



ASH Scotland Tobacco & Primary Medical Services (Scotland) Act March 2010

Key measures contained in the act:

- an end to the promotional display of tobacco brands in retail outlets, expected for larger retailers in 2011 and for smaller retailers in 2013
- an end to the sale of cigarettes through vending machines, likely to be implemented in 2011
- a requirement for those selling tobacco to be on a central register with the offence of selling tobacco without being registered having a penalty of a fine of up to £20,000 or 6 months in jail, or both
- there will be a requirement for local authorities to carry out annual programmes of enforcement on tobacco sales law
- the offence of proxy purchase of tobacco by adults for those under 18 is created with penalty of a fine up to £5000
- the offence of under 18s attempting to buy cigarettes is created
- police have the power to confiscate tobacco from under 18s in a public place
- enforcement officers have new powers to issue fixed penalty fines for breaches of the law
- enforcement officers can seek a banning order (for a maximum of 24 months) from a sheriff if more than three enforcement actions have been issued

The *Tobacco and Primary Medical Services (Scotland) Bill*¹ was passed in its final form by the Scottish Parliament on 27 January 2010 by an overwhelming majority of 108 votes to 15. It received royal assent on 3 March 2010 becoming the *Tobacco and Primary Medical Services (Scotland) Act 2010*². The Act is the most significant change in tobacco control legislation in Scotland since the *Smoking, Health and Social Care (Scotland) Act 2005*³ which banned smoking in most enclosed public places.

Part one of the Tobacco and Primary Medical Services (Scotland) Act contains wide-ranging measures aimed at reducing both the availability and attractiveness of cigarettes and other tobacco products to young people.

1. Introduction of the bill and parliamentary process

The Tobacco and Primary Medical Services (Scotland) Bill was introduced to Parliament on 25 February 2009 by the Scottish Government, giving legislative form to actions contained within *Scotland's future is smoke-free*⁴, the Government's 2008 smoking prevention action plan.

The chief aims of the tobacco control measures contained within the bill were to reduce the estimated 15,000⁵ young people in Scotland who become smokers each year by making tobacco products less accessible to them through greater control on

supply, and smoking a less attractive activity through banning the display of tobacco products, often in large and elaborate gantries, at the point of sale. After the introduction of the bill, it passed through three stages of parliamentary scrutiny between February 2009 and its passage in January 2010, receiving royal assent in March 2010.

2. Key tobacco control measures included in the act

- **An end to the promotional display of tobacco brands in retail outlets**
Under the act, an individual who displays tobacco products or smoking-related products (papers, filters, tubes, holders or pipes) commits an offence. When this comes into force, it will end the practice of storing and displaying tobacco products in a highly visible uncovered location behind the counter, common in Scotland. Regulations will specify how retailers can comply with this law, and set requirements on area of allowable display if retailers chose to cover their existing gantries with covers or flaps. Other compliance options for retailers include storing tobacco in drawers underneath the counter, or in closed semi-automated dispensing units (as is common practice in Ireland); retailers will be able to select the solution that works best in their particular environment. Specialist tobacconists (shops which derive more than half of their sales from specialist products like pipes and cigars) are exempt, however they are not permitted to display tobacco products or smoking-related products outside their shops (though window displays are permitted). Breaches of this law can be dealt with through enforcement officers' new powers to issue fixed penalty notices (as with any breach of tobacco sales law within the act), or, upon conviction, a fine of up to £2,500.
- **An end to the sale of cigarettes through vending machines.**
An individual who manages, or has control of a premises where a vending machine selling tobacco products is located after the act comes into force is liable for a fine of up to £2,500.
- **A requirement for those selling tobacco to be on a central register**
The act requires any individual who wants to sell tobacco products to register their details with the government. Those who fail to do so commit an offence and will be liable for a fine of up to £20,000, six months imprisonment, or both. These high penalties are intended as a deterrent to those who deal in illicit, non-duty paid tobacco, though the register will aid local authorities in their routine enforcement of tobacco sales law with registered legitimate retailers.
- **Local authorities have an obligation to carry out annual programmes of tobacco enforcement**
This strengthens the commitments local authorities have to identify and tackle breaches of tobacco sales law, ensuring the enforcement activity necessary to make use of the provisions in the act take place.
- **Proxy purchase of tobacco by adults for those under 18 will be an offence.** This mirrors the equivalent legislation governing the sale of alcohol in Scotland. An individual, 18 or over, who knowingly purchases tobacco products for a person under 18 is liable to a fine of up to £5,000

- Creation of offence for an individual under 18 to buy or attempt to buy cigarettes**

Prior to the tobacco act the only offence when an underage sale of tobacco took place was that of the *sale* of tobacco products, not the *purchase*. This brings tobacco sales law in line with that for alcohol, and balances legal responsibilities between the seller and buyer, regardless of the purchasers' age.
- Police have the power to confiscate tobacco from under 18s in a public place**

When a constable has reasonable grounds for suspecting a person is under the age of 18 and in possession of tobacco products or cigarette papers, they may require the individual to surrender the product to the constable, who can then dispose of it in a manner they feel is appropriate. Failure to comply with confiscation is an offence, liable for a fine of up to £500.
- Enforcement officers have new powers to issue fixed penalty fines for breaches of the law**

Once the above laws come into effect, enforcement officers may give a person a fixed penalty notice for all the offences in Part 1 of the act including the offence of display of tobacco products and sale of tobacco products to an under 18. This supplements the existing system whereby an individual could only be penalised for breaches of the tobacco sales law through the court system; a time-consuming and expensive process which only resulted in 17 prosecutions for selling tobacco to under-age customers between 2001/2 and 2006/7.⁶
- Enforcement officers can seek a tobacco sales banning order (to a maximum of 24 months) from a sheriff if more than three enforcement actions have been issued**

This strengthens the ability of enforcement officers to react to identified rogue retailers who may persistently break tobacco sales law. The three enforcement actions necessary to seek a banning order must take place within a two-year period, allowing for the possibility of moving swiftly to a banning order following a small number of enforcement visits (as different offences, e.g. failure to comply with the display ban and sales to under 18s, each count as a separate enforcement action.) If a retailer is banned from selling tobacco products, they must display a sign saying they are banned, alerting customers and distinguishing shops under the effect of a banning order from shops that have simply chosen not to sell tobacco (such as Lidl stores in Scotland).

3. Timescales for the act's implementation

Although commencement dates of the new laws have yet to be finalised, details discussed during the bill's passage through parliament make it likely that (subject to change):

- the display ban will be implemented for large shops in 2011, small stores in 2013
- tobacco vending machines will be banned from 2011 onwards
- tobacco retailers will have to register with the government by 2011.

4. Comparisons with similar UK legislation

4.1 UK Parliament Health Act

Running in almost parallel timescale with the Scottish legislation, equivalent legislation for England, Wales and Northern Ireland takes the form of the 2009 Health Bill [HL].⁷ The bill was introduced to the House of Lords in January 2009, passing through the Westminster Parliamentary process during the course of 2009, and following agreement by both houses on the text of the bill, received Royal Assent on the 12 November 2009 becoming the Health Act 2009.⁸

Part 3 of the Act dealt with tobacco control. Key differences between the tobacco control elements of the Westminster Act and the Scottish Act include:

- **Point of sale:** A similar provision banning the display of tobacco products, with exemptions for specialist and trade-to-trade wholesalers exists in both pieces of legislation. Regulations may result in differences between what is required to comply with the display ban in each country.
- **Vending machines:** The Westminster bill originally differed significantly from the Scottish legislation as it did not ban vending machines outright, instead giving the Parliament power to restrict access to tobacco vending machines, and the power to remove such machines completely if restrictions prove to be ineffective. However the bill was strengthened to a complete ban during its progress through parliament, meaning that all of the UK will be enacting a complete ban on cigarette vending machines.
- **Registration scheme and penalties:** The Health Act 2009 does not contain a requirement for tobacco retailer registration. In England, Wales, and Northern Ireland there is currently no requirement for retailers who sell tobacco products to proactively register. However, section 143 of the Criminal Justice and Immigration Act 2008⁹ provides a form of negative licensing (a system in which the right to sell is granted by default, but may be withdrawn upon infringement of law), where any retailer who commits three offences in two years can be subject to a banning order, prohibiting them from selling tobacco for a period no longer than one year.

The Regulatory Enforcement and Sanctions Act 2008¹⁰ makes provisions for the introduction of a fixed penalty notice scheme in relation to a range of offences¹¹, including tobacco sales offences covered by the Health Act. The Local Authorities Coordinators of Regulatory Services (LACORS) and the Department of Health are understood to be preparing guidance on how to apply RESA to offences contained within the Health Act.

4.2 Northern Ireland and Wales

The Westminster Health Act gives powers to the assemblies in Wales and Northern Ireland to draft regulations to ban displays and vending machines. Both administrations have confirmed they will move swiftly to implement the legislation.

5. Comparisons with similar Éire legislation

The Public Health (Tobacco) (Amendment) Act 2004 (Commencement) Order 2008¹² brought forward sections in the Public Health (Tobacco) (Amendment) Act 2004¹³ dealing with a ban on retail displays of tobacco, self service vending machines, and a registration scheme for retailers for implementation on 1 July 2009.

- **Point of sale:** The Irish legislation bans the advertising or display of tobacco products in any retail premises that sell tobacco products - retailers must ensure that tobacco products are stored out of view within a closed container or dispenser which only staff can access. The method of storage is at the discretion of the retailer as long as it complies with the above, and there are no regulations on 'permitted display' as in the Scottish and Westminster legislation. The tobacco retail environment is different in Ireland when compared to the current state in the UK with a high market penetration (approximately 70%) of 'retail vending machines' (semi-automated dispensing units, whose installation is commonly financially assisted by the tobacco industry) which were easily made compliant with display bans with no need for flaps or coverings. A strength of the Irish law is that it specifies in detail the nature of the signage (number, size, colour etc) retailers are permitted to use to let customers know that tobacco products are sold at that outlet which the Scottish legislation does not do to the same extent.
- **Vending machines:** Differing from the Scottish and English equivalent legislation, Ireland allows the use of vending machines for tobacco products, provided the operator complies with certain measures: the machine must be in a licensed premises or registered club; be adjacent or in close proximity to an area that is attended by a member of staff and be within the line of sight of a member of staff at all times. Finally, the machine must also only be activated by the means of a disc or card obtained by staff, or be activated by staff through another means (e.g. remote control). Decals or buttons for the machine must be free of all tobacco advertising and must not display tobacco products trademarks, logos, or other similar features.
- **Registration scheme and penalties:** In a similar manner to the planned Scottish system, and in contrast to the current legislation in England, Wales and Northern Ireland, Ireland requires all retailers who want to sell tobacco products to be registered with the Irish Office of Tobacco Control (OTC). Unlike the Scottish legislation where Ministers have no authority to charge for registration and the system was designed to be free of charge¹⁴, in Ireland a €50 fee is payable to the OTC upon registration. In the case of vending machines that are compliant as described above, both the owner of the machines and holder of the license (in the case of licensed premises) or the person entered in the register of clubs where the machine is located must register.

Environmental Health Officers are responsible for the enforcement of this legislation, with penalties for breaches of the law set out in section 5 of the Public Health (Tobacco) Act 2002¹⁵ In contrast to the Scottish legislation, there is no equivalent of fixed penalty notices in the Irish system, with all offences being processed through the Courts. If a person is convicted of a tobacco sales offence, they may be removed from the register of tobacco retailers (and unable to sell tobacco products without committing a further offence) for a period of time as determined by the Courts.

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- ⁴ Scottish Government. *Scotland's future is smoke-free: a smoking prevention action plan*. Online. Edinburgh: The Stationary Office 2008. Available from: <http://www.scotland.gov.uk/Publications/2008/05/19144342/13> [Accessed 3 February 2010]
- ⁵ Taulbut, M. Gordon, D and McKenzie, K. *Tobacco smoking in Scotland: an epidemiology briefing*. Online. Edinburgh: NHS Health Scotland and Scottish Public Health Observatory. 2008. Available from: <http://www.scotpho.org.uk/nmsruntime/saveasdialog.asp?IID=4210&SID=3590> [Accessed 3 February 2010]
- ⁶ Scottish Parliament Written Question S3W-3809, asked by Christine Grahame MSP on 30th August 2007 and answered by Kenny MacAskill MSP on 11th September 2007. Online. Available from: <http://www.scottish.parliament.uk/Apps2/Business/PQA/default.aspx?pg=S3W-3809> [Accessed 3 February 2010]
- ⁷ UK Parliament, *Health Bill 2008-09*. Online. Available at: <http://services.parliament.uk/bills/2008-09/health.html> [Accessed 3 February 2010]
- ⁸ Office of Public Sector Information. *Health Act 2009*. Online. Available at: http://www.opsi.gov.uk/acts/acts2009/ukpga_20090021_en_1 [Accessed 3 February 2010]
- ⁹ Office of Public Sector Information, *Criminal Justice and Immigration Act 2008*. Online. Available at: http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_1 [Accessed 3 February 2010]
- ¹⁰ Office of Public Sector Information. *Regulatory Enforcement and Sanctions Act 2008*. Online. Available at: http://www.opsi.gov.uk/acts/acts2008/ukpga_20080013_en_1 [Accessed 3 February 2010]
- ¹¹ Department of Business, Enterprise and Regulatory Reform (BERR). *Regulatory Enforcement and Sanctions Act 2008, Guidance to the Act*. Online. Available at: <http://www.berr.gov.uk/files/file47135.pdf> [Accessed 3 February 2010]
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- ¹³ Office of Tobacco Control, *Public Health (Tobacco) (Amendment) Act 2004*. Online. Available at: [http://www.otc.ie/Uploads/Public%20Health%20\(Tobacco\)%20\(Amendment\)%20Act%202004.pdf](http://www.otc.ie/Uploads/Public%20Health%20(Tobacco)%20(Amendment)%20Act%202004.pdf) [Accessed 3 February 2010]
- ¹⁴ Scottish Parliament – *Health and Sport Committee Official Report 18 November 2009*. Online. Available from: <http://www.scottish.parliament.uk/s3/committees/hs/or-09/he09-3002.htm#Col2417> [Accessed 3 February 2010]
- ¹⁵ Office of Tobacco Control, *Public Health (Tobacco) Act 2002*. Online. Available at: [http://www.otc.ie/Uploads/Public%20Health%20\(Tobacco\)%20Act%202002.pdf](http://www.otc.ie/Uploads/Public%20Health%20(Tobacco)%20Act%202002.pdf) [Accessed 3 February 2010]

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