



Working for a tobacco-free Scotland

ASH Scotland response to the Tobacco and Primary Medical Services (Scotland) Act 2010 Consultation on Tobacco Draft Regulations

INTRODUCTION

ASH Scotland welcomes the opportunity to submit a response to this consultation, and congratulates the Government on the Tobacco and Primary Medical Services (Scotland) Act, an important step towards reducing the number of young people in Scotland who become smokers through reducing the visibility and availability of tobacco products to young people.

ASH Scotland is an independent Scottish charity working in partnership to protect people from the harm caused by tobacco. As such, ASH Scotland strongly supports the policy aims of the regulations - to protect children and young people from the promotion of tobacco products in the retail environment, and to reduce the availability of tobacco and smoking-related products to those under the age of 18.

Smoking accounts for almost 13,500 deaths every year (24% of all deaths in Scotland)¹. 15,000 young Scots begin smoking each year², with around two-thirds of them starting to smoke under the age of 18³. Any consideration of the proportionality of youth smoking prevention measures must take into account the enormous tobacco industry-driven impact on life expectancy, health and the economy which we currently live with.

There is good evidence^{4,5} that the display of tobacco products⁴ at the point of sale is associated with recruitment to smoking. A registration scheme will help crack down on both rogue retailers who sell to the 57% of 15 year-old smokers⁶ who buy their cigarettes from shops, and the illicit trade. ASH Scotland considers the draft regulations to be generally effective, proportionate and workable, but would like to take the opportunity to highlight several areas which could be strengthened, in the sections that follow.

1. DISPLAY OF TOBACCO AND PRICES REGULATIONS: DISPLAY OF TOBACCO

1.1. Do you agree that tobacco retailers should be allowed to implement the Act by displaying tobacco and smoking related products in the way set out in the regulations?

The Act seeks to close the remaining loophole for tobacco promotion within the retail environment and so to reduce its attractiveness and availability to children. As such, it is important that the requirements are absolutely clear. Clarity and simplicity will support retailers to implement the legislation, government to explain it, and trading standards officers to enforce it. It will also narrow the opportunities for the tobacco industry to exploit any grey areas.

Justice McCombe, presiding over a legal challenge by the tobacco industry to the Tobacco Advertising and Promotion Act (TAPA) 2002 regulations, predicted that '*... flexibility and "loopholes" in the rules would be likely to be ruthlessly exploited by the industry.*'⁷

The characteristic abuse of loopholes by the industry has been well documented by researchers^{8,9,10} in a number of countries in reaction to a variety of different forms of regulation. There is no reason to believe that the situation will be any different regarding the restrictions on point of sale display in Scotland. In fact, as the restrictions on tobacco visibility and availability grow tighter and competing companies must work harder for their share of a dwindling market, ever more ingenious promotion solutions are being explored. Recent examples include the 'barcode', reminiscent of the Philip Morris brand Marlboro cigarette livery, which appeared on Ferrari's Formula 1 cars¹¹ before it was recently withdrawn due to protest; or the high-profile branding of the Davidoff Swiss Indoors tennis championship, with Imperial Tobacco's Davidoff cigarette branding beamed into homes around the world throughout the tournament.

Experience from Canada has shown that, even when tobacco products are concealed from view the majority of the time, tobacco manufacturers' payments to retailers to 'display product or sign' increased¹². A Canadian current affairs magazine, analysing this apparent contradiction¹³ describes how a tobacco company pays a retailer to have their products given a certain prominent space on a covered up gantry: "[t]heir reasoning is that, if you should open the doors to fill it, somebody in the store will see the brand."

In Ireland, where in many smaller stores gantries have been covered by sliding doors, we have heard reports of coloured lighting and bright shelf fillers being introduced to draw the eye to the tobacco shelving when doors are open for a sale.

For these reasons, Kenneth Gibson MSP lodged an amendment at stage two of the Bill which sought to avoid incidental display and required out-of-sight tobacco storage. Given the inevitability of tobacco industry attempts to find ways around marketing limitations, this remains the optimum solution.

A similar point was raised during the Bill's stage three debate when Dr Richard Simpson MSP, a member of the health and sport committee, sought to amend potential loopholes which could lead to various features on a covered gantry being used to promote tobacco products. These amendments were narrowly defeated but the Minister for Public Health and Sport stated: "*I assure the chamber that I will make it clear that the advertising of lighters over gantries and the use of lighting around gantries will not be acceptable.*"¹⁴

ASH Scotland believes that, to limit young people's exposure to tobacco in the retail environment and to reduce the number of future loopholes, regulations 4.(1)(b) and 4.(2) should be removed, meaning out-of-sight storage solutions will be required.

The definition of 'requested display' in regulation 4.(2) should be retained. In addition, regulation 4.(1)(a) must be amended to ensure that a requested display is only permissible if the individual who makes the request is 18 or over.

A regulation should be considered to ensure that no offence is created by the display of tobacco products if that display is requested by a duly authorised officer of an enforcement authority, a constable, or an officer of Revenue and Customs.

If the Scottish Government chooses to retain regulations 4.(1)(b) and 4.(2), ASH Scotland believes that it should be amended to forbid, in the allowable display area, lighting or the use of any 'other feature' as defined in regulation 2.(1)(c).

The definition of "incidental display" in regulation 4.(2) should include the words 'for no longer than is necessary to carry out the task', to guide enforcement officers.

The area of allowable display must not be increased. During the stage three debate of the primary legislation, where concerns were raised about the possible exemptions to the display

ban which these regulations might permit, the Minister for Public Health and Sport declared, "Regulations will limit the display of tobacco to 120cm², based on figures that have been provided by retailers showing that each row of a gantry in a small shop is around 15cm high and that the widest section for a tobacco product is 8cm."¹⁵

1.2. Do you agree that specialist tobacconists, cash and carries and duty free shops should be allowed to implement the Act by displaying and advertising tobacco products and smoking related products in the way set out in the regulations?

The decision to forbid the display of tobacco and smoking-related products when they are visible outside a specialist tobacconist is welcome. This issue was raised by Dr Ian McKee MSP during the Health and Sport Committee's stage two consideration of the Bill¹⁶, as the area outside the premises of a specialist tobacconists can be visible to children and young people. It is acknowledged that the numbers of specialist tobacconists in Scotland is limited, and that they are not known to be frequented by, or to sell the type of products that would generally appeal to, young people. However, it is important that, given the overall policy aim of limiting the visibility of tobacco products within the Act, such establishments do not become loopholes that undermine the spirit of the primary legislation. Hence we support regulation 3.(4).

Regarding bulk and duty-free tobacconists, ASH Scotland believes that they should comply with the same regulations as all other tobacco retailers. Regulation 4.(1)(c) should be removed.

However, if the Scottish Government chooses to move forward with this exemption, it must be made clear to bulk and duty-free tobacconists and enforcement officers, that an infringement of regulation 4.(1)(c) will lead to the exemption being removed for that class of businesses.

In addition, the regulation must be amended to state that such displays must not be situated in such a location within duty-free or bulk tobacconists that shop layout or design requires or encourages customers to pass through the area where tobacco products are displayed. The tobacco area must be subjected to age restriction and verification on entrance.

1.3 Do you agree that these proposed regulations set out an effective, proportionate and workable approach?

ASH Scotland believes that, with incorporation of the amendments above, the proposed regulations set out an effective, proportionate and workable approach.

It is essential that the regulations are commenced no later than the dates suggested in the consultation draft. The proposed timescales effectively balance the need for urgent action to prevent youth smoking, with adequate time for retailers and enforcement agencies to prepare for the changes.

1.4 Do you believe that these regulations are enforceable?

ASH Scotland believes that, with incorporation of the amendments above, the proposed regulations are enforceable. It is essential that the regulations are supported by clear and timely guidance to ensure that retailers and enforcement officers understand their responsibilities.

It should be noted that the legislation will reach retailers who may not see themselves as tobacconists, including retailers selling oral tobacco products such as paan. Communications and enforcement plans must encompass all retailers of tobacco products.

The final regulations and guidance must clearly maintain the public health objectives of the primary legislation.

2. DISPLAY OF TOBACCO AND PRICES REGULATIONS: DISPLAY OF PRICES

2.1. Do you agree that tobacco retailers should implement the Act by being allowed to display price lists for tobacco and smoking related products in the way set out in the regulations?

We welcome the Scottish Government's clear intention to minimise loopholes in the display of prices, while providing required information for customers and retailers. However, we believe that the regulations as drafted may provide unintended loopholes which could be exploited by the tobacco industry to promote their products at point of sale.

The regulations would more clearly support public health objectives if they were to clarify that all price displays must only show the current price of each brand variant sold. It should not be permissible to draw attention to any price reductions by, for example, scoring out an old price and replacing it with a new value. The number of price lists available in-store should be kept to the minimum required, which we believe is one list in each sales area. The current drafting could result in many poster-size lists in a relatively small space, drawing attention to the tobacco category; an on-request price list at each till and one on display per area is sufficient for communication to potential customers.

In regulation 10, on requirements for price lists available only on request, it is essential that it is clear that such lists may only be provided to customers aged over 18. The allowable size of product pictures seems excessive; we would prefer that product pictures be limited to no more than 25 square centimetres.

The lack of constraints on display of prices for bulk and duty-free tobacconists is concerning. Price lists for these retailers should be limited in size, with no border or frame, and should be placed only within the tobacco area, not visible from outside. There should be a limit of one price list per tobacco area.

Like trade-to-trade retailers, specialist tobacconists should not be able to display prices outside the shop.

In all other cases, the size limits for the lists and the fonts, along with the allowable information, all seem reasonable. It is essential that size limits are not increased, as price lists could easily become a surrogate form of in-store tobacco promotion.

3. REGULATION OF MOVEABLE STRUCTURES AND FIXED PENALTY NOTICES

3.1. Do you agree that retailers selling tobacco from a moveable structure should provide the information set out in the regulations to register for the tobacco sales registration scheme?

ASH Scotland is supportive of these regulations. Retailers who sell tobacco from moveable structures should provide information for registration and enforcement as is the case with other retailers.

3.2. Do you agree that the period in which a notice can be given should be set at seven days?

This appears consistent with other comparable laws.

3.3. Do you believe that the levels of fixed penalty notices set out in the regulations are appropriate?

The levels of fixed penalty notices seem proportionate to the offences. An escalator for cumulative offences within a set period is particularly welcome as it will provide a useful tool to deter persistent offenders.

3.4. Do you agree that these proposed regulations set out an effective, proportionate and workable approach?

Yes. However, it is unclear why vessels should not be included in the registration regulations. We understand the omission is due to a lack of clarity as to whether vessels currently sell tobacco products. We would suggest that it would be better to avoid a potential loophole, by requiring registration of all vessels which sell tobacco products, similar to the regulations for other moveable structures.

4. REGISTER OF TOBACCO RETAILERS REGULATIONS

4.1. Do you agree that retailers selling tobacco should provide the information set out in the regulations to register for the tobacco sales registration scheme?

We support these regulations. The additional information gathered by the registration scheme will support enforcement of the measures contained within the Act without being overly burdensome for those seeking to register to sell tobacco.

4.2. Do you agree that these proposed regulations set out an effective, proportionate and workable approach?

Yes. We also believe the dimensions and wording of the tobacco sales banning order are sufficient, and fulfil the aim of alerting customers when tobacco products are not permitted to be sold, and to distinguish retailers under the effect of a banning order from those who have chosen not to sell tobacco products voluntarily.

4.3. Do you believe that these regulations are enforceable?

Yes, we believe these regulations are clear and easily enforceable.

5. PRESCRIBED DOCUMENTS REGULATIONS

5.1. Do you agree with the identify cards set out in these regulations?

ASH Scotland believes it is essential that all retailers seek proper age verification of anyone who appears to be under 25 and is seeking to purchase tobacco products. We welcome the addition of cards bearing the PASS hologram to the list of acceptable identification documents. The Young Scot card is PASS approved and is freely available to all young people in Scotland.

In implementing the regulations, it is important that central government and local authorities do not in any way lend credence to the tobacco industry-supported Citizencard¹⁷. The 2008 National Institute for Health and Clinical Excellence (NICE) public health guidance on point of sale measures to reduce youth smoking uptake¹⁸ made a clear evidence-based recommendation that trading standards should actively discourage use of enforcement and related campaigns developed by the tobacco industry. This recommendation must be clearly set out in the enforcement guidance related to these regulations.

6. DISPLAY OF WARNING STATEMENT REGULATIONS

6.1. Do you agree with the dimensions of the warning statement as set out in the regulations?

We support these regulations which re-state the existing requirements.

¹ 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]. Edinburgh: NHS Scotland/Scottish Public Health Observatory. 2007. Available from:

<http://www.scotpho.org.uk/nmsruntime/saveasdialog.asp?IID=3907&slD=3256> [Accessed 29 June 2010]

² Taulbut, M., Gordon, D. McKenzie, K. *Tobacco smoking in Scotland: an epidemiology briefing*. [online]. Edinburgh: NHS Health Scotland and Scottish Public Health Observatory. 2008. Available from:

<http://www.scotpho.org.uk/nmsruntime/saveasdialog.asp?IID=4210&slD=3590> [Accessed 29 June 2010]

³ Office for National Statistics. *General Household Survey 2007 – Smoking and Drinking among adults 2007*. [online]. Newport: Office of National Statistics. 2008. Available from:

http://www.statistics.gov.uk/downloads/theme_compendia/GHS07/GHSSmokingandDrinkingAmongAdults2007.pdf [Accessed 29 June 2010]

⁴ Hastings G, Mackintosh AM, Holme I, Davies K, Angus K, Moodie C. *Point of Sale Display of Tobacco Products* [online]. The Centre for Tobacco Control Research/Cancer Research UK. August 2008. Available from:

http://info.cancerresearchuk.org/prod_consump/groups/cr_common/@nre/@pol/documents/generalcontent/crukmig_1000ast-3338.pdf [Accessed 29 June 2010]

⁵ Paynter J, Edwards R. The impact of tobacco promotion at the point of sale: a systematic review. *Nicotine Tob Res*. 2009 Jan;11(1):25-35. Epub 2009 Jan 27.

⁶ *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 2008* [online]. Edinburgh: Drug Misuse Information Scotland. Available from:

www.drugmisuse.isdscotland.org/publications/abstracts/salsus.htm [Accessed 29 June 2010]

⁷ British American Tobacco UK Ltd & Ors, R (on the application of) v Secretary of State for Health, 2004.

⁸ World Health Organization. *Tobacco industry interference with tobacco control* [online] 2009. Available from:

http://www.who.int/tobacco/resources/publications/tob_ind_int_cover_150/en/index.html [Accessed 29 June 2010]

⁹ Sebrié EM, Glantz SA. Attempts to undermine tobacco control: tobacco industry "youth smoking prevention" programs to undermine meaningful tobacco control in Latin America. *Am J Public Health*. 2007 Aug;97(8):1357-67. Epub 2007 Jun 28.

¹⁰ Harper TA, Martin JE. Under the radar--how the tobacco industry targets youth in Australia. *Drug Alcohol Rev*. 2002 Dec;21(4):387-92.

¹¹ Jagger S, Watson R. Ferrari F1 barcode a 'smokescreen for cigarette adverts' [online]. *The Times*. 29 April, 2010. Available from:

http://www.timesonline.co.uk/tol/sport/formula_1/article7111124.ece [Accessed 29 June 2010]

¹² Personal communication with officials of Health Canada, 8th January 2009. Total payments in 2001 were \$74,246,637; by 2007,

this figure had risen by 45% to \$108,203,683.

¹³ Lunau K. Cigarette Companies and Corner Stores Help Each Other Survive [online]. *Maclean's*. 4 August 2008. Available from:

<http://www.encyclopediecanadienne.ca/index.cfm?PgNm=TCE&Params=M1ARTM0013267> [Accessed 29 June 2010]

¹⁴ Scottish Parliament - Official Report [online]. 27 January 2010. Available from:

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0127-01.htm>

[Accessed 29 June 2010]

¹⁵ Scottish Parliament - Official Report [online]. 27 January 2010. Available from:

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0127-02.htm#Col23103> [Accessed 29 June 2010]

¹⁶ Scottish Parliament - Health and Sport Committee Official Report [online]. 11 November 2009. Available from:

<http://www.scottish.parliament.uk/s3/committees/hs/or-09/he09-2902.htm#Col2366> [Accessed 29 June 2010]

¹⁷ Citizencard is endorsed by the Tobacco Manufacturers Association. For more information, see

<http://www.citizencard.com/about.php> [Accessed 29 June 2010]

¹⁸ National Institute for Health and Clinical Excellence. *Mass-media and point-of-sales measures to prevent the uptake of smoking by children and young people (PH14)* [online]. 2008. Available from:

http://egap.evidence.nhs.uk/PH14/guidance/unnumbered_section_1 [Accessed 29 June 2010]