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Consultation on the Proposed Tobacco Sales Licensing (Scotland) Bill – Response by ASH Scotland

1. What concerns, if any, do you have about the enforcement of the minimum age limit for the purchase of tobacco?

Research shows that young people have little difficulty in buying cigarettes, that 15% of 15 year olds are regular smokers, that 82% of 15 year-old smokers report buying their own cigarettes, and that between one quarter and one third of retailers continue to sell tobacco to under-age customers.^{1,2,3} ASH Scotland considers that these data show that the existing law restricting the sale of tobacco to over-18s is not being enforced as effectively as it could be, and that the current penalties are not acting as a deterrent.

The Scottish Government, as a devolved administration of the UK, is signed up to the provisions contained in the WHO Framework Convention on Tobacco Control (FCTC)⁴. Article 16 states that: “Each Party shall adopt and implement *effective* legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen.” Scotland has a law prohibiting the sale of tobacco products to under-age customers, and in October 2007 the minimum age for the sale of tobacco was increased from 16 to 18.

There is however considerable evidence that children beneath the minimum age for the sale of tobacco have little or no difficulty in buying cigarettes. Data gathered in 2006 show that at age 15, 12% of boys and 18% of girls are regular smokers,⁵ while 82% of 15-year old smokers and 47% of 13-year old smokers report buying their own cigarettes.⁶ It is clear therefore that existing controls on under-age smoking are having little impact on the availability of cigarettes to children and young people below the legal purchase age.

While the law provides for retailers found to be selling tobacco underage to be prosecuted, and for those convicted to face a maximum fine of £2500, in practice prosecutions are rare and any fines levied many times lower than the maximum. Answers to parliamentary questions reveal that over the last six years there have been only 17 convictions, with an average fine of £188.⁷

Such infrequent court action would not be remarkable if the offence of selling tobacco to children was an infrequent occurrence. But recent test purchase exercises⁸

indicate that between a quarter and a third of tobacco retailers are making illegal sales of tobacco to under-age customers.

ASH Scotland does not consider that the existing law, while allowing for fines of up to £2500, is being effectively or adequately enforced. In spite of the best efforts of trading standards officers, the limited resources allocated to trading standards departments by many local authorities mean that the likelihood of detection and subsequent court action does not act as an effective deterrent to those retailers who are prepared to make illegal sales of cigarettes to children and young people under the age of 18.

2. What are your views on the effectiveness of a positive licensing scheme, i.e. a scheme requiring all outlets to apply for and receive a licence before tobacco products could be sold.

ASH Scotland takes the view that a positive licensing scheme has several distinct advantages over negative licensing that more than outweigh any increased costs. Positive licensing has been shown to be extremely effective when backed up with proactive enforcement efforts.

ASH Scotland supports a positive licensing scheme – we believe that positive licensing is likely to be more effective than a negative licensing scheme because positive licensing:

- sends a clear message to the retailer that selling tobacco (a lethal substance that kills one in two long-term users) is a conditional privilege and not an absolute right
- ensures that those selling tobacco are fully apprised of their legal responsibilities
- provides for the possibility of administrative enforcement options, including fixed penalty notices and licence suspension or withdrawal, rather than lengthy, cumbersome and expensive legal action through the courts
- allows for all retailers holding a tobacco retail licence to receive targeted information related to the sale of tobacco
- brings the regulation of sales of tobacco into line with those of alcohol.

The sale of alcohol has been the subject of positive licensing for many years. This reflects the potential harm to society as a whole and young people in particular caused by the consumption of alcohol. There is no doubt that tobacco constitutes a far greater health threat than alcohol – research indicates that smoking is implicated in almost 13,500 deaths per year, or around one in four of all deaths in Scotland⁹ – yet the sale of tobacco remains largely free of the sort of regulation by which the sale of alcohol has long been controlled.

3. What are your views on the effectiveness of a negative licensing scheme, i.e. a scheme whereby any outlet is entitled to sell tobacco without a licence and sanctions are only applied once a breach of the law has occurred.

ASH Scotland considers that negative licensing misses an opportunity to engage retailers in the regulation of tobacco sales until an offence has already taken place. The deterrent effect provided by requiring retailers to actively apply for a licence is lacking under such a scheme.

Negative licensing – a scheme whereby any outlet is entitled to sell tobacco without a licence, and contact with the regulatory framework only takes place once a breach of the law has already occurred – is a good description of the system we currently have, a system that has failed to prevent between one quarter and one third of tobacco retailers from selling cigarettes to under-age customers. Such a system is missing an opportunity to inform retailers about their responsibilities and thereby provide a powerful deterrent effect.

The nominal threat of a £2500 fine – in practice never applied – has proved to be ineffective in preventing a significant minority of shops from continuing to sell tobacco to children. We need a clear and effective system that acts as a deterrent to retailers.

4. Do you have a preference for either a positive or a negative licensing scheme?

ASH Scotland supports the introduction of a positive licensing scheme, and considers that it will provide a greater deterrent to the retailers who currently sell tobacco to under-age customers than negative licensing, and will enable more effective enforcement to be carried out. Positive licensing also enjoys a number of other advantages, including the ability to communicate targeted information to retailers, the ability to deliver swift and cost-effective enforcement, and the fact that tobacco retailers can be fully appraised of their legal responsibilities.

ASH Scotland is supportive of positive licensing, believing not only that it would be much more effective than negative licensing in tackling sales of tobacco to underage customers, but that only such a system accurately reflects the very real harm caused to children and young people by smoking and the uniquely addictive nature of the product. It is known that someone who begins smoking tobacco aged 14 is five times more likely to develop lung cancer than someone who begins at age 24, and fifteen times more likely than someone who never smokes.¹⁰

A report¹¹ on tobacco retail licensing produced by the Allen Consulting Group for the Australian Government Department of Health and Ageing included a “balanced scorecard approach”, an attempt to quantify the net effectiveness of various models of tobacco retail licensing.

In addition to the positive and negative licensing discussed above, the report also scored two other models, notification/registration and accreditation/certification, details of which are available on pp 37-38 of the report.

The scorecard uses five criteria, chosen to reflect the costs and benefits of the various tobacco control measures. The criteria used by the Allen Consulting Group were:

1. Licensing compliance costs
2. Licensing administration costs
3. Other tobacco control compliance costs
4. Other tobacco control administration costs
5. Level of tobacco control enforcement

Each criterion was then ascribed a score of between -5 to +5, with no licensing being equivalent to a score of zero.

The Allen Consulting Group's tobacco licensing scorecard came out as follows:

Criterion (see above)	Notification/ registration	Accreditation/ certification	Negative licensing	Positive licensing
1	-1	-2	0	-2
2	-1	-1	0	-1
3	+1	+1	+2	+3
4	+2	+1	+1	+1
5	+1	+1	0	+4
Total	+2	0	+3	+5

While it must be stressed that the criteria are used in an unweighted form (i.e. each criterion is given equal weighting), the Allen Consulting Group concluded that the preferred option (i.e. positive licensing) would remain the same if an alternative weighting were applied. This is because the final criterion – level of tobacco control enforcement – would be weighted more heavily and lead to positive licensing having an even greater net final score. This quantified approach used by a leading Australian consulting group supports the view that positive licensing is preferable to any other form of tobacco retail regulation.

The position of the Allen Consulting Group contrasts with the position taken by the Department of Health in England and Wales, who in their Consultation on Under-Age Sale of Tobacco¹² assumed that positive licensing would be no more effective than negative. ASH Scotland questions this assumption, as well as the DoH's assumption that neither licensing scheme would result in a greater than 10% reduction in under age sales. The experience from Australia demonstrates that positive licensing, backed up with active enforcement efforts on the ground, can result in compliance with legislation of up to 95%.¹³

5. What difficulties, if any, do you anticipate with the proposed legislation?

Positive licensing has been used to control the sale of alcohol for many years in the UK and is increasingly being introduced to control the sale of tobacco in other parts of the world. While there may be opposition from some quarters, ASH Scotland does not anticipate any legal or major practical difficulties with the proposed legislation.

Licensing as a means of regulating the sale of harmful and potentially harmful products is well-established. Sales of alcohol have been subject to positive licensing schemes for many years, and increasing numbers of jurisdictions around the world are applying a similar form of regulation to sales of tobacco.

Licensing of tobacco sales, both positive and negative, has been introduced in the majority of states of the USA, in several Canadian provinces, in New Zealand and in all Australian states and territories. The Republic of Ireland is planning to introduce a compulsory register of tobacco retailers, a system that bears strong similarities to positive licensing.

Concerns have been raised that a system of tobacco licensing might lead to greater incidence of tobacco smuggling in an attempt to circumvent any increased regulation.

A licensing system would make it easier to target illicit tobacco sales by providing the added offence of selling tobacco without a licence.

Legislation to require sales of tobacco to be licensed is both politically and practically feasible, it must however be accompanied by increased enforcement activity if it is to achieve maximum success in tackling the sale of tobacco to under-age customers.

6. Who should bear the costs of a tobacco licensing scheme?

ASH Scotland considers that the licensee should pay, in line with the licensing system in place for alcohol. Whoever bears the costs, any future tobacco licensing scheme must be both affordable and administratively simple to apply.

There are essentially three options: entirely funded by tobacco retailers, entirely funded by the taxpayer (at either a local or Scottish level) or a combination of the two. The consultation paper makes cogent arguments for each option; the taxpayer should pay since the main economic beneficiary of any tobacco regulation will be the taxpayer-funded health system. Alternatively, tobacco retailers should pay, since this follows the cost recovery model of licensing that is being applied to sales of alcohol.

ASH Scotland believes that the funding model for tobacco licensing should mirror that for other licensing schemes whose objectives include the promotion of public health and the protection of children and young people from harm.

Were the costs of any future tobacco licensing scheme to be subsidised by the taxpayer while the existing alcohol licensing scheme continued to be operated on a full cost-recovery basis, this could send out a confusing and misleading message that tobacco is a less dangerous product than alcohol.

ASH Scotland feels that the retailer should bear the costs of any future tobacco licensing scheme, but we do not believe that such a system should be a revenue raising exercise, nor should it impose a disproportionate cost or administration burden on the small businesses that make up much of the retail tobacco trade. The experience of many of the jurisdictions that have introduced positive tobacco licensing schemes shows that tobacco licensing can be provided at a relatively low cost to the retailer. A tobacco seller's licence in Tasmania, for example, costs only A\$93.75 per outlet;¹⁴ this is equivalent to just over £40 at today's exchange rates. The application involves only a single form that can be completed in less than quarter of an hour. In contrast, a liquor licence in Edinburgh in 2007 costs £172 for a new application or £86 for a renewal.¹⁵ In addition to the licence fee itself, an application must be accompanied by additional certificates and fees to a number of other council departments.¹⁶ The total cost for a new liquor licence comes to £432; in addition to this financial cost, the paperwork involved is complex, and an application likely to consume a considerable amount of time. The level of complexity and cost is unnecessary for a system of positive tobacco licensing.

Relative to the existing costs of a new liquor licence therefore, a tobacco retail licence could be accessed quickly and at reasonable cost to the retailer via the use of an online application process. Although there will be some retailers without internet access in their own homes, such access is easily and cheaply available in many outlets including public libraries and internet cafés.

7. What sanctions would be appropriate for a retailer found to have sold or supplied tobacco to under-age customers?

Sanctions aimed at deterring the sale or supply of tobacco to children and young people must be proportionate, meaningful and apply for a first offence. ASH Scotland believes that fixed penalty notices could be used for all offences, with additional licence suspensions being appropriate for subsequent offences.

For any legislation to be effective, the sanctions that accompany breaches in the law must be proportionate and meaningful. The present system allows for a warning to be issued for a first offence; only when the offence has been detected for a second time is a report sent to the procurator fiscal. Currently up to one in three shops is prepared to sell cigarettes to children, an indication that they do not expect to be prosecuted or convicted of this offence.

ASH Scotland believes that the offence of selling tobacco to children or young people below the legal purchase age should not go unpunished even for a first offence. It is known that smoking that begins in childhood is strongly linked with continued smoking into adulthood, and with greater consumption of tobacco. Research also shows that a smoker commencing the habit aged 14 is five times more likely to die of lung cancer than a smoker commencing at age 24.¹⁷

Given the appalling long-term health impacts of childhood smoking, ASH Scotland believes that every breach of the minimum purchase age for tobacco should be penalised. We feel that a first offence should be punished with a fixed penalty notice not exceeding Level 2 on the Standard Scale (currently £500¹⁸); this would send a strong message without imposing a costly administrative burden upon the legal system. In line with legislation allowing for other fixed penalty notices, a discount could be offered for persons paying the penalty notice within a fixed period of time.

8. If on-the-spot fines are applied, what appeals process should be put in place?

ASH Scotland believes that there must be an appeals process open to retailers served with fixed penalty notices. This is consistent with the arrangements in place for other fixed penalty notices such as parking tickets and notices issued under the Smoking, Health and Social Care Act.

Fixed penalty notices are frequently used in lieu of time-consuming and costly court action; such a notice offers a person the opportunity of discharging any liability to conviction for a range of offences. Fixed penalty notices are commonly used to enforce the ban on smoking in enclosed public spaces introduced by the Smoking, Health and Social Care Act 2005.¹⁹

Under this act, any person issued with a fixed penalty notice may, before the expiry of the period for payment of the penalty, make a request in writing for a hearing in respect of the offence. The regulating authority is obliged to grant such a hearing.

ASH Scotland feels that a similar appeals process should be followed in respect of fixed penalty notices issued in connection with tobacco retail licensing.

9. *What sanctions should be applied to retailers who repeatedly sell or supply tobacco to under-age customers?*

ASH Scotland considers that fixed penalty notices should be levied for all offences; for a second or subsequent offence, the right to sell tobacco should also be withdrawn. Second and third offences could be addressed with three and six month suspensions respectively.

Retailers who continue to break the law in relation to the minimum tobacco purchase age should face longer suspensions. For a second offence, they could be prohibited from selling tobacco for a period of up to three months; future breaches of the law could result in even longer suspensions.

10. *Do you have any other comments on the proposal?*

ASH Scotland takes the view that tobacco licensing must be seen as a means to enabling more effective enforcement, rather than an end in itself. Trading standards departments must receive additional resources to allow them to carry out more comprehensive enforcement, and should also have enhanced powers with relation to tobacco sales. Any future tobacco licensing bill must cover all forms of tobacco, whether smoked or smokeless.

While ASH Scotland takes the view that a positive licensing scheme would make a significant contribution to efforts to prevent the sale of tobacco to children and young people, we do not see any licensing scheme in itself as a solution to the problem of under-age tobacco sales.

We take the view that, rather than being an end in itself, a positive licensing scheme is a means to an end that will facilitate and enable more effective enforcement to take place. A positive licensing scheme will act as a deterrent to prevent retailers from selling cigarettes to children and young people, but only if the retailers believe that there is a realistic probability of the offence being detected.

It is clear that in some council areas, the levels of enforcement activity carried out by trading standards officers is not sufficient to provide such a probability, and unless enforcement is stepped up, any deterrent effect will be minimal.

The experience from Tasmania reinforces this message: a positive licensing scheme was introduced as part of the Public Health Act 1997, and since that time, a number of surveys have been carried out by Quit Tasmania.²⁰ In four surveys carried out between 1998 and 2002, the non-compliance rate varied between 48% and 78%, showing that licensing on its own is not enough to cause a culture change among tobacco retailers.

In 2004, however, another survey was carried out following an increase in enforcement activity. On that occasion, non-compliance fell dramatically to only 5%.²¹ The next survey, carried out in 2006, saw non-compliance rise again to 26%.²²

So any licensing scheme *must* be accompanied by increased enforcement activity if it is to achieve maximum impact. It is essential that additional resources be allocated to local authorities, and for there to be a statutory duty on them to carry out annual test purchasing or other equally effective enforcement activities.

Senior trading standards officers have pointed out (personal communication to Sheila Duffy, 29th November 2007) that the existing legislation outlawing the sale or supply of tobacco to under-age customers does not provide the same powers to enforcement staff as they have with relation to other age-restricted goods. Virtually all other legislation enforced by Trading Standards allows officers:

- The power to make test purchases
- The power of entry and inspection
- The power of seizure of goods and documents
- The power to request reasonable assistance.

Such powers should be extended to trading standards officers in respect of tobacco to enable them to carry out the enforcement of tobacco sales legislation more effectively.

Cigarettes make up the bulk of tobacco products bought by under-age customers, with a smaller proportion smoking hand-rolled tobacco.²³ Smokeless and oral tobacco use is uncommon outside certain ethnic minorities. However, ASH Scotland takes the view that any future tobacco licensing scheme should cover all forms of tobacco, whether smoked or smokeless.

In conclusion: a positive licensing scheme has the potential to enable and facilitate much more effective enforcement, but only if trading standards officers receive adequate resources. Consideration should be given to making the effective enforcement of tobacco sales legislation a statutory function of local authorities. Finally, the powers available to trading standards officers should be at least equal to the powers that trading standards officers have to enforce other legislation relating to age-restricted goods and products.

11. Can you identify any equal opportunities impacts (either positive or negative) arising from this proposal.

There are significant health inequalities associated with smoking, with a clear correlation between smoking rates and socio-economic factors. Smoking is recognised as a major contributor to health, poverty and social inequalities in Scotland. It is known that smoking accounts for half of the difference in life expectancy between men from the poorest and richest social classes. ASH Scotland considers therefore that efforts to tackle smoking rates by reducing the easy availability of cigarettes to children and young people can only help to address these inequalities.

There is a clear correlation between smoking levels (and smoking-related morbidity) and socio-economic conditions. The Atlas of Tobacco Smoking in Scotland²⁴ published in early 2007 showed how prevalence of smoking at NHS board and council level vary widely across Scotland, and how the use of tobacco is highest amongst the most disadvantaged communities. Smoking is recognised as a major contributor to health, poverty and social inequalities in Scotland. Furthermore, smoking accounts for half of the difference in life expectancy between men in the lowest and highest socioeconomic classes,²⁵ while death rates from tobacco use are two to three times higher among disadvantaged social groups than among the better off.²⁶

Efforts therefore to tackle the availability of cigarettes and tobacco to children and young people will contribute to a long-term reduction in the overall numbers of

smokers in Scotland, and can only help to address the inequalities caused by smoking.

¹ Evening Times, *1-in-3 Glasgow shops are caught selling cigarettes to kids*, 19th September 2007. Available from: <http://www.eveningtimes.co.uk/news/display.var.1698606.0.0.php> [Accessed 18th December 2007]

² Sunday Herald, *One third of shops breaking new law*, 9th December 2007. Online. Available from: http://www.sundayherald.com/search/display.var.1891525.0.onethird_of_shops_breaking_new_law.php [Accessed 18th December 2007]

³ Sunday Mail, *Told to Give Up. Stores selling cigs to kids*. 30th December 2007.

⁴ World Health Organisation, *Framework Convention on Tobacco Control*. (online). Available at: http://www.who.int/entity/tobacco/framework/WHO_FCTC_english.pdf [Accessed 16th January 2008]

⁵ Maxwell, C., Kinver, A., Phelps, A. *Scottish Schools Adolescent Lifestyle and Substance use Survey (SALSUS) National Report: Smoking, Drinking and Drug Use among 13 and 15 year olds in Scotland in 2006*. [Online] Drug Misuse Information Scotland (DMIS) 2007. Available from: http://www.drugmisuse.isdscotland.org/publications/local/SALSUS_2006.pdf [Accessed 12th October 2007]

⁶ Ibid.

⁷ Revealed in an answer to a written parliamentary question tabled by Christine Grahame (S3W-3811), answered by Shona Robison on 12th September 2007. Available at: <http://www.scottish.parliament.uk/business/pqa/wa-07/wa0912.htm> [Accessed 11th Jan 2008]

⁸ Evening Times, *1-in-3 Glasgow shops are caught selling cigarettes to kids*, Op Cit.

⁹ Health Scotland, ISD Scotland and ASH Scotland. *An atlas of tobacco smoking in Scotland: A report presenting estimated smoking prevalence and smoking-attributable deaths within Scotland*. [Online]. NHS Scotland/Scottish Public Health Observatory. 2007. Available from: <http://www.scotpho.org.uk/nmsruntime/saveasdialog.asp?IID=3907&slD=3256> [Accessed 12th October 2007]

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¹¹ The Allen Consulting Group. *Licensing of Tobacco Retailers and Wholesalers: Desirability and Best Practice*, Sydney. 2002

¹² Department of Health. *Consultation on Under-Age Sale of Tobacco*. [Online]. 2006. Available from: http://www.dh.gov.uk/prod_consum_dh/idcplg?IdcService=GET_FILE&dID=21803&Rendition=Web [Accessed 12th October 2007]

¹³ Quit Tasmania. *Brick Wall – Illegal Sales of Cigarettes to Children: Retailer Compliance Testing June 2004*. [Online]. 2004. Available from: http://www.quittas.org.au/reports/200406_brick_wall_final_report.pdf [Accessed 12th October 2007]

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