaces, NHS authorities and health boards should extend current monitoring and enforcement practices to include external designated smoke-free perimeters, within which all smoking is prohibited.

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

We suggest that the penalty for non-compliance of smoking legislation on NHS grounds be kept in line with the penalties for indoor offences.

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?

n/a

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

We fully support further action to make children's outdoor areas tobacco free and welcome the chance to explore the best mechanism to ensure this. Removing smoking from children's outdoor areas would support the reduction of children's exposure to adult smoking behaviour and reinforce a culture change in which tobacco is no longer part of everyday life.

However, developing further regulations requiring certain outdoor areas to become smoke-free calls for nuanced thinking in the definition, communication and enforcement of such a move. Children's exposure to harmful levels of second-hand smoke from adult smoking within enclosed domestic settings and within cars is much greater than when they are outside, and the primary focus needs to remain on targeting that exposure and encouraging smoking adults to take their smoking outdoors.

Restriction of smoking at children's outdoor areas may also encourage the denormalisation of smoking by reducing the visibility of adult smoking behavior, as well as contribute to reducing litter and lowering smokers' intake of tobacco, and that shift in attitude is what restrictive measures need to emphasise, rather than protection from second-hand smoke exposure, which was the rationale for indoor smoking restrictions.

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**

With reference to option 'c' above:

ASH Scotland suggests developing alternative options, such as clarifying the powers of local authorities regarding smoke-free children's outdoor areas. Such clarification of powers should set a duty for local authorities to plan and implement designated smoke-free areas according to the needs and context of their locale. While this approach would lack consistency at a national level, it would induce local authorities to plan a set direction of travel for their local tobacco control strategy and allow various communities to buy in to the strategies by inputting what they want regarding any restrictions.

By leaving the decisions about smoke-free children's outdoor areas with local authorities, another opportunity for joint working between the local authorities, health boards, and national government is created. The new duty to develop a comprehensive and detailed tobacco control strategy with regular monitoring and reporting at the national level of government could also encourage joint working in the effort to create a tobacco-free expectation for children's outdoor areas.

ASH Scotland would welcome giving local authorities the power to determine and implement designated smoke-free outdoor areas that would become statutory obligations under tobacco action planning.

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

While we suggest that it would be up to the local authorities to determine which areas would best be served by restrictions on outdoor tobacco use, we wish to highlight several outdoor locations and events where children and young people are particularly susceptible to the influence of adult smoking behaviour; what may begin as experimentation or 'modelling' of adult behaviour can become an addictive habit.

Local authority public play areas would be one of the first places to consider

implementing smoke-free restrictions. There are several benefits of restricting smoking in play-parks in terms of denormalising smoking, preventing children from seeing adult smoking behaviour as normal, reducing littering and lowering smokers' intake of tobacco.

Sports grounds and stadia – most sporting events are publicised and profiled as family-friendly occasions, and they offer the chance to highlight healthy lifestyles in which tobacco should play no part. That the Glasgow 2014 Commonwealth Games was the first to be smoke-free was listed in the 'highlights and successes' of the Post Games Report¹, and the Health Impact Assessment of the Games emphasised using the success of the smoke-free event to increase opportunities for the promotion of healthy lifestyles, smoke-free environments, and physical activity². Despite the success of the Games, they were not completely smoke-free, designated smoking areas were provided for staff and competitors. As many athletes may be deemed 'role models' for children and young people, moving towards making tobacco non-existent in Scotland's sports grounds and stadiums seems the best course of action for working towards a generation free from tobacco.

Public events which occur within a community, such as concerts and live music, cultural and seasonal activities, or child-oriented attractions should also aim to become smoke-free environments.

1. Glasgow 2014: XX Commonwealth Games Post-Games Report.
www.thecgf.com/games/2014/G2014-Official-Post-Games-Report.pdf

[Accessed 09 December 2014]

2. 2014 Commonwealth Games: Health Impact Assessment Report. Available at:
www.glasgow.gov.uk/CHttpHandler.ashx?id=2036 [accessed 9 December 2014]

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

Yes. Although everyone agrees that tobacco should not be sold to children it is still the case that underage smokers can sometimes purchase tobacco products. According to the most recent SALSUS results, 15% of 13 year olds and 31% of 15 year-olds who regularly smoke report that they buy tobacco from shops¹.

We believe that more can be done to enforce existing restrictions on selling tobacco to young people and therefore support the principle that retailers selling tobacco and/or e-cigarettes equipment should be required by law to challenge the age of anyone they believe to be under the age of 25. This should help clarify the situation around such transactions and will be of benefit to responsible retailers who already work within the law. It would also be beneficial if the guidelines were accompanied by proposals to simplify the guidance around test purchasing, to make tests more like real life purchasing situations, and make it more difficult for subjects to identify them.

1. Scottish Schools Adolescent Lifestyle and Substance Use Survey (SALSUS), 2014. *Smoking: Among 13 and 15 year olds in Scotland 2013*, NHS National Services Scotland. www.isdscotland.org/Health-Topics/Public-Health/Publications/2014-11-25/SALSUS_2013_Smoking_Report.pdf [Accessed 01 December 2014]

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

Yes, ASH Scotland agrees that people under the age of 18 should only be allowed to sell tobacco and e-cigarette accessories when authorised by an adult in a position of responsibility at the retail location. This should include cartridges and pre-filled cartridges; tanks, atomisers, cartomisers and clearomisers; e-liquids and diluents; variable voltage kits, pass-throughs and drop-in modules; coils; drip tips; and e-cigarette wicking materials.

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?

We suggest that authorisation should rest with the person formally named on the tobacco retailer's register. Therefore, the on-duty manager or other adult who authorises the young person to make any sales, whether or not that adult is present at the time of the offence, should be the offender in the case of any underage sales. Both (potential) parties – the register member and authorising adult – should be held responsible should an offence be committed.

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

a. the penalty

a

Yes, strict penalties should be the result of any offences resulting in under 18s purchasing tobacco or e-cigarette products. Being consistent with other age restriction requirements relating to tobacco and e-cigarette products seems the simplest way to implement the penalty.

b. the enforcement arrangements

b

A 2013 survey of pupils in Scotland found that 39% who smoked cigarettes regularly reported that they had bought cigarettes from a shop, supermarket or van in the last four weeks¹. Recent research in Scotland examining environmental drivers and smoking amongst adolescents concluded that it was likely that a high density of tobacco retailers in a neighbourhood may increase the ease with which individuals can access tobacco products and the local acceptability and normalisation of

tobacco-related behaviours². The authors go on to point out that such attitudes and norms in adolescents have been shown to predict smoking in the future^{3, 4} and that in Scotland, the more prominent and visible a tobacco presence is, the more positive the association with increased odds of related risky behaviours in adolescents. Such evidence suggests that enforcement at the retailer level is necessary in order to prevent underage smokers from obtaining illegal tobacco and e-cigarette products. Therefore, in the first instance, all retailers of such products should be required by law to challenge the age of anyone they believe to be under the age of 25. This should help clarify the situation around such transactions and will be of benefit to responsible retailers who already work within the law.

However, ASH Scotland suggests that in addition to the Challenge 25 policy, tobacco control policy should consider positive licencing for tobacco products across Scotland as a more effective means to reduce the likelihood of smoking and smoking initiation in adolescents.

1. Scottish Schools Adolescent Lifestyle and Substance Use Survey (SALSUS), 2014. *Smoking: Among 13 and 15 year olds in Scotland 2013*, NHS National Services Scotland. www.isdscotland.org/Health-Topics/Public-Health/Publications/2014-11-25/SALSUS_2013_Smoking_Report.pdf [Accessed 1 December, 2014]
2. Shortt NK, Tisch C, Pearce J, et al. The Density of tobacco retailers in home and school environments and relationship with adolescent smoking behaviours in Scotland. *Tobacco Control* Published Online First: on November 4, 2014 as [10.1136/tobaccocontrol-2013-051473](https://doi.org/10.1136/tobaccocontrol-2013-051473) [Accessed 02 December, 2014]
3. Larsen JT, Cohen LM. Smoking attitudes, intentions, and behaviors among college student smokers: positivity outweighs negativity. *Addiction Research and Theory* 2009;17:637–49. Available at: <http://informahealthcare.com/doi/abs/10.3109/16066350802068854> [Accessed 02 December, 2014]
4. Ganley BJ, Rosario DI. The smoking attitudes, knowledge, intent, and behaviors of adolescents and young adults: implications for nursing practice. *Journal of Nursing Education and Practice*, 2013;3:40-50. www.sciedu.ca/journal/index.php/jnep/article/view/1157 [Accessed 11 December 2014]

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)?

The Marmot Review notes that ‘tobacco control is central to any strategy to tackle health inequalities as smoking accounts for approximately half of the difference in life expectancy between the lowest and highest income groups. Smoking-related death rates are two to three times higher in low-income groups than in wealthier social groups’¹. ASH Scotland therefore welcomes the Scottish Government’s commitment both to reducing wider health inequalities, and to addressing the specific inequalities relating to smoking prevalence outlined in the Tobacco Control Strategy for Scotland. Tobacco usage is highest amongst Scotland’s most disadvantaged communities, and is a major contributor to health, poverty and social inequalities. Relative inequalities have increased steadily since 1981 because the health of the least deprived groups has improved at a faster rate than the most deprived. Smoking remains the most important preventable cause of ill-health and premature death in Scotland, with smoking-attributable deaths accounting for around a quarter of all deaths². However, amongst the most well-off it drops to around 15% of deaths, whilst for the least well-off it rises to 32%³, and amongst the 35 - 69 age group an average of 22 years of life are lost per death from smoking⁴. According to the Scottish Household Survey, the adults who most commonly smoke are

those unable to work due to short-term ill-health (60%), those unemployed and seeking work (51%) and those who are permanently sick or disabled (51%).

Tobacco use and exposure to second-hand smoke in pregnancy affects the health of pregnant women and their children. In Scotland over 10,000 mothers are recorded annually as being smokers at their 'first booking' with a health professional, and the highest levels are recorded in the lowest SIMD quintiles⁵. The use of pure nicotine during pregnancy remains an under-evidenced area of research and while the evidence on e-cigarettes, at this point, suggests that their use is less harmful than using lit tobacco, very little human data exists outwith the vast literature on prenatal exposure to tobacco smoke. However, research indicates that in utero exposure to nicotine may have adverse effects upon foetal development⁶ and any regulation should reflect this.

On the topic of advertising, ASH Scotland is concerned that the recent move towards television advertising of e-cigarettes requires close scrutiny. By strongly sexualising both the brand and product, the product could be marketed subversively at the expense of the protected rights relating to gender. ASH Scotland hopes that the Scottish Government and the Advertising Standards Authority will ensure that the new e-cigarette advertising guidelines are upheld within a rapidly evolving market.

1. Marmot et al, Fair Society Healthy Lives, 2010. Available at: www.instituteofhealthequity.org/projects/fair-society-healthy-lives-the-marmot-review [Accessed 04 December 2014]
2. NHS Health Scotland, ISD Scotland and ASH Scotland. An atlas of tobacco smoking in Scotland. Edinburgh: NHS Health Scotland, 2007. www.scotpho.org.uk/publications/reports-and-papers/497-an-atlas-of-tobacco-smoking-in-scotland-a-report-presenting-estimated-smoking-prevalence-and-smoking-attributable-deaths-within-scotland- [Accessed 12 December 2014]
- 3 Taulbut, M, Gordon, D and McKenzie, K. Tobacco smoking in Scotland: an epidemiology briefing [online]. Edinburgh: NHS Health Scotland and Scottish Public Health Observatory. 2008. www.scotpho.org.uk/publications/reports-and-papers/493-tobacco-smoking-in-scotland-an-epidemiology-briefing- [Accessed 12 December 2014]
4. NHS Health Scotland, ISD Scotland and ASH Scotland. An atlas of tobacco smoking in Scotland. Edinburgh: NHS Health Scotland, 2007. www.scotpho.org.uk/publications/reports-and-papers/497-an-atlas-of-tobacco-smoking-in-scotland-a-report-presenting-estimated-smoking-prevalence-and-smoking-attributable-deaths-within-scotland- [Accessed 12 December 2014]
5. Information Services Division, NHS National Services Scotland. Births in Scottish Hospitals Year ending 31st March 2013 (publication date 26th August 2014). Table 10, p14. www.isdscotland.org/Health-Topics/Maternity-and-Births/Publications/2014-08-26/2014-08-26-Births-Report.pdf? [Accessed 12 December 2014]
6. Smith A M, Dwoskin L P, Pauly J R. Early exposure to nicotine during critical periods of brain development: Mechanisms and consequences. Journal of Pediatric Biochemistry. 2010; 1(2): 125–141. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4042244/> [Accessed 12 December 2014]

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

The proposals seem likely to have positive implications for equality, particularly where tobacco harms can be reduced for vulnerable populations.

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

n/a

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?

Reductions in smoking prevalence whilst having gains for public health will result in reduced tobacco sales for retailers. However the retail profit margin from selling tobacco is minimal and the slow decline in smoking rates provides a long lead-in time for retailers to adapt to selling products which are less harmful to the communities they serve.

Action on measures to improve public health must not be deterred by fallacious arguments devised by vested commercial interests. For example, headlines originating with the tobacco industry suggesting widespread and immediate shop closures in relation to specific proposed tobacco control measures continue to be exposed as baseless scaremongering^{1,2}.

With the display ban coming into force for smaller retailers in April of 2014, as well as pending proposals around the currently under-unregulated sale of e-cigarettes, it is clear that retailers will need to be prepared to enforce new regulations. Improved enforcement of existing age restrictions should support responsible retailers already abiding by the law.

In addition to these specific points concerning business impact, ASH Scotland's response to questions 1-20 of this consultation covers a number of the more specific aspects of the proposed new regulations.

1. Advertising Standards Authority, Adjudication on Gallaher Ltd, 28 August 2013.

www.asa.org.uk/Rulings/Adjudications/2013/8/Gallaher-Ltd/SHP_ADJ_213116.aspx#.VIhd8HqsU11

[Accessed 10 December 2014]

For further information see: Morrison, R. How Many Corner Shops Face Closure Because of Tobacco Smuggling, 16 September 2013. <http://tobaccounpacked.wordpress.com/2013/09/16/how-many-corner-shops-face-closure-because-of-tobacco-smuggling/> [Accessed 11 December 2014]

2. Savell, E et al. How does the tobacco industry attempt to influence marketing regulations? A systematic review. 5 February 2014.

www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0087389

[Accessed 11 December 2014]

For further information see: Tobacco Research Control Unit, University of Bath. Extent of tobacco industry's lobbying tactics unveiled by new paper. 6 February 2014. <http://blogs.bath.ac.uk/tcrq/>

[Accessed 11 December 2014]

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

ASH Scotland believes that there is no need to wait with any age-restriction implementation timescale. Therefore, were the proposals to be put before the Scottish Parliament in the latter part of this parliamentary year, it would be reasonable to expect any new age restriction laws to come into force by April 2016. By acting quickly in this way we believe Scottish Ministers would signal their commitment to the appropriate regulation of e-cigarettes.

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

n/a

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.

ASH Scotland has no direct or indirect links with the tobacco industry nor have we received any funding from tobacco companies or their vested interests.