



**THE LAW SOCIETY  
of SCOTLAND**  
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# Consultation Response

## **Consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland**

**The Law Society of Scotland's response  
December 2014**

## Introduction

### Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes. To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and out with the solicitor profession.

The Health and Medical Law Sub Committee of the Law Society of Scotland, welcomes the opportunity to consider the Scottish Government's consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland. The Committee has the following comments to put forward in response to the questions posed in the consultation document.

### General Comments

We support the general policy aims of the consultation. The harmful effects of tobacco and smoking are undisputed. Statistics speak for themselves in relation to deaths caused by smoking and smoking related disease, including the health of those who breathe in users' smoke, particularly children.<sup>1</sup> We recognise that the proposals have the potential to address health and wellbeing and reduce the risk of harm caused by smoking and smoking related disease. We agree that the consultation supports the key tenets of European health policy<sup>2</sup> and would enhance the Scottish Government's Tobacco Control Strategy, 'Creating a Tobacco-free Generation'<sup>3</sup>.

Some initial observations are highlighted here and will be incorporated into our response below.

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<sup>1</sup> McNeill, A *et al.*, Tobacco control in Europe: A Deadly Lack of Progress((2012) , *European Journal of Public Health*, 22 Supp. 1 p1-3.

<sup>2</sup> WHO- Europe . European strategy for child and adolescent health and development. (2005) report Number: EUR/05/5048378

<sup>3</sup> <http://www.scotland.gov.uk/Publications/2013/03/3766>

First, is there public support for the proposals? This is particularly focussed on regulating electronic cigarettes. Given the divergent views on both their safety and efficacy, we would suggest that any legislative response should be proportionate to existing knowledge until data from any further research can be evaluated. Second, is enforcement effective and feasible? Also, we believe that any legislative changes should be firmly tied in with education and prevention of smoking. A combined approach is generally regarded as more effective and provides a more targeted response in changing patterns of smoking behaviour and promoting tobacco control <sup>4</sup> and the Tobacco Control Strategy provides a good framework within which to achieve this.

## **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. Whilst we recognise that some may consider these to be a safer alternative to conventional cigarettes, more information is still required on the risks and benefits to public health in general and particularly to young people. Minimum age of sale may also help reduce the use of electronic cigarettes as a 'starter product' for young people<sup>5</sup> and will also be consistent with current provisions relating to age on tobacco products.

#### **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 believe that age of sale regulations should be based upon an understanding of what harm may be caused by selling these products. It should therefore not be limited to using

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<sup>4</sup> Hunt, P.,(2012) Health and wellbeing:The role of government., *Public Health*, **126** s 19-23.

<sup>5</sup> Cobb, N, K & Abrams D, B., (2011). E-cigarette or drug deliver device? Regulating novel nicotine products. New England Journal of Medicine **365** 193-195.

presence of nicotine as the sole reference point. This could include, for example, the variability of quality in manufacture or nicotine delivery of each product.

### **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**

As with current legislation relating to traditional tobacco products<sup>6</sup>, we would suggest the liability of the offence applies to the retailers applying consistency.

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

Yes. We would suggest that the regulation of that sale of these products would be difficult to enforce and monitor if sold via vending machines.

### **Proxy purchase for e-cigarettes**

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

Yes. In Scotland, it is currently an offence to sell cigarettes to a proxy purchaser, and for a person to act as a proxy purchaser, i.e. a person aged 18 or over who knowingly buys or attempts to buy a tobacco product or cigarette papers on behalf of a person under the age of 18<sup>7</sup>. We believe that legislation relating to 'proxy purchasers' and the sale of e-cigarettes and traditional tobacco products should be consistent to ensure certainty, avoiding any ambiguity.

### **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?**

We suggest that any restrictions on advertising should be consistent with the current advertising restrictions of traditional tobacco products. However, we do recognise that this

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<sup>6</sup> Tobacco and Primary Medical Services (Scotland) Act 2010

<sup>7</sup> Ibid Section 6 'Purchase of tobacco products on behalf of persons under 18'

proposal may raise the problems of proportionality and enforcement. We believe that a more practical approach would be to consider the effect of the location and density of tobacco retailers in home and school environments. As many adult smokers may have tried their first cigarette before the age of 18, this would be a logical step towards enhancing public health for young people. As we understand, some interesting research has been undertaken recently in Scotland which considered density of tobacco retailers and incidence of adolescent smoking.<sup>8</sup> This research indicated the density of retail outlets in residential areas was associated with increased smoking among adolescents. They did not find a similar correlation where there was a high density around schools which they conjectured may be due to higher levels of surveillance and compliance by retailers within proximity to schools.<sup>9</sup> The research concluded that ‘Policy makers may be advised to focus on reducing overall density of tobacco outlets, rather than concentrating on “child spaces”’.<sup>10</sup>

#### **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, we agree. This would assist with other proposals above and also help gather and maintain data which would help inform practices, usage and education.

#### **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, we agree. In 2013 we responded to the consultation by Jim Hume MSP on his proposed Smoking (Children in Vehicles) (Scotland) Bill<sup>11</sup>. Some of our comments below mirror those to this earlier consultation.

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<sup>8</sup> Shortt, N,K *et al* (2014) The density of tobacco retailers in home and school environments and relationship with adolescent behaviours in Scotland *Tob Control* 0 1-8.

<sup>9</sup> Shortt, N,K *et al* (2014) The density of tobacco retailers in home and school environments and relationship with adolescent behaviours in Scotland *Tob Control* 0 1-8 at p.5.

<sup>10</sup> Shortt, N,K *et al* (2014) The density of tobacco retailers in home and school environments and relationship with adolescent behaviours in Scotland *Tob Control* 0 1-8 at p.1.

<sup>11</sup> [http://www.lawscot.org.uk/media/229424/health\\_proposed\\_smoking\\_children\\_in\\_vehicles\\_scotland\\_bill\\_law\\_society\\_of\\_scotland.pdf](http://www.lawscot.org.uk/media/229424/health_proposed_smoking_children_in_vehicles_scotland_bill_law_society_of_scotland.pdf)

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

No, we do not agree. See response to question 23 below.

**23. If you answered 'no' to Question 22, to whom should the offence apply?**

We take the view that it would be more logical that the driver, regardless of age, bears the responsibility to ensure no person smokes in the vehicle, where a child is present. This would be in line with other legislation which seeks to protect the wellbeing and safety of children travelling in vehicles, such as section 15(1) *Road Traffic Act 1988*, where a driver has the responsibility to ensure that a child under the age of 14 is wearing a seatbelt. A statutory defence could be included to the effect that 'the driver took all reasonable steps to ensure that the offence was not committed by any passenger in the vehicle'.

**24. Do you agree that Police Scotland should enforce this measure?**

We make some general observations here. Is it a recognised role of the Police Service in Scotland to enforce public health legislation? Also, is such enforcement effective and feasible? The prohibition is to apply to any vehicle whether it is moving or stationary and there is no distinction made if the proposed offence occurs on public or private roads. It applies to convertible cars even when they have their tops down but excludes motorcycles and sidecars. One can envisage that there will be challenges in enforcing a ban under some of these circumstances, for example, when the car is moving, conditions of very heavy traffic or when more than one person is smoking in the car. In all of these examples, the enforcing officers would need to see both the offence taking place and ascertain the age of any child or children present.

There is limited data currently available which evaluates the enforcement of smoking bans in private vehicles where children are present<sup>12</sup> and many studies, as we understand, use indirect reference to the wearing of seatbelts or using a mobile phone whilst driving- these comparators will only take the argument so far. Finally, how much reliance would there be on supplementary mechanisms such as use of media highlighting this proposed new role of Police Scotland ?

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<sup>12</sup> Wong G., *et al* .,(2011) Policy guidance on threats to legislative interventions in public health: a realist synthesis., Public Health 11 222 p.1-11.

**26. Do you agree that there should be an exemption for vehicles which are also people's homes?**

Yes, we agree.

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

A statutory defence could be included to the effect that 'the driver took all reasonable steps to ensure that the offence was not committed by any passenger in the vehicle'.

### **Smoke-free (tobacco) NHS grounds**

**29. Should national legislation be introduced to make it an offence to smoke or allow smoking on NHS grounds?**

We are not in a position to comment on smoking exclusion on NHS grounds, However, we do recognise that many hospitals already have a smoke free grounds policy in place<sup>13</sup> and it would be sensible to have a uniform and standardised approach.

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

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

Yes, we agree.

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<sup>13</sup> See for example, Ayrshire and Arran Health Board Smoke Free Grounds Policy. Available from: <http://www.nhsaaa.net/media/285510/paper12sfg.pdf> [Accessed 15 dec 2014]



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