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Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Supplementary Legislative Consent Memorandum: delegated powers exercisable within devolved competence conferred on Scottish Ministers in the Tobacco and Vapes Bill

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Contents

Introduction	1
Overview of the Bill	2
Delegated Powers	3
Review of relevant powers	4

Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 29 April 2025ⁱ, the Committee considered the [Supplementary Legislative Consent Memorandum](#) (“supplementary LCM”) lodged by the Scottish Government in respect of the [Tobacco and Vapes Bill](#) ⁱⁱ (“the Bill”).
2. The Committee is considering the supplementary LCM by virtue of Rule 9B.3.6 of the Scottish Parliament’s Standing Orders. Paragraph 6 of Rule 9B.3 provides that where the Bill that is subject to an LCM contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.
3. The Scottish Government, supportive of the Bill, lodged its initial LCM for the Bill on 21 November 2024 and recommended consent to the relevant provisions which relate principally to the devolved matter of public health. The Scottish Government considers that the Bill aligns with the ambitions and actions set out in its Tobacco and Vaping Framework, which was published in November 2023.
4. The Committee considered the delegated powers in the Bill which are conferred on the Secretary of State and may be exercised within devolved competence, and the powers conferred on the Scottish Ministers, on 28 January 2025 and 25 February 2025. The Committee then published its [report](#) on 28 February 2025. That report related to the last version of the Bill as amended at the committee stage in the House of Commons.
5. The Bill has since been amended and is currently in the House of Lords, having had its first reading on 27 March 2025. The provisions discussed in this paper relate to the [amendments tabled by the UK Government](#) on 18 March which now form part of the Bill.
6. The lead committee for the Supplementary LCM is the Health, Social Care and Sport Committee.

ⁱ At this meeting, Rona Mackay MSP substituted for Bill Kidd MSP, who submitted apologies.

ⁱⁱ This is the latest version the Bill available online.

Overview of the Bill

7. The Bill was introduced by the UK Government in the House of Commons on 5 November 2024. It is a substantial Bill, currently made up of 8 parts (170 clauses) and 21 schedules. Most of the provisions extend to the whole of the UK, with Part 2 extending only to Scotland. The stated purpose of the Bill is to create a smoke-free UK and minimise the harms of smoking. It is stated in the explanatory notes for the Bill that it builds on the existing legislative framework, seeking to broadly align provisions across the UK.

Delegated Powers

8. The UK Government has not published a supplementary Delegated Powers Memorandum (“DPM”) albeit an updated version of the initial DPM dated [27 March 2025](#) has been published which includes the new powers added to the Bill following amendment. This DPM explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected.
9. As is normal for UK Bills, there is no delegated powers memorandum by the Scottish Government. The Scottish Government’s views on the relevant clauses are set out in the supplementary LCM.

Review of relevant powers

New Clause 60: Age verification in relation to tobacco and vaping products etc (Amending sections 4 and 4A of the Tobacco and Primary Medical Services (Scotland) Act 2010)

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

10. At present, under the Tobacco and Primary Medical Services (Scotland) Act 2010 (“the 2010 Act”), it is a defence for someone who is charged with an age of sale offence in Scotland that they believed the customer was over the age of sale and that they took reasonable steps to establish the customer’s age. These reasonable steps include being shown a prescribed document (such as a passport, a UK driving licence, a European Union photocard driving licence, or another prescribed document) that would convince a reasonable person of the customer’s age.
11. This new clause amends section 4 and 4A of the 2010 Act to provide the Scottish Ministers with a power to prescribe methods of age verification through regulations. The prescribed list of documents on the face of the 2010 Act will be removed.
12. The DPM explains that the purpose of this new clause is to allow other steps to be specified to establish a customer’s age to enable the use of both physical documents and digital methods of age verification. It is stated that digital verification services can make transactions quicker and more secure for those that choose to use them. Similar regulation-making powers are provided in the Bill for England, Wales and Northern Ireland and aligns with the UK.

Committee consideration

13. The DPM states that:

“Scottish Ministers currently have powers in sections 4 and 4A of the 2010 Act to prescribe documents which can be shown to a sales person for the purpose of age verification. At the time those powers were taken it was recognised that the kinds of documents used may change over time and it was considered appropriate to take a power to accommodate such change without the need for primary legislation.”
14. Accordingly, the UK Government considers that this broader power will enable the Scottish Ministers to respond to changes in technology and consumer behaviours, as well as futureproofing the defence by providing flexibility to allow for advances in digital age verification services and processes. This will allow changes in the list of permissible physical identity document that are accepted to satisfy the defence.
15. The DPM also explains that for Scotland, there is no general defence of “reasonable steps” to the offences in sections 4 and 4A of the 2010 Act. The existing steps which are currently set out in those sections will continue to be

required to be taken in order to rely on the defence until such a time as new regulations are made under this power.

16. Regarding the procedure, the DPM explains that the negative procedure affords an appropriate level of parliamentary scrutiny for regulations prescribing the steps retailers must take when verifying a customer's age, given that the detail of the steps will be technical, procedural and non-contentious. The UK Government is of the view that the affirmative procedure, relative to the nature of the power and limited impact of such regulations on retailers, would not be an appropriate use of parliamentary time.
17. The Scottish Government is supportive of the provision and considers that whilst equivalent provision could be made in Scottish Parliament legislation, it is prudent to pursue this through the Bill. The Scottish Government is of the view that the provision will ensure the Scottish Ministers have the same flexibility to adapt to future digital advances in age verification to the same timescales as Ministers in the other 3 UK administrations, if appropriate to do so. Regarding the procedure, the Scottish Government also considers that the negative procedure is appropriate, and that the Parliament will have the opportunity to closely scrutinise the content of those regulations to ensure these meet the needs of Scottish policy.
18. The supplementary LCM also explains that due to tight timescales neither the UK nor the Scottish Government have had time to consult formally on this provision. The Scottish Government explains that consideration will be given as to whether consultation is needed, and if so, the nature of such consultation before regulations are brought forward under the power. It is also stated in the supplementary LCM that the Scottish Government has sought advice from Trading Standards to consider the implications of the proposal, and that they are supportive.
19. Given the technical nature of this power and that its purpose is confined to allowing the Scottish Ministers to prescribe in regulations the steps which should be taken by retailers to establish the customer's age, as a defence to the offence, the Committee considers this power to be acceptable. The Committee also considers that the negative procedure will provide the appropriate level of parliamentary oversight in this case.

20. The Committee is content with the new powers conferred on the Scottish Ministers in sections 4 and 4A of the Tobacco and Primary Medical Services (Scotland) Act 2010 in principle and that they are subject to the negative procedure.

Clause 167(7)(a): Commencement of clause 60

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: None

Provision

21. New clause 167(7)(a) confers a power on the Scottish Ministers to commence new

clause 60 by regulations and different days may be appointed for different purposes.

22. As is normal with commencement provisions, this power is not subject to any parliamentary procedure.

Committee consideration

23. The DPM states:

“As usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them and commencement by statutory instrument enables the provisions to be brought into force at a convenient time and in an orderly manner.”

24. Given that adequate explanation is provided in the DPM and that this is a standard provision, the Committee is content with this power and that it is not subject to any parliamentary procedure.

- 25. The Committee is content with the commencement power conferred on the Scottish Ministers and that it is not subject to any parliamentary procedure.**

