

British Lung Foundation Scotland

Response to E-Cigarette & Tobacco Control Consultation



Background

The British Lung Foundation is the UK's only charity dedicated to supporting everyone with a lung disease. Founded in 1984, the BLF provides funding for research into respiratory conditions, campaigns for better awareness and treatment of lung disease and provides direct support to patients. BLF Scotland functions as part of the UK-wide organisation, adapting the same goals for a different political and social context.

The majority of lung disease in Scotland is directly caused by or related to tobacco use. Our nation has a long historical relationship with the substance, with high smoking rates and damaging cultural norms. While the prevalence of tobacco use has greatly decreased in recent years, Scotland's rate remains the highest of the four home nations and health inequalities due to differential smoking rates in areas of deprivation are of increasing concern.

The Scottish Government has adopted an ambitious vision for a Scotland free from the harms of tobacco by 2034. BLF Scotland fully supports this goal, but recognises that it will not be met without significant legislative action to support smokers to quit and ensure that the next generation grows up tobacco-free.

Age Restriction for E-Cigarettes

1. Should the minimum age of sale for e-cigarette devices, refills (e-liquids) be set at 18?

Yes. British Lung Foundation supports an age limit for purchasing these products, and accepts the suggested age of 18. This law should be subject to regular review as new data emerges, or were the age of sale for tobacco products to be changed.

Although there is no indication that e-cigarettes/electronic nicotine delivery systems (ENDS) represent a health risk in any way comparable to smoking tobacco, there is currently a lack of conclusive research into their long-term health impact. Consequently, they cannot be recommended for children. Additionally, there exists concern over the potential for to renormalise smoking, and the potential for the devices to act as a "gateway" into nicotine addiction (as well as safety concerns following reported incidents of poisoning from ingested e-cigarette nicotine refills).

As e-cigarettes may be licensed as medicinal products and potentially available from the NHS in the future, any new law should not pre-emptively restrict their use as a prescribed smoking cessation tool by smokers under the minimum age.

2. Should age of sale regulations apply to:

- a. Only devices/refills containing nicotine or capable of containing nicotine?**
- b. All devices?**

BLF Scotland would support **option (b)**.

Experience in jurisdictions where nicotine-containing e-cigarettes are not legally available has shown that differentiating between products with and without nicotine is difficult in an enforcement context. Additionally, there is currently insufficient data available on the relative harm caused by nicotine-containing and nicotine-free products.

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

In line with legislation on tobacco products, option (c) is recommended by BLF Scotland to provide maximum disincentive for breaching the law.

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

Yes. In line with tobacco, we would support banning e-cigarette and refill sales from vending machines.

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

Not at present. We do not propose further restrictions at present, however the situation should be monitored and subject to review pending further research into the renormalisation impact of such accessories.

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. We support this move in line with tobacco proxy purchasing legislation.

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.

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.

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

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

The BLF is impressed by the potential of e-cigarettes/electronic nicotine delivery systems as a tool for harm reduction by allowing existing smokers to use these devices as a replacement for tobacco. However, there exists the possibility that unrestricted e-cigarette marketing could appeal to non-tobacco users.

Therefore we believe that e-cigarettes (whether or not they contain nicotine) should not be advertised in ways or through channels that could reasonably be thought to appeal to non-smokers, and, in particular, young people. Until robust research has confirmed minimal long-term health and renormalisation impact, we would recommend against children and non-smokers using e-cigs. It would therefore be inappropriate for e-cigs to be marketed to these audiences.

There should be an explicit requirement that the marketing of any such devices should present them as an alternative to tobacco products, intended only for existing tobacco users. Such adverts should be prohibited from any sound or imagery that might be perceived to promote smoking. This would require strong regulations on general advertising (such as bus shelters, advertising hoardings and potentially in-shop gantries and promotional items).

Specific regulations on celebrity endorsements and free/nominally priced e-cigarette products would also be desirable. While brand-stretching of tobacco products is already illegal under UK law (under the Tobacco Advertising and Promotion Act 2002), care should be taken around e-cigarette brands owned by transnational tobacco companies that elements from tobacco brands are not included in advertising, particularly during the transition to standardised packaging for cigarettes. There is a strong case for specific brand-stretching regulations on e-cigarette products.

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

BLF Scotland does not support a full ban on all ENDS advertising. Marketing activities should, however, be restricted to present e-cigarettes only as an alternative to tobacco products for existing smokers.

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)?

N/A

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?

N/A

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. The British Lung Foundation supports the extension of the Tobacco Retailers Register into a system of positive licensing for tobacco retailers, on the same principles as licensing for alcohol off-sales, with the goal of reducing the supply of tobacco products from their current unnecessarily high level of availability. This goal does not apply to e-cigarette products, which are, on the currently available evidence, likely to be significantly less harmful than cigarettes. E-cigarette products should be more easily available than tobacco products, in order to encourage smokers to utilise such devices in preference to cigarettes.

While we do not believe that the current model of tobacco retail registration has reduced the number of tobacco retailers, it is well suited to gathering information about the places tobacco is being sold. This has made it helpful for enforcing tobacco sale regulations and collecting general data on tobacco sales. Collection of this data on e-cigarettes would be useful for monitoring the developing use of this emerging technology, and enforcing new regulations on sales.

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

Yes. The current penalties in place for the Tobacco Retailers Register have not been shown to disincentivise the sale of tobacco, and would therefore be unlikely to hamper the availability of e-cigarette products or otherwise reduce their harm reduction potential.

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?

At present there is no substantive evidence base to indicate that e-cigarette devices cause ill-health through passive vapour inhalation. There is significant potential and a growing evidence base that these devices can have a significant role in harm reduction. Therefore, the BLF would not support the extension of smoke-free legislation to include e-cigarettes.

Robust data is not yet available on the potential renormalising effect e-cigarettes may have on tobacco smoking. Therefore, as a precautionary measure we strongly support the rights of individual premises to regulate the use of e-cigarettes within their own grounds, particularly in premises serving significant numbers of children and families. Many businesses and organisations, such as ScotRail, have already adopted such policies. We would support proportional measures to assist organisations in developing and enforcing these policies, if necessary.

In particular, we would support such policies in areas with a high footfall of children and young people, until further data is available on the extent to which e-cigarette use renormalises smoking. We support those organisations and businesses who serve children and families

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.

N/A

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?

N/A

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. The British Lung Foundation has campaigned on this issue for many years and has been at the heart of similar measures in England, Wales and Northern Ireland. We are delighted that the Scottish Government is moving forward with this plan, maintaining Scotland's hard-earned position as a nation at the forefront of tobacco control.

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

Yes. In line with other tobacco-related offences, a cut-off age of 18 is appropriate.

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. Enforcement of this new law must be carried out by Police Scotland for it to have any chance of successfully protecting children from exposure to secondhand smoke. This would be in line with similar laws internationally - all jurisdictions in Australia and majorities of those in Canada and the US which have such a law charge police with enforcement.

The impact assessment carried out by the UK Government into the law in England & Wales recommended strongly that police should enforce this measure, for both cost-effectiveness and to ensure proper enforcement.

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?

For clarity of enforcement, we believe that this law should apply to any moving vehicle. The law need not apply to mobile homes which are parked with the engine not running.

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

No other category of vehicle should be exempted.

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

N/A

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.

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)
- b. Only hospital grounds
- c. Only within a designated perimeter around NHS buildings
- d. Other suggestions, including reasons, in the box below

In order to ensure a smooth transition into smoke-free grounds, we propose that **option (c)** is introduced initially before a gradual roll-out of totally smoke-free grounds as proposed in **option (a)**. This will avoid potential problems at hospitals with very large grounds, such as Forth Valley Royal and Gartnavel, where smokers would have to travel long distances to leave the grounds.

This programme should work in concert with a Scotland-wide process of creating more non-smoking spaces, with a focus on publicly-owned areas such as schools, parks and Non-Departmental Public Bodies such as Historic Scotland, with the aim of denormalising tobacco smoking in public spaces.

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?

Enforcement should be carried out by NHS staff and Environmental Health Officers. This is comparable to enforcement of the Health and Social Care Act (Scotland) 2005. Similarly to that law, we anticipate a high level of voluntary compliance following the introduction of smoke-free grounds.

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

For clarity and acceptance by the public, the same penalties as for violation of the Health and Social Care Act (Scotland) 2005's prohibition on smoking in public places would be appropriate. This would include a fixed penalty notice of £50 and a higher penalty for failure to pay.

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?

NHS Boards are currently struggling to implement smoke-free grounds policies, due to the huge resource commitment required and a lack of clarity about the requirements of the policy. This has led to extremely wide variation in the effectiveness and enforcement of policies between Board areas. We believe that this state of affairs will only continue without the introduction of legislation, leading to a series of policies which are expensive and ineffective.

Irrespective of the introduction of legislation, widespread publicity of smoke-free regulations will be needed to ensure awareness and compliance among the public. This could be carried out at a national level (e.g. with a marketing campaign) or locally by NHS Boards.

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.

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
- b. Introducing national legislation that defines smoke-free areas across Scotland
- c. That the Scottish Government ensures sufficient local powers to allow decisions at a local level as to what grounds should be smoke-free
- d. Other actions.

We do not at this time support national legislation to create smoke-free family areas. However, we would strongly support a combination of those actions details in options (a) and (c), to allow local communities to determine whether their children's areas should be smoke-free and how that policy can best be implemented.

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

As part of a sustained campaign to denormalise smoking, we believe that areas such as play parks, public parks and beaches may be candidates for smoke-free status. Additionally, we believe that the Scottish Government should look to make the grounds of Non-Departmental Public Bodies, such as Historic Scotland and the National Trust for Scotland, smoke-free.

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.

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.

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. It is desirable to bring tobacco sales in line with stricter regulations on the sale of alcohol. This would require the *specific* authorisation of each individual sale of a tobacco or e-cigarette product by a responsible person over the age of 18.

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?

To bring tobacco sales in line with alcohol sales (as per the Licensing (Scotland) Act 2005) the person listed on the Tobacco Retailers Register for the premises, or any person designated by them who is over the age of 18, should be able to authorise sales.

42. Do you agree with the anticipated offence, in regard to:
- a. the penalty
 - b. the enforcement arrangements

Yes.

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 impact of smoking is more keenly felt among people from many traditionally disadvantaged groups. As such there is the opportunity for effective tobacco control legislation to impact those groups more positively than others and reduce historic health inequalities.

In particular, there is research indicating that LGBTI people and members of other gender and sexual minorities may have considerably higher smoking rates than members of the general population. As the existing data in this area is not specific to Scotland, we believe that there is a good case for further research to determine the impact of tobacco on LGBTI people in our nation. It may be the case that, in addition to measures set out in this consultation, specific prevention or cessation measures would be beneficial in reaching LGBTI people.

Smoking prevalence is known to be particularly high among people with mental health problems. Again, this provides the opportunity to reduce health inequalities by working effectively with this community.

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

N/A

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?

N/A

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

Social marketing campaigns to inform the general public about the impact of new regulations may be the best way to achieve this goal, although separate campaigns may be required for measures such as banning smoking in cars carrying children.

It is vital that these regulations are introduced as soon as possible. With that in mind, we would hope that all such measures can be in place by the time of the May 2016 Scottish election.

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

N/A

Framework Convention Declaration

As a party to the World Health Organisation'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.

British Lung Foundation has no direct or indirect links with the tobacco industry, and has never received funding from the industry or related groups.

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