Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill

Under Age Sales Ltd

We are a social enterprise that specialises in helping retailers to tackle under age sales. We provide support, training, point-of-sale materials and advice to retailers. We also provide the Law of Age Restricted Sales legal text book which, from the Autumn of this year, will also be available in a Scottish law version.

We are happy for our response to be published in full and we will also publish our response on our website at www.underagesales.co.uk. In addition, we would ask that any quotes taken from our response are used in the context in which they are intended and we would be happy to advise if the context is not clear.

Health (Tobacco, Nicotine etc. and Care)(Scotland) Bill

We welcome the proposals in this Bill to bring nicotine vapour products into line with tobacco products in Scotland. Whilst the relative health consequences of the two are very different, it is our view that nicotine is an addictive product and, notwithstanding any health issues, ought to be age restricted to over 18’s on that basis alone. We consider that it remains too early to know the longer term consequences of these new products.

However, some care does need to be taken to ensure that their use as a potential tool for young people to quit smoking tobacco is not hindered. Although there are similar policy considerations for nicotine vapour products to tobacco, they are not the same and legislators need to take care to recognise the differences between the products rather than necessarily ‘lumping them in together’.

Draft Clause 1 – New Section 35A(2) (c) & (d) – we note the proposals to exclude human medicines and medical devices from the scope of definition of a nicotine vapour product. This proposal differs subtly from those adopted in England. In England the exemption only applies insofar as authorised by the relevant regulatory body or parallel import licence. So, for example, if a nicotine vapour product were authorised (say) for persons over 16 to use, then the prohibition on selling them would not apply to a person aged 16 or 17, but would apply if they were aged under 16. On our interpretation of proposals in Scotland, the product would be wholly exempt from the controls, regardless of any constraints put upon it by the regulatory body or parallel import licence. This would create the rather odd scenario where a person younger than the age restriction imposed by the medicinal licence would be able to legally purchase the product in Scotland (but not in England).

In addition, in our response to the English proposals, we pointed to considerable scope for confusion if such products were on general sale. We recommended that such products be restricted to pharmacy only settings, but that suggestion was not adopted in the English legislation.
Draft Clause 2(1) – New Section 4A(4) we note the power to proscribe documents capable of proving age. We would hope and expect that Scottish Ministers will continue to proscribe and respect the UK-wide Proof of Age Standards Scheme (PASS). Although in Scotland, the Young Scot card is issued, elsewhere in the UK, other forms of card are issued now with a standardised design (except the Young Scot card). We hope that Scottish Ministers will continue to recognise other PASS accredited cards from elsewhere in the UK.

Although there is some controversy surrounding this, we do not recommend that military personnel ID be approved as valid ID unless the premises in question is located within the confines of a military base. This is because, to the average shop worker, they would have no idea what a military ID would look like and, for obvious security reasons, the Ministry of Defence are unwilling to make examples of them available for training purposes. In addition, military personnel can be aged 16 or 17.

Draft Clause 3 – we note proposals to require tobacco and nicotine vapour products businesses to operate an age verification scheme (or ‘Challenge 25’ policy). It is important to understand the policy reasons for such schemes and to take particular care not to improperly regulate for them.

The ‘challenge 25’ scheme was introduced by the Retail of Alcohol Standards Group to provide a safe buffer for shop workers between the legally prescribed age (18) and the age at which you could safely assume someone was over the prescribed age. That gap of 7 years was intended to provide a reasonable precaution against making under age sales. It is now widely used and accepted by retailers, but that does not mean that it should be made mandatory. This is because it sets a risk of drift on where the legal prescription ends and the reasonable precautions begin. If the legal prescription becomes 25, then the precaution (to maintain the buffer) would have to rise to 32. That creates confusion in the minds of retailers and consumers alike.

It is important that the focus of the law is on the legally prescribed age and the focus of reasonable precautions is on how to maintain compliance with that legally prescribed age. We are therefore concerned about making this a mandatory requirement.

Draft Clause 3(5) – we are unsure how guidance about the range of documents that may be shown … as evidence of a person’s age will be of any use, given that by proposed new section 4A(4), such documents are going to be proscribed. This would suggest that Scottish Ministers are seeking powers to derogate from the proscribed documents. It is also a little odd to suggest that retailers must ‘have regard to’ such guidance, when failure to follow it would constitute the creation of an absolute liability offence under proposed new section 4A.

We welcome and completely support draft Clause 3(5)(c) – training is an absolutely essential element of securing effective systems and procedures to
prevent under age sales. However, often public authorities have chosen the lowest common denominator for training provision and have accepted dubious e-learning or cheap alternative training. The lack of robust procedures to ensure that (a) the learner is who they say they are, and (b) the learner has actually learnt and understood the course; bring training on this subject into disrepute.

We strongly recommend that training be linked to a SCQF Level 4 Certificate in Preventing Under Age Sales (or an EQF Level 2 equivalent). The robustness of the SCQF procedures and quality assurance will ensure effective training. We would not consider any training outside of the SCQF or its equivalents to be valid for these purposes.

**Draft Clause 4 – New Section 4C(7)** – we consider the penalty for this offence (level 1 on the standard scale) to be inadequate. In our view, this offence demonstrates serious mismanagement of the registered premises and ought to attract the equivalent penalty for under age sales of tobacco or nicotine vapour products themselves (level 4 on the standard scale).

**Draft Clause 5 – New Section 4D** – There seems to us to be no logical reason why the defence of ‘due diligence’ would not be available to an offence under proposed new section 4B(1) – failure to have an age verification policy in place.

We note and agree the proposals to bring retailers of nicotine vapour products within the terms of the tobacco registration scheme and banning orders.

**Declaration**

We are happy to declare that our services, in providing training and support to retailers to prevent under age sales, are funded by those retailers (including tobacco retailers) and by trade associations and manufacturers (including the tobacco industry). However, our views are our own and we have not been funded, commissioned or otherwise encouraged to provide this response to you by the tobacco industry or any of their representatives.

**Under Age Sales Ltd**