

HEALTH (TOBACCO, NICOTINE ETC. AND CARE (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders in relation to the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

POLICY CONTEXT AND SCOPE OF THE BILL

3. The Bill covers three distinct policy areas: non-medicinal Nicotine Vapour Products ("NVPs"), tobacco control and smoking on NHS hospital grounds; ill-treatment or wilful neglect; and duty of candour.
4. Alongside the Scottish Government's latest Tobacco Control Strategy, Creating a Tobacco-Free Generation¹, this Bill supports the Scottish Government's objective to support longer healthier lives and to tackle the significant inequalities in Scottish society. It will do this by restricting the accessibility of NVPs to children and young people under 18; reducing their visibility and appeal to children, young people under 18 and adult non-smokers; reinforcing the age restriction on tobacco products to further protect children and young people under 18; and introducing statutory outside no-smoking areas around buildings on NHS hospital grounds.
5. The duty of candour provisions support the implementation of consistent responses across health and social care providers when there has been an unexpected event or incident that has resulted in death or harm, that is not related to the course of the condition for which the person is receiving care.
6. The provisions on ill-treatment or wilful neglect will establish a new criminal offence which will apply to individual care workers, managers and supervisors, either employed, or volunteering on behalf of a voluntary organisation, who provide care or treatment. An offence is also established that will apply to organisations. The Bill provides courts with additional penalty options in respect of organisations that are convicted of wilful neglect/ill-treatment.

¹ *Tobacco Control Strategy: Creating a Tobacco-Free Generation* - www.gov.scot/tobaccofreegeneration

OVERVIEW OF THE BILL

Part 1 – Overview

7. Part 1 of the Bill contains a number of new controls on tobacco products, nicotine vapour products (“NVP”) and smoking on NHS hospital grounds. Chapter 1 contains provision which puts a prohibition on selling NVPs to persons under the age of 18, a power to ban the sale of NVPs from vending machines, a prohibition on the purchase of NVPs on behalf of a person under the age of 18 and a requirement for retailers of NVPs to be on a Register and related provision about banning orders. It also includes controls which apply to the sale of both NVPs and tobacco products: a requirement on retailers to operate an age verification policy, a prohibition on unauthorised sales by persons under the age of 18 and a statutory due diligence defence. Chapter 2 contains regulation-making powers which enable certain forms of advertising and promotion of NVPs to be prohibited or restricted. Chapter 3 contains provision related to prohibiting smoking in designated smoke-free outdoor areas on NHS hospital grounds.

8. In summary, Part 1 of the Bill:

- introduces the offence of selling a NVP to a person under the age of 18;
- introduces the offence of failing to operate an age verification policy at premises where tobacco products or NVPs are offered for sale;
- introduces the offence of allowing a tobacco product, cigarette papers or a NVP to be sold by a person under the age of 18 without authorisation;
- provides powers to introduce the offence of selling a NVP from a vending machine;
- introduces the offence of carrying on a NVP business whilst unregistered or from unregistered premises;
- provides for a due diligence defence against certain tobacco product and NVP related offences;
- makes it an offence for a person aged 18 or over to purchase a NVP for a person under the age of 18 (commonly known as “proxy purchase”);
- provides powers to make regulations containing prohibitions or restrictions on NVP advertisements and brand-sharing and to make related offences;
- provides powers to make regulations prohibiting or restricting giving away a NVP or a coupon for a NVP and to make related provision and offences;
- provides powers to make regulations prohibiting or restricting a sponsorship agreement which promotes NVPs and to make related offences; and
- makes it an offence to smoke outside a NHS hospital building within an area designated by regulations and makes related offences as well as powers to make regulations on the detail.

9. Further information about the Bill’s provisions are contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 73 and in the Policy Memorandum published separately as SP Bill 73.

Part 2 — Duty of Candour

10. Part 2 of the Bill creates a legal requirement for health, social work and care organisations to inform people when they have been harmed (either physically or psychologically) as a result of the care or treatment they have received. There are also requirements for organisations to prepare and publish reports in relation to the duty of candour.

11. In summary, part 2:

- requires organisations to follow the duty of candour procedure;
- outlines the incidents and outcomes which trigger that duty;
- provides a power to make changes to the list of outcomes;
- provides a power to make regulations setting out the duty of candour procedure;
- defines an apology, in relation to the duty of candour; and
- sets requirements for reporting and monitoring the duty of candour.

Part 3 — Ill-treatment and wilful neglect

12. Part 3 of the Bill establishes offences relating to the wilful neglect or ill-treatment of adults receiving health care or social care. There are two main offences in this part: an offence that applies to care workers, and an offence that applies to care providers.

RATIONALE FOR SUBORDINATE LEGISLATION

13. In deciding whether provision should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has considered the need to:

- Strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation;
- Anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- Make proper use of valuable parliamentary time;
- Allow detailed administrative arrangements to be kept up to date within the basic structures set out in the Bill; and
- Take account of the likely frequency of amendment.

14. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any; and why it was considered appropriate to make it subject to that procedure (or not to make it subject to any such procedure).

DELEGATED POWERS

Part 1: Tobacco, Nicotine Vapour Products and Smoking

Chapter 1: Sale and purchase of tobacco and nicotine vapour products

Section 2(1) – Sale of nicotine vapour products to persons under 18

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

15. Section 4A(4)(c) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (“the 2010 Act”), to be inserted by section 2(1) of the Bill, contains a power enabling the Scottish Ministers to prescribe documents in addition to those laid down in the Bill (i.e. a passport and EU photo driving licence), which retailers may accept from those wishing to purchase nicotine vapour products as proof of identification that they are aged 18 or over. This effectively extends the power in section 4 of the 2010 Act that allows the Scottish Ministers to prescribe documents which retailers may accept as identification for the purchase of tobacco products. The power enables the Scottish Ministers to define other documents, such as a Proof of Age Standard Scheme (PASS) approved card and the Young Scot National Entitlement Card, which may be used by people to demonstrate to retailers that they are 18 or over and thus legally entitled to be sold nicotine vapour products. The intention is for the documents to be prescribed under this power to mirror those already in place for tobacco products under the Sale of Tobacco (Prescribed Documents) (Scotland) Regulations 2013 (SSI 2013/202).

Reason for taking power

16. Section 4A(4)(a) and (b) provide that a passport or an EU photo driving licence is acceptable documentation. There are, however, other forms of documentation which the Scottish Ministers regard as being acceptable. A list of these documents may need to be changed from time to time, either to remove or add documents, or to change the reference to a document which, for example, may come to be known by a different name. This power gives the Scottish

Ministers the flexibility to vary the list to ensure it is up-to-date with acceptable documents. Making a detailed list which may need to be varied is suited to provision contained in regulations. It avoids the need to make such changes in primary legislation and in the view of the Scottish Ministers, makes best use of valuable parliamentary time.

Choice of procedure

17. Changing the list of acceptable documentation is a relatively non-controversial and straightforward matter. The Bill ensures that a passport or an EU photo driving licence are always acceptable. The power is supplementary in nature and does not allow for the amendment of primary legislation therefore a passport or EU photo driving licence cannot be removed from the list of acceptable documentation. Given the nature of the provision which can be made and the degree of flexibility required, the Scottish Ministers consider that a power subject to negative procedure is appropriate. The negative procedure was used for the equivalent power in section 4 of the 2010 Act regarding tobacco products. The Scottish Ministers consider the negative procedure to strike an appropriate balance between flexibility and the need for scrutiny of provision of this nature.

Section 3(1) – Age verification policy

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

18. Section 3(1) of the Bill inserts section 4B (age verification policy) into the 2010 Act.

19. Section 4B(1) and (2) require a person who carries on a tobacco or nicotine vapour product business to operate an age verification policy at every premises where such a business is being carried on, but it does not include distance sales (where the sale does not take place in the physical presence of the retailer) e.g. it does not apply to premises which are used only to despatch tobacco or NVPs such as a warehouse used to service internet sales. Section 35 (interpretation) of the 2010 Act contains a definition of “tobacco business”. Section 8(2) of the Bill inserts into section 35 of the 2010 Act definitions of “nicotine vapour product business” and “tobacco or nicotine vapour product business”. The businesses referred to by these definitions only involve the sale of products by retail.

20. Section 4B(3) defines an “age verification policy”. It involves the person selling taking steps to challenge the age of a customer buying a tobacco product or a NVP who appears to that person to be under the age of 25 or such older age as may be specified in the policy.

21. Section 4A(4) provides the Scottish Ministers with a power to make regulations to amend the age (up or down) referred to in subsection (3). Age 25 has been chosen for this proposal to bring it into line with similar measures already in place for alcohol and with voluntary measures already applied by retailers.

22. The requirement to have an age verification policy seeks to reduce the number of illegal sales made to under 18s. The intention is for guidance to be published by the Scottish Ministers, which retailers must have regard to. The Scottish Government will consult with key stakeholders in the development of guidance which may cover matters such as training, awareness raising and appropriate identification

Reason for taking power

23. There is no immediate intention to exercise the power under section 4A(4). The Scottish Ministers are content with the age being set at 25 on the face of the Bill. However, circumstances may change in future. The power allows the minimum age of 25, which an age verification policy must be based on, to be changed by regulations up or down. This provides flexibility to allow the Scottish Ministers to change the age without recourse to primary legislation. It is conceivable that circumstances might change, for example, where the number of illegal sales reduce thereby allowing the age to be reduced. There are equivalent powers in alcohol licensing legislation which allow the age of 25 to be reduced or increased. If it is considered appropriate to change the minimum age in future, this power would allow legislation on alcohol, tobacco and NVP age verification policies to be changed simultaneously, to ensure consistency and avoid retailers operating different policies.

Choice of procedure

24. The power allows for primary legislation to be amended by subordinate legislation and accordingly, the affirmative procedure is appropriate. The specified age is a key tenet of the policy and the Scottish Government consider that changing the age merits the higher degree of scrutiny provided by the affirmative procedure.

Section 4 – Sale by persons under 18

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

25. Section 4 of the Bill inserts section 4C (sale of tobacco or nicotine vapour products by persons under 18) into the 2010 Act.

26. Section 4C(1) makes it an offence for a responsible person to allow the unauthorised sale of tobacco products or NVPs by a person under the age of 18. In accordance with section 4C(2) the “responsible person” is the registered person, where premises from which the sale is made is noted in the Register against that person’s name, or where the premises is unregistered it is the employer of the person who made the sale and/or a person having management and control of the premises. Section 4C(3) provides an exception to the offence, which allows persons under 18 to make sales where a registered person has authorised a person under 18 to make sales at the premises noted in the Register against that registered person’s name

27. Section 4C(4) requires the authorisation to be recorded and kept at premises where a person under 18 has been authorised to make sales.

28. Section 4C(5) enables the Scottish Ministers by regulations to prescribe the form and content of authorisations, and the method of how authorisations must be recorded. If an authorisation fails to comply with the requirements of the regulations then it is deemed not to have been made.

Reason for taking power

29. The form and content, and method of recording, of an authorisation is a largely a matter of administrative detail. The power allows the Scottish Ministers to make provision for a standard layout, what an authorisation should contain (e.g. details of the premises where the authorisation applies, who made the authorisation and other business information) and the means by which an authorisation may be recorded (e.g. electronic and/or paper). This is helpful to enforcement agencies which need to be able to determine whether an authorisation has been made, and made appropriately. The Scottish Ministers consider it is appropriate for such detail to be dealt with through secondary legislation rather than on the face of the Bill. It may also be necessary to amend the administrative arrangements set out in the regulations from time to time e.g. to take account of best practice informed by enforcement work. A degree of flexibility is therefore required.

Choice of procedure

30. The Scottish Ministers consider the negative procedure to be appropriate. The main provision for the authorisation policy is on the face of the Bill. The regulations provide administrative detail which is likely to be uncontroversial, and may require to be amended periodically. Negative procedure achieves the best balance between use of parliamentary time and still providing Parliament with sufficient opportunity to scrutinise the administrative form and content, and method of recording, of authorisations.

Section 7(1)– Extension of vending machine prohibition

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

31. Section 7 of the Bill provides that the definition of “vending machine” in section 9 (prohibition of vending machines for the sale of tobacco products) of the 2010 Act may be amended by regulations to include machines which sell NVPs. This would make it an offence to sell NVPs through automatic vending machines.

Reason for taking power

32. The Scottish Government believe that extending the prohibition of sales from vending machines (currently applying to tobacco products) to include the sale from machines of NVPs may require to be notified under the EU Technical Standards Directive. We are not aware of the existence of any NVP vending machines but cannot, at this time, rule out the possibility. Section 9 of the 2010 Act was notified. Taking a power to amend section 9 means that, if we conclude that notification is necessary, draft regulations can be notified rather than the whole Bill. This allows the draft regulations to be adjusted expediently as a result of any observations from other EU Member States and prevents any delay affecting the progress of the Bill through the Parliament.

Choice of procedure

33. Negative. This power allows for an amendment to primary legislation. The Scottish Ministers recognise that it is not usual to apply negative procedure to a power capable of amending primary legislation. However, the power is a very narrow and technical one. There is no discretion as to how it may be used – it can only be exercised to include NVPs within the vending machine ban. The intention has been made clear on the face of the Bill and the power simply allows for notification of the draft regulations – explained in more detail in paragraph 32. Negative procedure achieves the appropriate balance of scrutiny and use of parliamentary time.

Section 9(1)(a) – Registration and changes to Register

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

34. Section 9 of the Bill amends section 11 (application for registration and addition of premises etc.) of the 2010 Act to make changes to registration and the Register (as established by section 10 of the 2010 Act) to account for the inclusion of NVP businesses.

35. Section 9(1)(a) amends section 11 so that persons carrying on a NVP business can apply for registration and persons carrying on a tobacco business can update their registration if they also retail NVPs. Under section 20 of the 2010 Act (as amended by section 11 of the Bill) it is an offence for an unregistered person to carry on a tobacco or NVP business.

36. Section 11(2) of the 2010 Act sets out certain information which applications must contain, which applicants must comply with when submitting an application to become a registered retailer of tobacco products or (as amended by the Bill) NVPs. Subsection (2)(d) provides that the Scottish Ministers may prescribe by regulations any other information to be contained in an application with which applicants must comply. NVPs are sold by a wider range of retailers than is currently the case for tobacco, for example, from stalls in shopping centers. It is possible that in future further details about the premises might be required to facilitate enforcement and support.

Reason for taking the power

37. The practical operation of the Register may reveal that it would be helpful to have additional information, over and above what is already required by section 11. This power allows the Scottish Ministers flexibility to require additional information to help achieve the effective operation of the Register. Given both the detailed nature of such provision and the need for flexibility to allow the Scottish Ministers to respond to experience of the Register in operation, it is deemed to be an appropriate matter for subordinate legislation.

Choice of procedure

38. Since regulations made under this power are likely to be uncontroversial and administrative in nature, it is considered that negative procedure will provide the appropriate level of parliamentary scrutiny. The negative procedure has been applied to the existing power in section 11(2)(d) of the 2010 Act regarding applications in respect of tobacco. This power is adjusted only slightly by the Bill so that it now extends to applications in respect of NVPs in addition to tobacco; the Bill does not otherwise amend the existing power. The Scottish Ministers consider the negative procedure to strike an appropriate balance between flexibility and the need for scrutiny of provision of this nature.

Section 10(5) – Tobacco and nicotine vapour product banning orders

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

39. Section 10(5) of the Bill amends section 19 (tobacco retailing banning orders: display of notices) of the 2010 Act to change references from “tobacco retailing banning order” to “tobacco and nicotine vapour product banning order” and adjust the signage requirements so that they include reference to the point of sale of NVPs. Section 19 requires retailers of tobacco and/or NVPs, in respect of whom a tobacco and NVP banning order has been granted, to display a notice in the premises specified in the order if the person continues to carry on a retail business at those premises. Section 19 sets out specific requirements of the notice, including its content, where it must be displayed on the premises (it must be readily visible to persons at every relevant point of sale) and the period of time it must be displayed.

40. Section 19(5) of the 2010 Act provides that the Scottish Ministers may prescribe by regulations, the dimensions of the notice to be displayed in accordance with this section, the wording of the statement to be displayed on the notice, and the size of the statement. This power is adjusted slightly by the Bill so that it now extends to tobacco and NVP banning orders, rather than tobacco retailing banning orders i.e. it can now be used to prescribe the dimensions, wording and size of notices in respect of the new tobacco and NVP banning order.

Reason for taking the power

41. This power allows the Scottish Ministers flexibility to prescribe the wording, dimensions and size of the statement to provide a clear notice to customers that a banning order is in place. Given

both the detailed nature of such provision and the need for flexibility to allow the Scottish Ministers to respond to experience of the Register in operation and enforcement requirements, it is deemed to be an appropriate matter for subordinate legislation.

Choice of Procedure

42. Since regulations made under this power are likely to be uncontroversial and administrative in nature, it is considered that negative procedure will provide the appropriate level of parliamentary scrutiny. The negative procedure applies to the existing power in section 19(5) of the 2010 Act regarding tobacco retailing banning orders. The Bill only slightly adjusts this power, so that it now applies to the revised banning order. The Bill does not otherwise amend the width of the power. The Scottish Ministers consider the negative procedure to strike an appropriate balance between flexibility and the need for scrutiny of provision of this nature.

Section 13 – Power to exclude certain premises

Power conferred on: the Scottish Ministers
Power exercisable by: regulation made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

43. Section 13 of the Bill inserts a new power into section 35(1) (interpretation) of the 2010 Act. Section 13 clarifies the meaning of “vehicle” in the definition of premises and provides the Scottish Ministers with the power to make regulations excluding from that meaning any aircraft or ship, boat or other water-going vessel of a specified description. The effect is to remove the requirements of the 2010 Act (for tobacco and, as amended by the Bill, for NVPs) from applying to vehicles specified in the regulations. Similar powers exist in other pieces of legislation e.g. under section 58(1) of the Food (Scotland) Act 2015.

Reason for taking power

44. It may be desirable to exclude certain ships and aircraft from being subject to the 2010 Act e.g. to prevent local authorities and the police boarding military or merchant ships visiting Scotland from other states to investigate whether they have a tobacco or NVP vending machine on board. Classifications of ships and aircraft may require to be updated from time to time and it therefore seems appropriate to make the provision by regulations.

Choice of procedure

45. This is a narrow power which would only be used to prevent unintended enforcement actions in a limited set of circumstances. It is therefore considered that the use of this power can be left to the level of parliamentary scrutiny which comes with the negative procedure.

Chapter 2: Advertising and promotion of nicotine vapour products

Section 17(1) – Advertising and brandsharing

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

46. Section 17(1) of the Bill contains a wide power for the Scottish Ministers to make regulations to prohibit or restrict in the course of a business the advertising and brand-sharing of NVPs. The powers could, for example, be used to prohibit or restrict the advertising of NVPs on billboards, product displays, bus stops, posters, leaflets, banners, brochures and certain published material in Scotland. Regulations could also prohibit or restrict unrelated branded products or services being used in NVP branding, and vice versa. Section 17(2) contains a non-exhaustive list of the kind of provision which may also be made in regulations under the power in section 17(1), covering enforcement, offences, penalties, defences and exceptions e.g. there could be an exception made for specialist trade shops and an exception allowing certain forms of advertising at point of sale.

47. Section 17(3) specifies the maximum penalty which regulations under section 17(1) may prescribe for offences as, on summary proceedings, imprisonment not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) or both, and on conviction on indictment, imprisonment not exceeding 2 years or an unlimited fine or both.

48. Section 17(4) defines certain expressions used in section 17, which have the effect of shaping the power in subsection (1). In particular, the definition of “nicotine vapour product advert” concerns a “published advertisement” whose purpose or effect is to promote a NVP, and it also includes a product “display” whose purpose or effect is to promote a NVP. The word “advertisement” is not defined and bears its ordinary meaning. A wide definition of “published” is provided to make clear that this term covers any way of making an advertisement available to the public in Scotland; it is, for example, not limited to print media and can cover electronic and audio-visual media.

49. The policy intention is to exercise this power to achieve a coherent ban on the advertising and brand-sharing of NVPs, similar to, but not exactly like, the existing ban on advertising and brand-sharing of tobacco. Tobacco advertising was largely banned by the Tobacco Advertising and Promotion Act 2002 (TAPA). The intention is to achieve a similar effect by regulations. The power contained in section 17(1) allows the Scottish Ministers to make regulations to supplement the revised EU Tobacco Products Directive (“TPD”). The TPD, which must be implemented by May 2016, requires member states to implement a ban on cross-border advertising and promotion. The forms of advertising and promotion of nicotine-containing NVPs which will be banned by the TPD include:

- Television broadcasting;

- Radio broadcasting;
- Information society services;
- Most publications (e.g. newspapers); and
- Sponsorship with a cross-border effect (e.g. televised sporting events).

50. The UK Government are responsible for implementing the TPD across the UK. The Scottish Ministers have consented to the UK Government making regulations to give effect to the TPD for the UK in so far as it falls within the legislative competence of the Scottish Parliament. Implementation will be achieved by way of UK regulations made by statutory instrument which we understand are in development.

Reason for taking power

51. This power is being taken in the Bill to allow for provision to be made by regulations as part of a package of other measures, mentioned below, which control the advertising and promotion of NVPs. The Bill sets out the framework and allows regulations to provide for the detail.

52. The enabling power in the Bill allows the Scottish Ministers to consider the UK regulations to ensure that regulations made under the Bill fit together with, and are not incompatible with, the UK Government's regulations giving effect to the TPD. There is clearly an interface between controls on cross-border advertising and domestic advertising which needs careful consideration. It also allows for further consideration of exactly what kinds of cross-border advertising are indeed covered by the TPD (the provisions of which are fairly new) and therefore what may be able to be covered in regulations under this power; this ensures compatibility with EU law. It also seems sensible, given the potential cross-border effects within the UK of exercising this power in the absence of similar provision on domestic advertising being made in the rest of the UK, that further consultation on the detail may be desirable before making regulations in order to hear the views of the public and stakeholders on how any prohibitions or restrictions can be adapted to work best in practice.

53. The TPD is currently subject to a legal challenge which has been referred to the Court of Justice of the European Union. It is possible that a judgement will not be available before the Bill has completed its passage through Parliament. Whilst we do not expect that challenge to be successful, it cannot be ruled out that the TPD will fall in whole or in part. It is preferable to have a power in the Bill which can be relied upon to adapt to any changes or revisions to the TPD as a result of that challenge. In the event that the TPD falls then the power could, for example, be used to extend the ban to some forms of advertising which were otherwise covered by UK-wide regulations implementing the TPD (e.g. newspaper adverts in Scotland).

54. Depending on the detail of the regulations and market characteristics at the time the regulations are to be made, the Scottish Government believes that it is possible draft regulations may need to be notified under the EU Technical Standards Directive. Should this be necessary, the regulations can be notified in draft and adjusted expediently as a result of any observations

from other EU member states. This also avoids the need to notify the Bill and potentially delay parliamentary proceedings.

55. The power allows the Scottish Ministers to make exemptions to any prohibition or restriction on advertising and brand-sharing of NVPs. It is intended that these exemptions should cover point of sale advertising and promotion. Other exemptions may also be made e.g. for advertising within trade shops which is not visible outside the shop. As set out in detail in the policy memorandum, the Scottish Government does not intend to treat NVPs exactly like tobacco products. Exemptions balance the need to protect non-smokers and especially children and young people, yet recognises the harm reduction potential of NVPs for current smokers. The tobacco industry (who own many NVP businesses) have in the past, as forms of advertising have been banned, diverted resources into other available forms of advertising. It is therefore conceivable that industry could divert advertising and marketing resources into those exemptions in a way that is undesirable and not within the spirit of the legislation. The Scottish Ministers have committed to keeping exemptions under review to ensure that they are not exploited in a way that circumvents the prohibitions or restrictions. Likewise, the Scottish Government is in part taking a precautionary approach in acting to minimise the impact of several potential consequences of the use of NVPs. In reviewing the exemptions in place the Scottish Government will continue to consider emerging evidence; it is therefore conceivable that further exemptions could be made or exemptions narrowed. Taking a power regarding exemptions allows such flexibility.

56. Taking a power to provide for offences, defences and enforcement allows the Scottish Ministers to consider offences etc. under the UK regulations (to see if achieving a consistent enforcement regime is possible for cross-border and domestic advertising controls) and account for exemptions mentioned above. The detail of offences, defences and enforcement are best left to be decided after the detail of the prohibitions or restrictions to be proposed in regulations is worked out, so that appropriate criminal sanctions and enforcement provision is made in the regulations. Offences and enforcement provisions are often made in secondary legislation e.g. to implement EU obligations. Once the nature of prohibitions or restrictions are known then suitable offences can be applied for contravening them, penalty levels can be determined, fixed penalty notices can be applied or not, and appropriate enforcement provision made (e.g. powers of entry, if needed). However, it is envisaged that the enforcement arrangements will be similar to those set out in sections 25 to 32 of the 2010 Act and that the defences provided will be similar to those set out in sections 5 and 6 of the Tobacco Advertising and Promotion Act 2002.

Choice of procedure

57. The exercise of this power is likely to attract a high level of public interest and the detail of the provision to be made clearly has an impact on NVP businesses. Whilst the power is wide it is nevertheless shaped to a degree by the detailed provision in section 17(2). The intention is clear given the comparator with provisions of the Tobacco Advertising and Promotion Act 2002. The power is of course limited to making provision within legislative competence e.g. it cannot control TV and radio broadcasting. The provision that it can make should also be further narrowed by the effect of the TPD. The anticipated exercise of the power is therefore relatively modest by comparison to its width. Its width is, however, needed to ensure flexibility. On balance it seems appropriate that the regulations should be made subject to affirmative procedure. The Scottish Ministers consider that this strikes the right balance between the

importance and likely extent of the provision to be made, achieving a high degree of scrutiny and making best use of parliamentary time.

Section 18 – Free Distribution and nominal pricing

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

58. Section 18(1) of the Bill contains a power for the Scottish Ministers to make regulations to prohibit or restrict in the course of a business the giving away of NVPs (and coupons for those products) for free including retailing them for a nominal sum. Section 18(2) contains a non-exhaustive list of the kind of provision which may also be made in regulations, covering enforcement, offences and penalties, defences and exceptions. It also makes clear that regulations can make further provision about the circumstances in which a product or coupon is to be treated as being made available for a nominal sum.

59. This power allows the Scottish Ministers to make regulations to supplement the revised EU Tobacco Products Directive (“TPD”). The TPD is explained above. The TPD does not control free distribution or nominal pricing. However, recital 47 of the TPD encourages EU Member States to regulate “domestic sales arrangements” and “domestic advertising” within their own jurisdictions.

60. The policy intention is to exercise this power to achieve a comprehensive ban (albeit with some exceptions) on the promotion of NVPs, similar to, but not exactly like, the ban on advertising and promotion of tobacco. This power enables a prohibition or restriction to be put on the free distribution and nominal pricing of NVPs to control promotional tools which involve giving them away free or for a consideration tantamount to free. The power cannot be used to make provision which goes as far as controlling other kinds of promotional offer, for example, ‘buy one NVP get one free’ offers of discounted pricing. Discounting pricing is a distinct matter from nominal pricing and free distribution. Section 9 (free distribution) of the Tobacco Advertising and Promotion Act 2002 bans the free distribution of tobacco products and contains powers allowing nominal pricing to be controlled; it also contains powers allowing substantial discounts to be controlled but this is not replicated by the Bill. Whilst substantial discounts could be used to promote NVPs, they do so in a different way. They do not equate to giving the product away for free or at price so low that it makes access to NVPs unreasonably easy. Evidence shows that competitive pricing is a popular reason for smokers choosing to try a NVP.

61. Section 18(3) specifies the maximum penalty which regulations may prescribe for offences as, on summary proceedings, imprisonment not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) or both, and on conviction on indictment, imprisonment not exceeding 2 years or an unlimited fine or both.

Reason for taking power

62. This power is being taken in the Bill to allow for provision to be made by regulations as part of a package of other measures, mentioned in this memorandum, which control the advertising and promotion of NVPs. The Bill sets out the framework and allows regulations to provide for the detail.

63. The expression “nominal pricing” in the Bill is to bear its ordinary meaning but the detailed power in section 18(2)(a) allows the Scottish Ministers to make regulations to effectively refine what nominal pricing means within the boundaries of its ordinary meaning if that proves desirable and practical. An example of this might be providing, in circumstances where a store or loyalty card is used to spend points to purchase a NVP, that this is making a NVP available for a nominal sum. The power allows an opportunity for further consultation before making such detailed provision.

64. As already highlighted, the potential cross-border effects within the UK of exercising the powers in relation to advertising and promotion mean that further consultation on the detail may be desirable before making regulations in order to hear the views of the public and stakeholders on how any prohibitions or restrictions can be adapted to work best in practice. This also applies to the provision to be made on free distribution, and in support of that, nominal pricing. Depending on the detail of the regulations and market characteristics at the time the regulations are to be made, the Scottish Government believes that it is possible draft regulations on free distribution and nominal pricing may need to be notified under the EU Technical Standards Directive. Should this be necessary, the regulations can be notified in draft and adjusted expediently as a result of any observations from other EU member states.

65. The detail of offences, defences and enforcement are best left to be decided after the detail of the prohibitions or restrictions to be proposed in regulations are worked out, so that appropriate criminal sanctions and enforcement provision is made in the regulations. It is envisaged that the defences and enforcement of the prohibition or restriction on free distribution and nominal pricing will mirror those made under the powers in the Bill respect of advertising, brandsharing and sponsorship. The intention is to achieve a consistent enforcement regime in so far as that is possible; powers are therefore needed in respect of free distribution and nominal pricing to ensure that can be done since it is not certain what provision is to be made yet under the advertising, brandsharing and sponsorship powers. Whilst the detail is to be worked out it is envisaged that enforcement arrangements will be similar to those set out in sections 25 to 32 of the 2010 Act and that the defences provided will be similar to those set out in sections 5 and 6 of the Tobacco Advertising and Promotion Act 2002.

Choice of procedure

66. The exercise of this power is likely to attract a high level of public interest and the detail of the provision to be made clearly has an impact on NVP businesses. Whilst this power is not particularly wide – it is limited to controlling free distribution and nominal pricing – the Scottish Ministers nevertheless regard the detail of the provision to be made under it to merit the high level of scrutiny afforded by the affirmative procedure.

Section 19 – Sponsorship

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

67. Section 19(1) of the Bill contains a power for the Scottish Ministers to make regulations to prohibit or restrict a person in the course of a business entering into a sponsorship agreement where the purpose or effect of anything done as a result of the agreement promotes a NVP. Subsection (4) defines “sponsorship agreement”. It can include the sponsorship of an event, activity or person in, or in connection with, Scotland. Section 19(2) contains a non-exhaustive list of the kind of provision which may also be made in regulations, covering enforcement, offences and penalties, defences and exceptions.

68. This power allows the Scottish Ministers to make regulations to supplement the revised EU Tobacco Products Directive (“TPD”). The TPD is explained above. The TPD controls sponsorship with a cross-border effect e.g. televised sporting events. This does not cover sponsorship taking place in Scotland with no cross-border effect. However, recital 47 of the TPD encourages EU Member States to regulate “domestic sales arrangements” and “domestic advertising” within their own jurisdictions.

69. The policy intention is to exercise this power to achieve a comprehensive ban on the advertising and promotion of NVPs, similar to, but not exactly like, the ban on advertising and promotion of tobacco. Section 10 of the Tobacco Advertising and Promotion Act 2002 banned sponsorship in relation to tobacco. The intention is to achieve a similar effect for NVPs by regulations.

70. Section 19(3) specifies the maximum penalty which regulations may prescribe for offences as, on summary proceedings, imprisonment not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) or both, and on conviction on indictment, imprisonment not exceeding 2 years or an unlimited fine or both.

Reason for taking power

71. This power is being taken in the Bill to allow for provision to be made by regulations as part of a package of other measures, mentioned above, which control the advertising and promotion of NVPs. The Bill sets out the framework and allows regulations to provide for the detail.

72. The enabling power in the Bill allows the Scottish Ministers to consider the UK regulations to ensure that regulations made under the Bill fit together with, and are not incompatible with, the UK Government’s regulations giving effect to the TPD (which can make provision on cross-border sponsorship). It also allows for further consideration of exactly what kinds of cross-border sponsorship is indeed covered by the TPD (the provisions of which are fairly new) and therefore what may be able to be covered in regulations under this power; this ensures compatibility with EU law. It also seems sensible, given the potential cross-border

effects within the UK of exercising this power in the absence of similar provision on domestic advertising being made in the rest of the UK, that further consultation on the detail may be desirable before making regulations in order to hear the views of the public and stakeholders on how any prohibitions or restrictions can be adapted to work best in practice.

73. The TPD is subject to a legal challenge which has been referred to the Court of Justice of the European Union. It is possible that a judgement will not be available before the Bill has completed its passage through Parliament. Without prejudice to the possible outcome, it cannot be ruled out that the TPD will fall in whole or in part. It is preferable to have a power in the Bill which can be relied upon to adapt to any changes or revisions to the TPD as a result of that challenge. In the event that the TPD falls then the power might be able, for example, to be used to extend the ban to forms of sponsorship which were otherwise covered by UK-wide regulations implementing the TPD.

74. Taking a power to provide for offences, defences and enforcement allows the Scottish Ministers to consider offences etc. under the UK regulations and account for exemptions mentioned above. The detail of offences, defences and enforcement are best left to be decided after the detail of the prohibitions or restrictions to be proposed in regulations are worked out, so that appropriate criminal sanctions and enforcement provision is made in the regulations. This is explained in more detail in paragraph 57. It is intended that defences and enforcement arrangements will largely replicate those prescribed for advertising, brandsharing, free distribution and nominal pricing. It is envisaged that the enforcement arrangements will be similar to those set out in sections 25 to 32 of the 2010 Act and that the defences provided will be similar to those set out in sections 5 and 6 of the Tobacco Advertising and Promotion Act 2002. Accordingly, taking a power here enables consideration of how related advertising and promotion controls are enforced, to help achieve consistency and compatibility. The power offers this flexibility.

Choice of procedure

75. The Scottish Government considers it appropriate that the Scottish Parliament give a high level of scrutiny to the detail of this power. It is likely that the policy underpinning the exercise of the power will attract a high level of interest and clearly it impacts on certain kinds of sponsorship agreements. However, it is worth noting that provision made under this power is likely to be fairly limited given that the TPD controls cross-bordering sponsorship. The power is primarily intended to be used to supplement the TPD with additional controls on domestic sponsorship arrangements. On balance, the Scottish Government considers that the affirmative procedure is most suitable here.

Chapter 3: Smoking outside hospitals

Section 20(2) – Section 4C(4) – Display of warning notices outside hospitals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

76. Section 20 of the Bill inserts section 4C into the Smoking, Health and Social Care (Scotland) Act 2005 (“the 2005 Act”). Subsection (1) of section 4C places a duty on NHS Health Boards to prominently display signs at every entrance to NHS hospital grounds.

77. Subsection (2) requires the person in management and control of each building on hospital grounds to prominently display signs at every entrance to each building. Subsection (5) makes it an offence for a person to fail to comply with this requirement. It also makes it an offence to fail to comply with requirements which may be set out in regulations made under subsection (4).

78. Subsection (3) provides that a sign must state that it is an offence to smoke in the no-smoking area outside a hospital building or knowingly permit smoking there.

79. Subsection (4) gives the Scottish Ministers a power to make regulations which may provide further detail as to the manner of display, and the form and content, of the no-smoking signs.

Reason for taking power

80. It will be important that the public, staff and visitors are clear about where they will commit an offence; signage is a crucial tool in this respect. The power allows the Scottish Ministers to set the manner of display, form and content of no-smoking signs. This allows for signage to be made consistent across NHS hospital grounds, if desirable. It is possible that the content of the signs could change periodically, for example if the distance of the no-smoking area changed. The content may be determined to some extent by the scope of other powers used to refine what is meant by, and make exceptions from, the definitions in the Bill of hospital grounds, buildings and the no-smoking area.

Choice of procedure

81. This power is subject to negative procedure. The power is narrow and is intended to be used to set out administrative and technical details on signage. The Scottish Ministers consider that negative procedure achieves the appropriate balance of scrutiny and best use of parliamentary time.

Section 20(2) – Section 4D(2)(a)-(b) – Meaning of “no-smoking area outside a hospital building” and related expressions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if exercising the power in section 4D(2)(a) and negative if exercising the power in section 4D(2)(b).

Provision

82. Section 20 of the Bill inserts section 4D into the 2005 Act. Subsection (1) of section 4D defines the meaning of “no-smoking area outside a hospital building”. It is an area lying immediately outside a hospital building. It is bounded by a perimeter of a specified distance from the building. However, the area is limited to being within, and thereby cannot fall outside of, hospital grounds. Section 4D(3) defines “hospital grounds”.

83. Subsection (2)(a) gives a power to the Scottish Ministers to make regulations prescribing the specified distance of the perimeter.

84. Subsection (2)(b) provides that the Scottish Ministers may make further provision about determining the perimeter around a building e.g. they could make detailed provision on how to determine the starting point outside a building from which the specified distance is to be measured and to make provision which allows for a more regular shaped perimeter (as opposed to an irregular shaped perimeter resulting from the shape of over-hanging roofs/parts of buildings, steps and so on).

85. The intention of the legislation is to ensure that there is a consistent and easily understood prohibition of smoking around all buildings on NHS hospitals sites (subject to such exceptions as may be made by regulations under the Bill). However, as with the 2005 Act and the regulations under that Act which implemented the smoking ban in enclosed public spaces (including inside most hospitals), it is important that the areas that are to be captured by the legislation are clearly defined to ensure that they are coherent and readily understood.

Reason for taking power

86. The power contained in section 4D(2)(a) allows the Scottish Ministers to set the distance (i.e. the extent) of the perimeter from buildings on NHS hospital grounds. The area within a perimeter is the “no-smoking area”. Note that some buildings and land may be made exempt under other powers in the Bill.

87. The perimeter could, for example, be set at a distance between 10 meters to 15 meters from buildings on NHS hospital grounds. The same distance is to apply to all buildings, for consistency. The Scottish Ministers consider that setting the distance for the perimeter is best achieved in consultation with NHS Health Boards and other stakeholders and implemented by regulations. The power enables an opportunity for that consultation. This approach also allows the extent of the perimeter to be varied in future, either reducing or increasing it, to take account of what works well in practice. There is a balance to be struck between preventing smoking and being compassionate towards smokers (particularly patients who may have limited mobility). The power allows for flexibility to make adjustments to the extent of the perimeter to get the balance right, if that proves necessary.

88. The power contained in section 4D(2)(b) allows for a detailed consideration of the issues, which are not straight-forward, before provision is made in regulations on how the perimeter is to be determined. Provision made under this power is likely to be quite technical. It is detailed provision which allows for the perimeter to be calculated properly and consistently. It must take account of the difference shapes, sizes and features of different buildings. The Scottish

Government intend to consult with NHS Health Boards before making regulations – the power allows for this opportunity. It also allows the provision to be varied in future by regulations to take account of how it is working in practice.

89. The powers in section 4D(2)(a) and (b) may, at first, be exercised together in a single set of regulations to specify the distance of the perimeter and to provide for how it is to be determined but thereafter provision could, for example, be made under section 4D(2)(b) alone subject to negative procedure to adjust how the perimeter is determined, if that proves desirable e.g. to take account of practice.

Choice of procedure

90. The extent of the perimeter is a key aspect of the policy. A perimeter of a greater distance has a greater impact. The power contained in section 4D(2)(a) is, however, fairly narrow in the sense that provision can only be made which specifies a distance. On balance, given the width of the power and its significance to the outside smoking ban policy, the Scottish Government considers it appropriate for Parliament to have an elevated level of scrutiny. The distance specified under the power is likely to attract a high level of interest. The Scottish Government considers the affirmative procedure to be appropriate.

91. This power contained in section 4D(2)(b) is narrow and may be used to facilitate the power in subsection (2)(a) by providing for the technical, and more minor, detail of measuring a perimeter. The Scottish Government therefore considers that negative procedure is appropriate.

Section 20(2) – Section 4D(4)(a)-(d) and 4D(5) – Meaning of “no-smoking area outside a hospital building” and related expressions

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative when exercising the power in section 4D(4)(a) and negative when exercising the powers in section 4D(4)(b)-(d) or 4D(5).

92. Section 20 of the Bill inserts section 4D(4) into the 2005 Act. Subsection (3) of the 2005 Act defines “hospital”, “hospital building” and “hospital grounds”. A hospital means a health service hospital as defined in section 108(1) of the National Health Service (Scotland) Act 1978. A hospital building is simply a building on hospital grounds. Hospital grounds covers land in the vicinity of a hospital which is associated with it.

93. The intention of the Bill is to ensure that there is a coherent and easily understood prohibition of smoking around buildings on NHS hospital grounds. The intention is, however, to enable regulations to be able to make certain exceptions and provision which makes clear the extent of the ban. As with the 2005 Act and the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 which implemented the smoking ban in enclosed public spaces, it is important that areas to be captured by the Bill are carefully and clearly defined to ensure they can be identified properly. This is likely to include a high level of detail and complex rules setting out the relationships between the no-smoking perimeters around buildings, and the perimeters and land, on NHS grounds. There will be certain circumstances where entire

hospitals, parts of hospital grounds, certain buildings or parts of the no-smoking areas outside of buildings should be exempt from the outside smoking ban. There may also be a need in certain circumstances to include specified land within the ban which might not otherwise be caught and make further provision to elaborate on, and clarify, the meaning of “hospital grounds”. Section 4D contains a package of powers which make this possible.

94. Section 4D(4)(a) provides that the Scottish Ministers may by regulations exempt hospitals of a specified description (which otherwise fall within the definition of a “hospital” under the 1978 Act) from the provisions in the Bill which prohibit smoking on NHS hospital grounds. That means that if a hospital is excluded the entire grounds of that hospital and all its buildings are exempt from having any no-smoking areas e.g. the state psychiatric hospital could be excluded.

95. Section 4D(4)(b) allows the Scottish Ministers by regulations to provide that certain land is or is not to be considered “hospital grounds” and to make further provision elaborating on the meaning of “hospital grounds” for the purposes of prohibiting smoking outside NHS hospital buildings. It allows the Scottish Ministers to refine the definition, to make clear that land of a specified description is or is not “hospital grounds” regardless of whether that land is in the vicinity of, and associated with, a hospital. For example, it may be desirable to exclude grounds containing staff or student accommodation from being hospital grounds with the result that the ban on smoking will not apply outside those buildings. It may also be desirable to definitively include certain land (rather than relying on a vicinity and association test) in certain circumstances e.g. it may be desirable to include public roads running through hospital grounds in circumstances where a person is on foot (i.e. not in a moving vehicle). This power enables such provision to be made.

96. This power also enables further provision to be made to elaborate on the meaning of “hospital grounds” for the purposes of the outside smoking ban. As mentioned, “hospital grounds” means land in the vicinity of a hospital which is associated with it. This power enables more detailed provision to be made in that respect to assist in determining which land does and does not fall under the definition. Provision in regulations could, for example, lay down factors or criteria to take into account when assessing if a piece of land is “associated” with a hospital.

97. Section 4D(4)(c) enables the Scottish Ministers to make regulations to prescribe that certain buildings are not to be considered ‘hospital buildings’ for the purposes of prohibiting smoking outside NHS hospital buildings. A building excluded in this way means it does not have a perimeter applied to it by section 4D(1) of the Bill and therefore it does not have a no-smoking area surrounding it on account of it being a hospital building (parts of the grounds of that building may nevertheless fall within a no-smoking area on account of a perimeter applied by the Bill to a neighbouring building – but the power in section 4D(4)(d) could deal with this, if desirable). For example, a psychiatric ward building or a hospice building on hospital grounds could be excluded under this power.

98. Section 4D(4)(d) provides that the Scottish Ministers may by regulations provide that land of a specified description is not to be considered part of a no-smoking area outside of a hospital building. This allows certain land to be excluded from being part of a no-smoking area. Whilst the intention is for no-smoking areas around buildings on hospital grounds to be applied

more or less uniformly (subject to provision made under other powers in section 4D), this power enables the Scottish Ministers to exempt certain pieces of land from the general prohibition applied by the Bill. For example, where a building such as an adult hospice has been excluded from being a hospital building, and therefore does not have a no-smoking area applied to it on account of it being a hospital building, the hospice is still on hospital grounds where no-smoking areas can apply around neighbouring buildings; this means it is possible the area outside the entrance to the hospice could be caught by the no-smoking perimeter of a nearby hospital building and it may be desirable to remedy this by using this power. The power might, for example, make provision which removes the area outside of the entrance to a hospice from being a part of any no-smoking area if that area is the only accessible space for residents of the hospice to smoke. The policy intention is to have as few exceptions as possible but the power recognises that the relations between buildings (and perimeters applied by the Bill around hospital buildings) are complicated and vary from hospital grounds to hospital grounds.

99. Section 4D(5) allows regulations made under subsection (4) by the Scottish Ministers to make provision modifying the application of section 4C so that signage requirements can be adjusted, as appropriate, to take account of exceptions and other provision made by those regulations. Section 4C requires signage at entrances to hospital grounds and hospital buildings. The requirement for signage depends on whether land is defined as “hospital grounds” or buildings are defined as “hospital buildings”. The powers contained in section 4D(4) can, for example, exclude specified land and hospital buildings. This might mean that there should be consequential modifications of the signage requirements in section 4C e.g. signage may only be required at the entrances of buildings outside of which there is a no-smoking area in place or there may not be a need for signage at some entrances to hospital grounds where that section of the grounds does not have any buildings on it with a no-smoking perimeter applied to them. The consequential power in section 4D(5) allows the Scottish Ministers to make desirable adjustments like this to ensure that signage is not required in places where it is not needed and information on signs is helpful and not misleading. These form a package of powers in section 4D which can be exercised to tailor the application of the outside smoking ban.

Reason for taking power

100. The power contained in section 4D(4)(a) enables the Scottish Ministers to exempt by regulations certain hospitals in circumstances where the general prohibition is inappropriate due to the service hospitals are providing or the type of patient they are providing care for. For example, for facilities providing residential accommodation, such as the State hospital, adult hospices or psychiatric hospitals, it may be desirable to use this power to exempt them entirely from the outside smoking ban. These establishments are given certain exemptions under the 2005 Act regarding the smoking ban in enclosed public spaces. However, many are moving towards operating entirely smoke-free indoor areas. It is conceivable, and indeed likely, that in future these establishments might move to operating smoke-free outdoor areas. The Scottish Government may wish to support or mandate this action by removing such exemptions in future. The power therefore provides necessary flexibility.

101. The powers contained in section 4D(4)(b)-(d) allow for careful consideration of the detail before provision is made. The powers enable complex provision to be made which is best suited to regulations rather than primary legislation. It is not possible to be overly prescriptive in primary legislation given the variety of kinds of hospital buildings and grounds. The powers

provide flexibility to make provision in regulations revising the detail over time and to take account of how the outside smoking ban is working in practice. The relationships between buildings and how the no-smoking perimeter is defined will be complex, it is therefore possible that the experience of enforcing the regulations could identify technical refinements.

102. Section 4C of the Bill contains the general rules on signage but as a result of the powers being exercised in section 4D(4) it may be desirable to modify the signage requirements. The power contained in 4D(5) is necessary to do this. The modifications which might be desirable cannot be worked out fully before the powers in section 4D(4) are exercised. Nor is it possible to be overly prescriptive in primary legislation given the variety of kinds of hospital buildings and grounds. The power provides flexibility to make provision in regulations revising the detail over time and to take account of how the outside smoking ban is working in practice.

103. The Scottish Government intend to consult with NHS Health Boards before making regulations under section 4D – the powers allow for this opportunity.

Choice of procedure

104. Determining what is and isn't a hospital for the purposes of this part of the Bill is fundamental to the application of the policy. The power contained in section 4D(4)(a) is constrained, however, by the definition of "hospital" in the 1978 Act; the power can remove hospitals from that definition for the purposes of the outside smoking ban but it cannot add hospitals into the outside smoking ban which are not caught by that definition in the first place e.g. entirely privately operated hospitals. It can only apply to NHS hospitals. The Scottish Government nonetheless considers it appropriate for the Scottish Parliament to provide an elevated level of scrutiny to the detail of a power, which is likely to attract a high level of interest. The Scottish Government considers the affirmative procedure to be appropriate.

105. The width of the power contained in section 4D(4)(b) is limited to a degree by the definition of "hospital" and to the extent it could be used to include land within the meaning of "hospital grounds" which might not otherwise be caught by that definition, it is supplementary in nature. The provision made is likely to be detailed and in part technical.

106. The power contained in section 4D(4)(c) is narrow. This power can only be used to exclude a building from being a "hospital building" for the purposes of this part of the Bill.

107. The power contained in section 4D(4)(d) is also a narrow power – it is limited to excluding specified land from no-smoking areas. It cannot extend no-smoking areas.

108. The power contained in section 4D(5) is not a standalone power. It is consequential to the powers in section 4D(4). It allows regulations made under section 4D(4) to modify the signage requirements in the Bill. Section 4C can only be 'modified' to account for provision made under section 4D(4); section 4C cannot be textually amended to apply by default in all circumstances. The provision made is likely to be detailed.

109. The powers contained in section 4D(4)(b)-(d) and 4D(5) are narrow and enable the detail of the outside smoking ban to be refined; the major exceptions (to entirely exclude certain

hospitals in the first place) are to be made under the power which is to be subject to affirmative procedure in section 4D(4)(a). Given the level of detail and nature of the provisions which may be made under the powers in section 4D(4)(b)-(d) and 4D(5) and the fact that they are unlikely to be controversial or attract much interest, the Scottish Ministers consider the negative procedure to be appropriate, to apply the correct level of scrutiny and make best use of parliamentary time.

Section 20(8) – Smoking outside NHS hospitals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative Procedure

Provision

110. Section 20(8)(e) of the Bill amends paragraph 4(1) of schedule 1 to the Smoking, Health and Social Care (Scotland) Act 2005 to include the new offences being inserted into the 2005 Act by the Bill (contained in sections 4A, 4B and 4C(5)) into the power in paragraph 4(1). That power allows the Scottish Ministers to prescribe by regulations the amount of a fixed penalty notice which may be issued in respect of those offences.

111. The intention is that the existing provision for fixed penalty notices in schedule 1 to the 2005 Act, including the amount to be paid, apply to the new offences. The amount to be paid is currently set out in the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006.

Reason for taking the power

112. The expansion of this power is based on the same rationale the power was taken in the 2005 Act. Whilst it is not the intention of the Scottish Ministers at this time to vary the amount to be paid on issue of a fixed penalty notice, this may be required in future to ensure the sum remains an appropriate one for enforcement purposes. The power provides the flexibility necessary to amend the sum payable without resorting to primary legislation. It might be desirable in future, for example, to increase the rate to reflect inflation or increased costs to the local authority of administering fixed penalty notices. Schedule 1 of the 2005 Act does not limit the maximum that may be prescribed by the Scottish Ministers.

Choice of procedure

113. The sum payable for a fixed penalty notice is likely to attract a high level of interest and clearly impacts on those issued with penalties. The Scottish Ministers consider that a higher level of parliamentary scrutiny is needed and therefore the affirmative procedure should continue, as it is at present under the 2005 Act, to be appropriate here.

Part 2 – Duty of Candour

Section 21 – Incident which activates duty of candour procedure

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative Procedure

Provision

114. Subsection (1) requires a responsible person to follow the duty of candour procedure (in section 22) as soon as reasonably practicable after becoming aware that subsection (2) applies. Subsection (2) applies where, among other things, certain outcomes listed in subsection (4) have occurred (or could occur).

115. Subsection (4) lists those outcomes and include death and various descriptions of harm (both physical and psychological). Subsection (5) gives the Scottish Ministers power to modify subsection (4).

Reason for taking power

116. As the Bill is implemented and in light of experience, it may be necessary to amend or add to the list in subsection (4) to take account of learning from the application of the duty across organisations. The power therefore allows flexibility to take those circumstances into account. Given that the definitions of harm are central to the application of the duty of candour procedure, it is essential that changes can be made. The power allows for these changes to be made to reflect learning arising from the implementation of definitions and new discoveries in respect of harm occurring in health and social care provision.

Choice of procedure

117. The regulations are subject to affirmative procedure in accordance with section 32(2). This is considered the appropriate level of Parliamentary procedure for the textual amendment of primary legislation.

Section 22 – Duty of candour procedure

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative Procedure

Provision

118. Subsection (1) gives power to the Scottish Ministers to specify the actions which should be taken by the responsible person (the “duty of candour procedure”). Subsection (2) lists the matters that the regulations may in particular make provision about. Section 21(1) requires that the “responsible person” follows the duty of candour procedure set out in section 22.

Reason for taking power

119. This enables an outline of the detailed requirement of implementation to be provided, reflecting the principles outlined and reflecting the fact that this level of detail is more suited to regulations than primary legislation. It is considered appropriate to use secondary legislation to set out the detail of the duty of candour procedure. This will also provide flexibility to review and amend the list in light of evidence and feedback from organisations.

Choice of procedure

120. The way in which organisations identify, respond and review unintended and unexpected events resulting in harm will be a vital aspect of determining the operating effectiveness of the duty of candour procedure. The Scottish Government intends to work with stakeholders before making regulations and this power allows for this opportunity. This is subject to the negative procedure which is considered appropriate because the regulations will be used to set out matters of detail which may need to be amended from time to time. The duty on the “responsible person” to follow the duty of candour procedure is set out in the Bill. A higher level of Parliamentary scrutiny is not considered appropriate for a provision of this nature.

Part 3 – III Treatment and Wilful Neglect

Section 31 – Penalty for ill-treatment and wilful neglect of mentally disordered person

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

121. Section 31 provides for substitution of section 315(4) and insertion of new subsection (5) of the Mental Health (Care and Treatment) (Scotland) Act 2003 to update references to the definitions of “provides care services” and “care service” which previously existed in section 313 of that Act.

122. The definition of “provides care services” includes a power for Scottish Ministers to set out any further circumstances in which care services are provided in addition to anything done by virtue of a contract of employment or any other contract.

Reason for taking power

123. It is considered appropriate to use secondary legislation to set out such further circumstances in which care services are provided, to reflect any future changes to the way in which care services are provided to persons with a mental disorder, without using primary legislation for this purpose. For example, if in future, circumstances arose where someone provided care services to a person with a mental disorder without a contract being in place between the organisation providing the care service and the individual directly responsible for providing the service, this power would ensure that the definition of “providing care services” can be amended without recourse to primary legislation. An order making power is considered

appropriate to specify the level of detail which is required and can be brought forward in shorter timescales than primary legislation.

Choice of procedure

124. This is subject to the negative procedure which is considered appropriate given the limited nature of the enabling power. A higher level of Parliamentary scrutiny is not considered appropriate for a provision of this nature.

Section 33– Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure, unless provision is made to add to, replace or omit the text of an Act in which case the affirmative procedure applies

Provision

125. Subsection (1) provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, any provision made by or under the Bill.

126. Subsection (2) provides that regulations made under subsection (1) may modify any enactment (including this Act).

Reason for taking power

127. The new provision introduced by the Bill may give rise to the need for ancillary provisions. The Scottish Ministers may need to make such provision by regulation to support the full implementation of the Bill. This provision empowers the Scottish Ministers to make provisions concerning incidental, supplemental, consequential, transitional, transitory provision or savings where this is thought to be necessary. For example, transitional powers may be required to allow the mandatory registration of NVP retailers to commence; it may be desirable to allow a period of grace for retailers to take relevant action before they can be held criminally liable.

128. Without these powers to make ancillary provision, it might be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intention of the original Bill. It would not be an effective use of Parliament's time, or the Scottish Government's resources to deal with such matters through primary legislation. They are best addressed through subordinate legislation.

Choice of procedure

129. If regulations made under this section add to, replace or omit any part of the text of an Act they are subject to the affirmative procedure. This approach is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different

approach in this case. Otherwise, negative procedure appears to make best use of parliamentary time and scrutiny given the ancillary nature of the provision which can be made.

Section 34 – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no procedure

Provision

130. Subsection (1) provides that this section and sections 32, 33 and 35 come into force on the day after Royal Assent.

131. Subsection (2) provides that any remaining provisions of this Act come into force on such date as the Scottish Ministers may by regulations appoint. It is common to take a power to commence provisions of a Bill. Subsection (3) clarifies that different days may be appointed for different purposes.

132. Subsection (4) provides that regulations under subsection (2) may include transitional, transitory or saving provision.

Reason for taking power

133. Some formal sections of the Bill are commenced on the day after Royal Assent. The Scottish Ministers may consider it appropriate for the substantive provisions of the Bill to be commenced at such a time as they appoint to be suitable. This is to provide flexibility to enable the provisions of the Bill to be brought into force in a co-ordinated and managed way, so as to give proper effect to the Bill. It is normal practice for such commencement provisions to be dealt with by subordinate legislation.

Choice of procedure

134. It is usual practice for commencement regulations to be laid before Parliament but not subject to additional procedure. Commencement regulations bring into force provisions whose policy have already been considered by the Parliament during the passage of the Bill.

*This document relates to the Health (Tobacco, Nicotine etc. and Care (Scotland) Bill (SP Bill 73)
as introduced in the Scottish Parliament on 4 June 2015*

HEALTH (TOBACCO, NICOTINE ETC. AND CARE (SCOTLAND)

DELEGATED POWERS MEMORANDUM