

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?

Comments

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?

Comments

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)?

Comments

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?

Comments

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?

Current sanctions under the Tobacco Retailers Register include the removal of a premises from that register should a Tobacco Retailing Banning Order be made against that property. A Tobacco Retailing Banning Order can be sought by the

council if there are three relevant enforcement actions taken against that property within two years.

Presumably, should ENDS be added to the Tobacco Retailers Register, enforcement actions relating to sales of ENDS would also classify as 'relevant'. In that case two enforcement actions against sales of ENDS in a short period after age restrictions are introduced – when added to a historic test purchase failure on tobacco – could lead to a premises losing the ability to sell both tobacco and ENDS. We do not think that this is equitable. It would be fairer if offences relating to the sale of tobacco and offences relating to the sale of ENDS were kept fully separate.

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?

Comments

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

The matter of permitting members of the public to use ENDS in-store is something to which all Co-operative societies have given a great deal of consideration. At the start of November 2014 The Co-operative Group became the latest society to implement a policy prohibiting their use in-store by the public. All societies prohibit use of ENDS in-store by employees, over whom they have sanctions. But there is a distance between that HR policy and a policy prohibiting members of the public to use ENDS.

Our position on this question is that this should be left to the decision of individual businesses. As you note, there is no consensus from public health professionals about whether there are risks to public health from second-hand vapour. It may be that the Scottish Government wishes to restrict their use in buildings in the public sector (hospitals, schools, libraries etc). We do not believe that this should be extended to public spaces that are privately owned on a statutory basis. We believe, as we have said before, that ENDS and cigarettes are very different products. Moreover, users of ENDS are aware of this. Our experience is that vapers are very aware of their 'right' to vape and resent being compared to smokers. We anticipate that it may be hard to enforce our policy on in-store use by members of the public in certain instances where the vaper is stident about there being no passive health harms caused by the water vapour produced by the ENDS. We anticipate that this will remain the case even should legislation be introduced to ban the use of ENDS in enclosed public spaces – the tone of public responses to this proposal in the Welsh Public Health White Paper earlier in 2014 was hostile. In the event of mass

disobedience to any ban on their use we as a business would not wish to be held liable for our inability to enforce the law on members of the public.

As stated earlier, the evidence we have seen from ASH and SALUSUS suggests that public use of ENDS is not resulting in a large number of non-smoking children and non-smokers choosing to access them. Nor do we think that use of ENDS necessarily undermines the smoking ban. The smoking ban was a genuinely successful piece of legislation which is widely supported. However there seems to be widespread public acceptance that ENDS are not cigarettes. ENDS can be distinguished from cigarettes, particularly at the close distance that would be required to request a customer to desist. Many of the earliest models were explicitly designed to resemble conventional cigarettes but the latest models can more accurately be described as 'e-pens' as they distinguish themselves from cigarettes. The LED at the end is in most cases green, the vapour produced dissipates rapidly and there is no tell-tale odour produced.

While we believe that ENDS and cigarettes can be clearly distinguished we do not believe that it is so easy to distinguish over-the-counter ENDS from those ENDS which may hold a medicines licence. The consultation document makes it clear that these regulations will not apply to licensed ENDS used as nicotine replacement therapy. It is impossible for an employee to be able to tell at a glance whether an ENDS has been licensed or not and a user would be unable to prove this if challenged. We therefore believe that such a general policy that excluded licensed ENDS would be unworkable. Either licensed products must be included in any ban or no ENDS can be restricted in this manner.

We would therefore encourage the Scottish Government to make no regulations prohibiting general use of ENDS in enclosed public spaces. However, there is action that could be taken to help businesses introduce such a policy of their own volition. We would encourage the Scottish Government to revisit the rules on No Smoking signage as laid down in the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 to see if any accommodation can be made to allow those premises who wish to customise the permitted signs to enable them to make explicit reference to ENDS to do so.

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?

Comments

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?

Comments

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?

Comments

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?

Comments

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

Comments

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 <input type="checkbox"/> |
| b. Only hospital grounds | b <input type="checkbox"/> |
| c. Only within a designated perimeter around NHS buildings | c <input type="checkbox"/> |

d Other suggestions, including reasons, in the box below

Comments

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)?

Comments

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

Comments

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

Comments

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?

Comments

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

Comments

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

Comments

Age verification policy 'Challenge 25' for the sale of tobacco and electronic cigarettes

38. Do you agree that retailers selling e-cigarettes, refills and tobacco should be required by law to challenge the age of anyone they believe to be under the age of 25?

Yes ☐ No ☒

39. Do you agree that the penalties should be the same as those which are already in place for selling tobacco to someone under the age of 18?

Yes ☐ No ☒

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

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

Yes ☐ No ☒

41. Who should be able to authorise an under 18 year old to make the sale, for example, the person who has registered the premises, manager or another adult working in the store?

There is no clear answer to this. There is already a structure in place with regard to the sale of alcohol. Every premises will have a Designated Premises Supervisor responsible for the sale of alcohol at that site. This individual will always possess a personal alcohol licence, thereby proving that they have undergone relevant training, and will be in a position of responsibility at that premises. Even in our smallest stores we are likely to have other personal licence holders who have undergone further accredited training into the responsibilities accompanying sale of alcohol and the requirement to not undermine the licensing objectives. There is

therefore a formal in-store structure where certain individuals are recognised as being responsible for the sale of alcohol.

This in-store structure does not exist with regards to the sale of tobacco. It certainly does not exist with regards to the sale of ENDS which are currently unregulated.

It would not be appropriate to require the person who has registered the premises to authorise the sale. In the cases of multiple store operators like The Co-operative Group or Sainsbury's the registration would be handled by someone at a central support centre with limited direct interaction with the store. The store manager is likewise not appropriate because due to shift patterns they may not always be on site. Even when a store manager or deputy is on site they may be engaged in something that would prevent them being able to come to the tills to authorise a sale (placing orders, dealing with an enforcement visit, conducting staff training or handling a disciplinary for example). Therefore the only option would be to have the sale authorised by someone over the age of 18. The adult will not necessarily be more competent or better trained than the under-18.

We would therefore argue that 16 and 17 year old store staff are allowed to proceed to sell tobacco and ENDS without the requirement for authorisation, as at present.

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)?

Comments

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

Comments

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

Comments

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?

Comments

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

Comments

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

Comments

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

Comments

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.

Part of the retail mix in Co-operative Food stores is the sale of tobacco products. A large proportion of these stores are small shops where tobacco sales can be a significant proportion of overall sales. Overall tobacco sales comprise 14% of annual Co-operative Food turnover. We therefore have a contractual relationship with several tobacco suppliers, who have also provided some support with regards to the tobacco display ban. However we wish to stress that this response has been formulated independently of any input from tobacco companies. No dialogue on this consultation was sought or received from tobacco companies. This response represents the views, beliefs and concerns of The Co-operative Group. This response has also been shared with Scotmid Co-operative Society which supports its contents.

A Consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland – The Co-operative Food response

The UK Consumer Co-operative Movement comprises 16 retail Co-operative Societies. Together these societies operate some 4,000 food outlets. Of these, two societies trade in Scotland: The Co-operative Group, trading under the banner of The Co-operative Food, operates 393 stores in Scotland and Edinburgh-based Scotmid Co-operative operates 191. Both societies sell tobacco products and have registered their stores accordingly on the Tobacco Retailers Register. Both societies also sell e-cigarettes.

We welcome the opportunity afforded to us by the Scottish Government to respond to this consultation. In particular we are keen to participate in an open and productive debate about the retail and use of Electronic Nicotine Delivery Systems (ENDS). ENDS are commonly referred to as 'e-cigarettes' although this nomenclature is becoming outdated. The first ENDS released onto the UK market did, intentionally, resemble the cigarettes they sought to replace. As the market has matured, however, products have diversified away from their original appearance. The latest products to become widely available on the market are more commonly called 'e-pens' as they resemble writing pens more closely than they do traditional cigarettes. For the sake of this response we propose to use the acronym ENDS to be in no doubt that we refer to all electronic devices that a consumer may use to deliver nicotine into their system.

The growing diversification of the ENDS market presents a challenge. There is, at present, no legislation in effect anywhere in the United Kingdom to govern the manufacture, marketing, sale or use of ENDS other than consumer product safety regulations. The 2014 Children and Families Act grants the UK government the power to prohibit the sale of nicotine products to persons under the age of 18 in England and (with consent of the Welsh Ministers) Wales and criminalise the proxy purchase of these products on behalf of users under 18. Draft regulations were only published for consultation in December 2014; furthermore the Children and Families Act does not apply to Scotland. The European Tobacco Products Directive will come into effect in May 2016 and will enforce mandatory safety and quality requirements on all ENDS not covered by the Medicines Directive. This will include restrictions on maximum nicotine strength and on ingredients, will mandate the provision of health warnings and user information leaflets and will introduce stricter rules on advertising. However, this will not take effect until 2016. Until this time – or such time as the powers granted under the Children and Families Act are exercised – this still leaves the UK with no legislation in effect.

Thus it has been left to individual businesses to decide how best to sell ENDS in a responsible manner. This is a matter that has exercised all co-operative retail societies in the UK. We believe that we have established a set of guidelines to help ensure that we retail these products in a responsible manner. These are:

- All Co-operative societies deal only with reputable ENDS suppliers
- All Co-operative societies stock only mainstream products – e-cigarettes and e-pens
- All Co-operative societies refuse to stock any products they feel are designed to appeal to children or young people
- All Co-operative societies exercise an age restriction at 18
- All Co-operative societies support this restriction by using a Challenge 25 policy – if the purchaser is believed to be under 25 they are asked to produce identification to verify that they are 18 or over
- All Co-operative societies ban the on-premises use of ENDS by employees
- It is left to individual Co-operative societies whether to ban the on-premises use of ENDS by members of the public. In November 2014 The Co-operative Group became the latest society to implement a policy banning their use by customers in store

We are aware that many other retailers operate some or all of these policies in a similar fashion. We are also aware that not all businesses behave in such a responsible manner. We would therefore welcome intervention from the Scottish

Government in some of these areas where the biggest benefits can be achieved – principally age restriction, proxy purchase and products designed to appeal to children and young people (e.g. flavoured 'shisha sticks'). However we believe that some of the proposals, even if they represent best practice – such as restricting the use of ENDS indoors or mandatory use of Challenge 25 – should be left to businesses to implement their own policies.

We are also keen to preserve the distinction between ENDS and tobacco. Whilst nicotine is an addictive chemical, the information we have seen is that ENDS deliver many fewer toxins and at much lower levels than conventional cigarettes. As a result we do not believe that these products pose threats to the health of users in the same way as tobacco. ENDS have come to be seen as a lifeline by those who have finally been able to quit smoking after many unsuccessful years of trying. 'Vapers' are evangelical about their benefits – as can be seen by the widespread public interest to the Welsh Government's consultation on its Public Health White Paper in 2014. There were 672 submissions in total, including 162 individual public responses and 270 public submissions of a stock letter on e-cigarettes [\[link\]](#). The tone of public responses to the proposal to restrict the use of ENDS in enclosed spaces was hostile. It may be that ongoing research identifies greater threats to public health from ENDS than are currently estimated; if that is the case we would support proportionate action being taken at that time. In the meanwhile we argue that ENDS should be treated very differently from tobacco products due to the vastly decreased levels of harm that come from their use. We are therefore opposed to the extension of existing tobacco control measures like the display ban or the Tobacco Retailers Register to cover ENDS.

Our chief aim is to help the Scottish Government produce a position which is clear, consistent and workable. It must be future-proof. It must also take into account the requirement to be effective at stopping bad behaviour from some businesses without over-burdening those businesses who are already behaving in a responsible and community-focused manner.

Age restriction for e-cigarettes

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

Yes. We believe that this should be introduced as soon as possible. Both The Co-operative Food and Scotmid already operate voluntary age restrictions at 18 on these products.

We apply these restrictions to all products containing nicotine, including nicotine replacement therapy gums and patches.

Q.2. Should age of sale regulations apply to:

a. only e-cigarette devices and refills (e-liquids) that contain nicotine or are capable of containing nicotine, or

b. all devices / refills (e-liquids) regardless of whether they contain or are capable of containing nicotine?

We have no firm opinion on this matter. We do not currently sell any devices or refills that do not contain nicotine.

Option a would make it clear that it was the delivery of nicotine that was being restricted not what the product looks like. This would, in turn, make it much easier for retailers to apply in store – it makes the key issue the nicotine content rather than subjective views on whether the product should be restricted based upon what it looks like. The proposed regulations in England and Wales are that only products containing or designed to contain nicotine would be covered. We would welcome cross-border consistency on this matter.

On the other hand it could create confusion in the minds of members of the public if an under-18 is seen purchasing something that looks like an e-cigarette but is not asked for ID. Option b would therefore protect the reputation of the retailer. It would also prevent any moves to market an 'e-cigarette-like' product which contains no nicotine but could hence be marketed at young non-smokers (perhaps with flavoured vapour). We would be very unlikely to stock such a product but Option b would prevent this development from occurring in the first place. If the Scottish Government was minded to extend any age restriction to devices and refills which did not contain nicotine we would need a very clear, workable and future-proof definition of precisely what aspects would cause a product to be age restricted. We believe that this could be difficult to agree in the short term and we would have concerns if the search for a workable definition were to delay the introduction of restrictions on nicotine-containing ENDS.

Q.3. Whom should the offence apply to?

We believe that both the retailer selling the ENDS and the young person attempting to buy the ENDS should both be regarded as committing an offence.

The offence must, obviously, apply to the retailer in line with other statutory age restrictions in place (such as alcohol, tobacco, lottery tickets or petrol). However we would, in general, like to see more emphasis on the individual responsibility of the purchaser of age-restricted products. Underage consumption of alcohol and tobacco, for comparison, are at historically low levels. The latest SALSUS report [\[link\]](#) shows that the proportion of regular smokers amongst pupils is now at the lowest level since the survey started in 1982. The proportion of pupils who had never smoked a cigarette increased between 2002 and 2013 from 45% to 76%. Similarly, the proportion who had drunk alcohol in the last week was the lowest since the series started monitoring this in 1990 with a fall from 14% to 4% of 13 year olds and from 34% to 19% of 15 year olds over just three years between 2010 and 2013. 68% of 13 year olds and 30% of 15 year olds reported having never had a proper alcoholic drink. However young people are still getting hold of products that can cause them harm despite tougher legislation, greater enforcement and more resources being spent by retailers on compliance and best practice than ever before.

Accepting the responsibility of the would-be purchaser would, we believe, strengthen the hand of the police to confiscate age restricted products possessed by underage individuals and underline the fact that it is not acceptable to seek to buy prohibited products. We have experienced instances where gangs of under-18s attempt to intimidate staff members into selling them age restricted products through threats or violence. It is not acceptable that intimidation in this manner is not regarded as an offence and all the penalties are levied at a store or staff member that was fearful of refusing the sale. The lesser penalty for attempted purchase as outlined in the consultation document would be appropriate.

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

Yes. We cannot see how age restrictions can be applied unless a member of staff is required to process the transaction.

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

We have no firm opinion on this matter. However we note that the draft regulations proposed for England and Wales do not extend the restriction to cover component parts such as batteries, charging devices and electrical leads and consistency in this matter would probably benefit both consumers and retailers. Whatever the decision of the Scottish Government on this matter we would hope that the resultant legislation is completely clear about what accessories are covered and which are not.

Proxy purchase for e-cigarettes

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

Yes.

It is very difficult for stores to detect attempts to purchase age-restricted products by proxy. As retailers we cannot get this correct 100% of the time. When we get it wrong – by preventing sale to an of-age customer intending to buy for their own legitimate consumption – we face complaints. These are not just complaints to us as a business but can also be negative news stories in the local or sometimes even national press.

However, both The Co-operative Group and Scotmid do currently extend their internal proxy purchasing policies and training to ENDS. We believe that this action is necessary to prevent a loophole in the law whereby underage individuals are able to access restricted products. Most underage smokers now get their tobacco from people old enough to legally purchase tobacco. The recently published SALSUS results for 2013 [\[link\]](#) show that for the 2% of 13 year olds who are regular smokers the most common source of their tobacco is being “given cigarettes” (50% of regular smokers); for the 9% of 15 year olds who are regular smokers the most common source is asking others to buy them for them (56% of regular smokers). Now only 54% of 13 year old regular smokers and 71% of 15 year old regular smokers have ever even tried to buy from a shop (down from 79% and 83% respectively in 2010). By making proxy purchase of these products an offence the Scottish Government would be strengthening the hand of retailers who seek to prevent ENDS from getting into the hands of children. Notably, of course, under the Tobacco and Primary Medical Services (Scotland) Act it is the person buying or attempting to buy the product for an underage individual who commits the offence.

Having said that, from our own experiences we are not aware of any attempted proxy purchases of ENDS in our stores since we started selling them; this contrasts with tobacco and – in particular – alcohol.

Domestic advertising and promotion of e-cigarettes

Q.8. Should young people and adult non-smokers be protected from any form of advertising and promotion of e-cigarettes?

We do not see the need to introduce further restrictions on the advertising of ENDS. We believe that these are very different products from tobacco and should not have the same restrictions extended to them. ENDS are often seen as a popular and viable way to reduce reliance upon tobacco. We believe that smokers should be able to be presented with information about their availability.

There is no evidence that ENDS are attracting non-smokers. The anti-smoking body ASH has expressed the view – both in private to us and also in public statements – that e-cigarette use does not ‘normalise’ the act of smoking and that their use is contributory to declining rates of smoking rather than increasing. Deborah Arnott, Chief Executive of ASH, stated in response to the proposals contained in the Welsh Government’s Public Health White Paper for restricting public use of ENDS in enclosed spaces that the argument that e-cigarette uses normalises the act of smoking “is not borne out by the evidence so far from England, where our research shows that their use is almost without exception only amongst current and ex-smokers. There is growing evidence that they are effective in helping smokers quit, and this is to be welcomed” [\[link\]](#). This statement was followed up by research conducted by ASH in partnership with YouGov which found that the number of ‘non-smokers’ who had used e-cigarettes was “negligible” (0.1%) – two-thirds of users were current smokers and one-third ex-smokers, suggesting that they have a valid role to play in helping people cease or reduce smoking.

The March 2014 'Trends in electronic cigarette use in England' Smoking Toolkit Study [\[link\]](#) further supports these statements by ASH. The study's lead, Professor Robert West, commented that "Despite claims that use of electronic cigarettes risks renormalising smoking, we found no evidence to support this view. On the contrary, electronic cigarettes may be helping to reduce smoking as more people use them as an aid to quitting" [\[link\]](#) Launching a University College London study in May 2014 he stated "Some public health experts have expressed concern that widespread use of e-cigarettes could 're-normalise' smoking. However, we are tracking this very closely and see no evidence of it" [\[link\]](#).

There is, however, evidence that children are trying ENDS. The latest SALSUS investigation [\[link\]](#) shows that in 2013 7% of 13 year olds and 17% of 15 year olds had tried them. However, the data also shows that regular usage is low – only 1% of 13 year olds and 3% of 15 year olds had used them more than "once or a few times". This is actually lower than the prevalence of regular smokers (2% of 13 year olds and 9% of 15 year olds). Moreover, most usage – as with adults – was by smokers or ex-smokers. 66% of regular smokers and 46% of occasional smokers had tried e-cigarettes. Yet even here the majority had used them only once or a few times (48% of regular and 38% of occasional smokers). So despite the fact that purchase of ENDS is currently legal at all ages only a small number of Scottish pupils have tried them more than a few times. Usage is more common amongst those who already use tobacco, which is already subject to significant age and advertising restrictions.

We would argue that introducing age restrictions on the purchase of ENDS is the most proportionate response to stop them getting into the hands of underage non-smokers. Enforcement of proxy purchase restrictions would be the most proportionate response to stop them getting into the hands of underage smokers. However, we note that despite these restrictions currently being in place for tobacco there is still evidence of underage smoking. This suggests that greater enforcement activity needs to be targeted against those who supply children and young people with tobacco. For those who have developed already developed addiction use of ENDS, where prescribed by medical professionals, could actually be a route away from tobacco.

The Co-operative would never develop any form of advertising or promotion designed to appeal primarily to young people and would never authorise any such material produced by supplier to be displayed in or around our stores. We believe that if effective action is taken to prevent under-18s accessing ENDS (age restrictions and proxy purchase bans) there will be little or no point for any business – manufacturer or retailer – to produce promotional material aimed at young people. It may be that some code of practice relating to the advertising and promotion of ENDS could be developed, along the lines of the Code of Practice on the Naming, Packaging and Promotion of Alcoholic Drinks [\[link\]](#) operated by The Portman Group, could be established, preferably on a UK-wide basis. However, rules for the marketing of ENDS came into effect in November 2014 (see below) that we believe cover off the most contentious points and provide a basis for advertising and marketing ENDS in a responsible way that prohibits the targeting of young people.

Q.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?

As per our answer to Q.8 we do not believe that there is any need to introduce additional restrictions on the advertising of ENDS any more than there is for other comparable products such as nicotine gum or nicotine patches. The Committee of Advertising Practice and the Broadcast Committee of Advertising Practice have already formulated rules for the marketing of ENDS [\[link\]](#) which came into effect on 10th November 2014. These rules are:

- Rule 1: Marketing communications / advertisements for e-cigarettes must be socially responsible
- Rule 2: Marketing communications /advertisements must contain nothing which promotes any design, imagery or logo style that might reasonably be associated in the audience's mind with a tobacco brand

- Rule 3: Marketing communications /advertisements must contain nothing which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light. This rule is not intended to prevent cigarette-like products being shown
- Rule 4: Marketing communications /advertisements must make clear that the product is an e-cigarette and not a tobacco product
- Rule 5: Marketing communications /advertisements must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health
- Rule 6: Marketers must not use health professionals to endorse electronic cigarettes
- Rule 7: Marketing communications /advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients
- Rule 8: Marketing communications /advertisements must not encourage non-smokers or non-nicotine users to use e-cigarettes
- Rule 9: Marketing communications /advertisements must not be likely to appeal particularly to people under 18, especially by reflecting or being associated with youth culture. They should not feature or portray real or fictitious characters who are likely to appeal particularly to people under 18. People shown using e-cigarettes or playing a significant role should not be shown behaving in an adolescent or juvenile manner
- Rule 10: People shown using e-cigarettes or playing a significant role must neither be, nor seem to be, under 25. People under 25 may be shown in an incidental role but must be obviously not using e-cigarettes
- CAP Rule 11: Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise e-cigarettes if more than 25% of its audience is under 18 years of age.

We regard these rules as appropriate to this evolving market. We will have to await the decisions that the Advertising Standards Agency make to enforce these rules but we believe that they cover the major concerns. Again, this is the sort of thing that could potentially be governed by a Portman Group-style Code of Practice but we believe that CAP/BCAP rules – backed up with appropriate judgements by the ASA – already provide a more rigorous framework.

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

Please see our answers to Questions 8 and 9.

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

Please see our answers to Questions 8 and 9.

Q.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)?

Please see our answers to Questions 8 and 9.

Q.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.

Inclusion of electronic cigarettes on the Scottish Tobacco Retailer Register

Q.14. Do you agree that retailers selling e-cigarettes and refills should be required to register on the Scottish Tobacco Retailers Register?

No. Tobacco and ENDS are very different. We believe that by forcing businesses to register in order to sell ENDS two things will happen. Firstly, businesses – particularly those that do not sell tobacco – may decide that it is not worth the extra administration to register and stop selling ENDS as a result. Secondly, greater confusion could be created for the public about whether ENDS are just as injurious to health as tobacco. This may result in decreased availability of ENDS to those seek to use them in order to help quit smoking and decreased will to try them as an alternative to tobacco. From what is known at present ENDS seem to provide a less-unhealthy alternative to tobacco and a gateway away from tobacco. This may be put in doubt if ENDS are lumped in with tobacco on a public health register.

Furthermore we are not aware of any immediate need for ENDS to be treated as tobacco products in this manner. We did not support the proposals for the introduction of the Tobacco Retailer Register but we can see some utility for it in identifying illicit sales of non-duty paid or counterfeit products and as a tool to identify retailers which do sell to under-18s. As ENDS do not attract duty there is no need to identify non-duty paid products. As they do not attract duty there is no counterfeit or black market in ENDS to guard against. And in our experience the dangers of underage sales do not warrant the requirement to register to sell ENDS. As the consultation document quotes, 60% of attempts to buy e-cigarettes by underage individuals in one survey were unsuccessful – even when such sales would be perfectly legal. It was stated before that we are not aware of any attempts to proxy purchase ENDS for underage individuals. We have also seen very few instances of underage individuals attempting to purchase ENDS from our stores. We therefore suggest that the Tobacco Retailer Register is used to police the sale of tobacco – which has greater health concerns and criminal activity associated with it – and not the very different ENDS.

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

No.

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

Current sanctions under the Tobacco Retailers Register include the removal of a premises from that register should a Tobacco Retailing Banning Order be made against that property. A Tobacco Retailing Banning Order can be sought by the council if there are three relevant enforcement actions taken against that property within two years.

Presumably, should ENDS be added to the Tobacco Retailers Register, enforcement actions relating to sales of ENDS would also classify as 'relevant'. In that case two enforcement actions against sales of ENDS in a short period after age restrictions are introduced – when added to a historic test purchase failure on tobacco – could lead to a premises losing the ability to sell both tobacco and ENDS. We do not think that this is equitable. It would be fairer if offences relating to the sale of tobacco and offences relating to the sale of ENDS were kept fully separate.

E-cigarettes – use in enclosed public spaces

Q.17. Do you believe that the Scottish Government should take action on the use of e-cigarettes in enclosed public spaces?

No.

Q.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?

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

The matter of permitting members of the public to use ENDS in-store is something to which all Co-operative societies have given a great deal of consideration. At the start of November 2014 The Co-operative Group became the latest society to implement a policy prohibiting their use in-store by the public. All societies prohibit use of ENDS in-store by employees, over whom they have sanctions. But there is a distance between that HR policy and a policy prohibiting members of the public to use ENDS.

Our position on this question is that this should be left to the decision of individual businesses. As you note, there is no consensus from public health professionals about whether there are risks to public health from second-hand vapour. It may be that the Scottish Government wishes to restrict their use in buildings in the public sector (hospitals, schools, libraries etc). We do not believe that this should be extended to public spaces that are privately owned on a statutory basis. We believe, as we have said before, that ENDS and cigarettes are very different products. Moreover, users of ENDS are aware of this. Our experience is that vapers are very aware of their 'right' to vape and resent being compared to smokers. We anticipate that it may be hard to enforce our policy on in-store use by members of the public in certain instances where the vaper is strident about there being no passive health harms caused by the water vapour produced by the ENDS. We anticipate that this will remain the case even should legislation be introduced to ban the use of ENDS in enclosed public spaces – the tone of public responses to this proposal in the Welsh Public Health White Paper earlier in 2014 was hostile. In the event of mass disobedience to any ban on their use we as a business would not wish to be held liable for our inability to enforce the law on members of the public.

As stated earlier, the evidence we have seen from ASH and SALSUS suggests that public use of ENDS is not resulting in a large number of non-smoking children and non-smokers choosing to access them. Nor do we think that use of ENDS necessarily undermines the smoking ban. The smoking ban was a genuinely successful piece of legislation which is widely supported. However there seems to be widespread public acceptance that ENDS are not cigarettes. ENDS can be distinguished from cigarettes, particularly at the close distance that would be required to request a customer to desist. Many of the earliest models were explicitly designed to resemble conventional cigarettes but the latest models can more accurately be described as 'e-pens' as they distinguish themselves from cigarettes. The LED at the end is in most cases green, the vapour produced dissipates rapidly and there is no tell-tale odour produced.

While we believe that ENDS and cigarettes can be clearly distinguished we do not believe that it is so easy to distinguish over-the-counter ENDS from those ENDS which may hold a medicines licence. The consultation document makes it clear that these regulations will not apply to licensed ENDS used as nicotine replacement therapy. It is impossible for an employee to be able to tell at a glance whether an ENDS has been licensed or not and a user would be unable to prove this if challenged. We therefore believe that such a general policy that excluded licensed ENDS would be unworkable. Either licensed products must be included in any ban or no ENDS can be restricted in this manner.

We would therefore encourage the Scottish Government to make no regulations prohibiting general use of ENDS in enclosed public spaces. However, there is action that could be taken to help businesses introduce such a policy of their own volition. We would encourage the Scottish Government to revisit the rules on No Smoking signage as laid down in the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 to see if any accommodation can be made to allow those premises who wish to customise the permitted signs to enable them to make explicit reference to ENDS to do so.

Q.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?

No response.

Age verification policy 'Challenge 25' for the sale of tobacco and electronic cigarettes

Q.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?

No.

We absolutely believe that use of a Challenge 25 policy to help prevent sales to underage individuals is best practice and is to be encouraged. The Scottish Government's clear support of Challenge 25 for tobacco sales and their encouragement of all tobacco retailers to adopt the policy is very welcome. It was retailers themselves, the members of the Retail of Alcohol Standards Group, which first developed the Challenge 25 (originally 'Challenge 21') policy in 2005. Both The Co-operative Group and Scotmid were both using Challenge 25 on sales of alcohol prior to the policy being enshrined in Scottish law by the Alcohol etc (Scotland) Act 2010. We both currently use it on sales of tobacco. We both currently use it on sales of ENDS – despite there currently being no statutory age restriction on these products.

However, we oppose the introduction of a legal requirement for Challenge 25 to be observed. Challenge 25 was introduced by retailers to give them a 'buffer' to ensure that they would not sell alcohol to under-18s. This 'buffer' would also ensure that they did not break the law and face enforcement action. By making it a legal requirement to follow Challenge 25 that safety buffer is removed. Previously the legal requirement was to prevent sales of alcohol to under-18s and Challenge 25 was a useful tool to achieve compliance. Since the Alcohol etc (Scotland) Act came into effect in October 2011 the legal requirement has been to ask for ID from all individuals subjectively judged to be under 25. So should alcohol be sold to an under-18 the law would be broken twice for the same offence – once for the sale to an underage individual and another time for not checking proof of age. However, alcohol could be sold legally to an of-age 24-year-old – but if ID was not checked the law would still be broken despite the fact that no licensing objectives were breached.

This is why we fully support the use of Challenge 25 but oppose the legal requirement to do so. Challenge 25 was always meant to be a voluntary best practice measure which provided a safety buffer to ensure retailers always got it right. By making it a legal requirement the safety buffer is removed. Instead of being judged on an objective matter of fact (whether the customer was under 18) retailers would be judged on an entirely subjective measure (whether the customer looked to be under 25).

Q.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?

No. We believe that selling tobacco to someone under the age of 18 has an objective standard by which the action can be judged – whether the purchaser is under 18 or not. Introducing a subjective element – whether or not that individual looks to be younger or older than 25 – complicates the matter and makes it harder to prove an offence beyond reasonable doubt. Failure to ask an of-age individual for ID is clearly a lesser offence than selling to an underage individual as no one is harmed.

This view is even more strongly held in the case of ENDS where the health harm caused by use is much lesser than that caused by use of tobacco.

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

Q.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?

No. This would have a disproportionate impact upon convenience store operators. In most stores, regardless of size, tobacco is only sold from one area. The tobacco gantry is located behind a counter commonly referred to as the 'kiosk'. In supermarkets the kiosk will be in addition to other till-points. In convenience stores the kiosk will often be the only serving area in the store. Tobacco also provides a disproportionately high contribution to the sales of convenience stores as opposed to larger supermarkets – overall tobacco makes up 14% of turnover in The Co-operative Food.

This means that, should, 16 and 17 year old members of staff be prohibited from selling tobacco and ENDS without authorisation there is a very great disincentive to having them man tills at the kiosk. In supermarkets they can be moved to other tills which are less likely to see products requiring authorisation. But in convenience stores there are no other tills. This could result in convenience store operators discriminating against under-18s when hiring members of staff. This will reduce the opportunities for employment for 16 and 17 year olds.

Q.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?

There is no clear answer to this. There is already a structure in place with regard to the sale of alcohol. Every premises will have a Designated Premises Supervisor responsible for the sale of alcohol at that site. This individual will always possess a personal alcohol licence, thereby proving that they have undergone relevant training, and will be in a position of responsibility at that premises. Even in our smallest stores we are likely to have other personal licence holders who have undergone further accredited training into the responsibilities accompanying sale of alcohol and the requirement to not undermine the licensing objectives. There is therefore a formal in-store structure where certain individuals are recognised as being responsible for the sale of alcohol.

This in-store structure does not exist with regards to the sale of tobacco. It certainly does not exist with regards to the sale of ENDS which are currently unregulated.

It would not be appropriate to require the person who has registered the premises to authorise the sale. In the cases of multiple store operators like The Co-operative Group or Scotmid the registration would be handled by someone at a central support centre with limited direct interaction with the store. The store manager is likewise not appropriate because due to shift patterns they may not always be on site. Even when a store manager or deputy is on site they may be engaged in something that would prevent them being able to come to the tills to authorise a sale (placing orders, dealing with an enforcement visit, conducting staff training or handling a disciplinary for example). Therefore the only option would be to have the sale authorised by someone over the age of 18. The adult will not necessarily be more competent or better trained than the under-18.

We would therefore argue that 16 and 17 year old store staff are allowed to proceed to sell tobacco and ENDS without the requirement for authorisation, as at present.

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

a. the penalty

b. the enforcement arrangements

No.