

# Legislative Consent Memorandum

## Tobacco and Vapes Bill

### Background

1. This memorandum has been lodged by Neil Gray, Cabinet Secretary for NHS Recovery, Health and Social Care, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Jenni Minto, Minister for Public Health & Women's Health. The Tobacco and Vapes Bill was introduced in the House of Commons on 20 March 2024. The Bill can be found at [Tobacco and Vapes Bill publications - Parliamentary Bills - UK Parliament](#).

### Content of the Tobacco and Vapes Bill

2. As stated in the explanatory notes, the Bill seeks to create the first smokefree generation and reduce youth vaping. In order to do so, it will introduce measures which seek to stop people from starting smoking, as well as stopping vaping products from being targeted at children.

3. The core measures in the Bill will:

- from 1 January 2027 make it an offence to sell tobacco products to anyone born on or after 1 January 2009;
- provide powers to reduce the appeal and availability of vapes (nicotine and non-nicotine) to children;
- strengthen enforcement activity to support implementation of the above measures (England and Wales only).

4. To close regulatory loopholes and protect against future harms of nicotine addiction, the Bill will also enable relevant existing measures regulating vapes to be expanded to a wider range of nicotine products, such as nicotine pouches. The Bill also amends various product definitions, to ensure consistent application of the law across the different UK jurisdictions, improve readability and subsequent enforcement.

5. The Bill seeks to apply broadly equivalent measures UK-wide, building on the existing legislative frameworks that apply across the UK. It is split into six parts, with five schedules which make consequential amendments in relation to certain parts of the Bill. Parts 1 to 3 make provision regarding the sale and distribution of tobacco, vaping and nicotine products within each of the constituent nations of the UK. Part 1 of the Bill extends to England and Wales, Part 2 extends to Scotland and Part 3 extends to Northern Ireland. Part 4 of the Bill contains powers to regulate the product requirements for tobacco and vaping products which can be exercised for the whole of the UK, and so extends to the whole of the UK. Part 5 of the Bill contains a power to amend existing notification requirements under the Tobacco and Related Products Regulations 2016. Those Regulations are UK-wide and the powers can be exercised

for the whole of the UK. Part 6 of the Bill contains general provision, and extends to the whole of the UK. As health is devolved, and the majority of provisions have a public health purpose, the inclusion of the majority of provisions which extend to Scotland in the Bill requires the consent of the Scottish Parliament.

6. As well as introducing new restrictions and powers, the Bill also repeals and restates clauses from existing legislation – often with some minor amendments to ensure consistency but with little or no change to the policy intention or the effect of the measures. The majority of changes which are undertaken as part of this consolidation exercise are contained in Part 1, and the associated schedules. The majority do not impact Scotland. A similar consolidation of equivalent legislation for Scotland was undertaken when the Tobacco and Primary Medical Services (Scotland) Act 2010 (the “2010 Act”) was passed. Where there is such provision which extends to Scotland, this is highlighted below.

## Provisions Which Relate to Scotland

7. A number of clauses in the Bill extend to Scotland. The relevant provisions are outlined below.

## Part 2 – Sale and Distribution: Scotland

8. Part 2 of the Bill applies to Scotland and makes various amendments to the 2010 Act and The Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (the “2016 Act”). The Scottish Government considers that all of the clauses in Part 2 of the Bill require the consent of the Scottish Parliament. They make provision applying to Scotland for a purpose which is within the legislative competence of the Scottish Parliament, namely public health. Insofar as the clauses in this Part provide the Scottish Ministers with new powers and amend existing powers, they also alter the executive competence of the Scottish Ministers.

## Clause 37 – age of sale for tobacco products etc

9. The 2010 Act currently makes it an offence to sell tobacco products or cigarette papers to anyone under the age of 18. Clause 36(2) amends the 2010 Act to make it an offence to sell tobacco products to anyone born on or after 1 January 2009. The effect is that children born on or after this date will never be able to be legally sold tobacco products. The definition of “sell” ensures that registered retailers under the age of sale will still be able to purchase tobacco products for trade purposes. Amendments are also made to update references to the defence to the offence.

10. Clause 37(3) amends the age verification policy provision in the 2010 Act, to take into account the new age of sale for tobacco products. The age verification policy is different depending on whether it is a tobacco business, herbal smoking product business or nicotine vapour product business.

11. Clause 37(4) updates the proxy purchasing offence which applies to individuals purchasing tobacco products on behalf of someone who is under the age of sale. The effect of this is that it will be an offence for a person aged 18 or over to knowingly buy or attempt to buy a tobacco product, herbal smoking product or cigarette papers on behalf of a person who is born on or after 1 January 2009.

12. Clause 37(5) amends the provision relating to the display of warning statements to align with the new age of sale restrictions. The effect is that the notice which must be displayed under section 8 of the 2010 Act must contain the following statement: "It is illegal to sell tobacco products to anyone born on or after 1 January 2009".

13. Scottish Government published its refreshed Tobacco and Vaping Framework in 2023, setting out decisive action to achieve its goal of a tobacco-free Scotland by 2034. Under the first implementation plan of our framework, the Scottish Government committed to considering responses to the consultation on the age of sale for tobacco and whether legislation should be brought forward. This legislation will therefore contribute significantly to the implementation of this framework and work towards the Scottish Government's 2034 goal.

## Clause 38 – sale of unpackaged cigarettes

14. Clause 38 creates an offence in the 2010 Act in relation to selling cigarettes not in their original packaging. This clause makes it an offence for a person to sell cigarettes other than in their original packaging, defined as the retail packaging in which cigarettes were supplied to the person for the purpose of sale. Anyone who is convicted of this offence could receive a fine up to £1,000 (level 3 on the standard scale). This is already an offence in Scotland under section 3 of the Children and Young Persons (Protection from Tobacco) Act 1991, which introduced restrictions around the sale of cigarettes that were not in their original packaging. This Bill repeals that legislation and restates the offence in the 2010 Act, ensuring the Scottish tobacco legislative framework is clear and easily accessible.

## Clause 39 – repeal of offence of purchasing tobacco products by under 18s

15. Clause 39 repeals section 5 of the 2010 Act which provides that it is an offence for someone under the age of 18 to buy or attempt to buy a tobacco product or cigarette papers. The effect of this is that it will no longer be an offence for someone under the age of 18 to buy or attempt to buy tobacco products or cigarette papers.

16. Public Health stakeholders have consistently challenged this offence, noting that it has the potential to criminalise young consumers who are addicted to nicotine. We also know from enforcement agencies that this is difficult, practically, to enforce. Responses to the consultation also highlighted this issue, directly requesting this provision to be removed.

17. Therefore, in line with views from key stakeholders and in line with the position in England and Wales, the Scottish Government requested that a provision be included in the Bill to remove the purchase offence.

## Clause 40 – repeal of powers to confiscate tobacco products from persons under 18

18. Section 7 of the 2010 Act provides for police powers in relation to the confiscation of tobacco products where there are reasonable grounds for suspecting that a person in a public place is under the age of 18 and is in possession of a tobacco product of cigarette papers. Clause 40 repeals section 7 of the 2010 Act, so that the police will no longer have powers to confiscate. In line with the position on repealing the purchase offence, this will ensure that enforcement is focused on retailers and businesses, rather than individuals who are addicted to nicotine. This is also in line with the position in the rest of the UK.

## Clause 41 – extension of tobacco legislation to herbal smoking products

19. Clause 41 amends provisions in the 2010 Act that apply to tobacco products to include herbal smoking products. Herbal smoking products are not currently in scope of the age of sale restrictions in the 2010 Act. The changes made by clause 41 ensures alignment between Scotland and the position that already exists in the rest of Great Britain. It also aligns with the position in Scotland before 2010, when changes were made to the definition of tobacco products which meant that herbal smoking products were brought out of scope, and so closes a potential regulatory loophole.

20. Herbal smoking products are introduced into provisions regulating the sale of tobacco products to persons under 18 (section 4), age verification policy (section 4B), sale of tobacco or nicotine vapour products by persons under 18 (section 4C) and purchase of tobacco products on behalf of persons under 18 (section 6) of the 2010 Act.

21. The clause also makes provision to extend the existing prohibition of vending machines for the sale of tobacco products and nicotine vapour products in Scotland so that it applies to herbal smoking products. This is in line with the approach in the Bill for England and Wales.

22. The clause inserts definitions of “herbal smoking product”, “herbal smoking product business” and “tobacco, herbal smoking product or nicotine vapour product business” in the 2010 Act.

## Clause 42 – power to make provision about warning statements

23. Section 8 of the 2010 Act currently requires tobacco retailers in Scotland to display a notice containing a statement that it is illegal to sell tobacco products to

anyone under the age of 18. This clause amends section 8(5) of the 2010 Act to provide Scottish Ministers with a power to make regulations in relation to the size, appearance, or any other aspect of the notice. This represents a slight expansion of the power currently provided in section 8(5) of the 2010 Act and ensures equivalent powers are aligned across the UK.

## Clause 43 – power to regulate nicotine products

24. This clause amends the 2010 Act to provide Scottish Ministers with a power to extend the existing measures in the 2010 Act which apply to nicotine vapour products to include other nicotine products, such as nicotine pouches, which are currently out of the scope of the existing restrictions and requirements under the 2010 Act. This will allow Scottish Ministers to introduce regulations so that the age of sale restrictions, age verification requirements, sale of nicotine vapour products by persons under 18, proxy purchase, and due diligence defences apply to a broader range of nicotine products which may emerge on the UK market. This aligns with the approach for England and Wales.

## Clause 44 – free distribution of nicotine products

25. Clause 44 amends the 2016 Act to extend the Scottish Ministers' existing powers to regulate the free distribution of nicotine vapour products, to include other nicotine products. Section 18 of 2016 Act provides Scottish Ministers with a power to prohibit or restrict the free distribution of nicotine vapour products. This clause amends this power to enable regulations to be made that prohibit or restrict the free distribution of other nicotine products, like nicotine pouches.

## Clause 45 - displays of vaping and nicotine products

26. Clause 45 introduces a new power into the 2010 Act for Scottish Ministers to impose prohibitions, requirements or limitations on the retail display of vapes and nicotine products, including display of prices. In line with existing powers in the 2010 Act to regulate the display of tobacco products, the power does not cover “displays” on a website. A new offence is set out on the face of the Bill, applicable to a person who acts in breach of any regulations made under the new power. The penalty for committing an offence would be a fine, not exceeding level 4 on the standard scale (£2500).

27. Scottish Government published its refreshed Tobacco and Vaping Framework in 2023, setting out decisive action to achieve its goal of a tobacco-free Scotland by 2034. Under the first implementation plan of the framework, the Scottish Government committed to reviewing what further actions are required to limit the appeal of vapes and novel products. This legislation will therefore contribute significantly to the implementation of this framework and work towards the Scottish Government's Programme for Government goal of taking action to reduce vaping amongst young people and non-smokers.

## Clause 46 - alignment of definitions

28. Clause 46 updates the definitions of “tobacco product” and “nicotine vapour product” in the 2010 Act. The amendment to the definition of “tobacco product” aligns with the new definition of a tobacco product as outlined in clause 36 for England and Wales. Tobacco products that are currently available in the UK market are considered to be covered by the existing definition of tobacco product contained in the 2010 Act. The additional wording “consumed in any other way” is intended to cover products that may be invented with novel forms of usage.

29. The clause also updates the definition of “nicotine vapour product” in section 35A of the 2010 Act by specifying that “vapour” includes aerosol and vaporised and is to be construed accordingly. This updated definition provides greater clarity on what is included.

30. The Tobacco and Vaping Framework sets out the importance of being responsive to novel nicotine and tobacco products which are, and will continue to be, harmful to health. This legislation will therefore help contribute to the Scottish Government’s aim of being a tobacco free nation.

## Clause 47 - power to make consequential provision

31. This clause enables the Scottish Ministers to make regulations which amend, repeal or revoke primary and secondary legislation where such provisions are consequential on Part 2 of the Bill.

## Part 4 – Product Requirements

32. The provisions in this Part extend to the whole of the UK and include various regulation making powers exercisable by the Secretary of State in relation to product requirements for tobacco, vaping, and nicotine products. Clause 67 provides that the Secretary of State must obtain the consent of the Scottish Ministers before making regulations under Part 4, if they contain provision which would be within the legislative competence of the Scottish Parliament. Further details of the powers are provided below.

33. The Scottish Government considers that all of the clauses in Part 4 require the legislative consent of the Scottish Parliament as they make provision for a purpose which is within the legislative competence of the Scottish Parliament, and are capable of being used to make regulations with a devolved purpose, namely public health. While the regulation-making powers are exercisable only by the Secretary of State, the Scottish Government consider that clause 67 alters the executive competence of the Scottish Ministers, giving them the power to grant or refuse consent for regulations to be made under the powers in Part 4 if the regulations contain provision which would be within the legislative competence of the Scottish Parliament.

## Clause 58, 59 and 60 – tobacco product requirements

34. Clauses 58, 59, and 60 enable the Secretary of State to make regulations relating to the retail packaging of tobacco products, the flavour of tobacco products, and other tobacco product requirements. They are broadly re-stating existing powers currently in section 94 of the Children and Families Act 2014, with some minor modifications, as part of a consolidation exercise.

35. Clause 58 provides powers for the Secretary of State to make regulations about the retail packaging of tobacco products. The regulations can relate to the production, importation or supply of products – ensuring any individual or organisation involved in the supply chain could be required to adhere to the regulations. The powers are broad, and provision made under them could cover a wide range of packaging elements - including markings and information on the packaging, its appearance, materials, texture, size and shape, the means by which it is opened, and the numbers and quantities of products contained in them.

36. The powers are re-stating existing powers to make provision about the retail packaging of tobacco products set out in section 94(6) and (7) of the Children and Families Act 2014 (the 2014 Act). The Scottish Parliament provided legislative consent to those powers in the 2014 Act via a legislative consent motion. The powers in the 2014 Act were used to make the Standardised Packaging of Tobacco Products (SPOT) Regulations 2015, which introduced standardised packaging with the primary aim of discouraging people from smoking by reducing the appeal of tobacco products.

37. Clause 59 provides powers for the Secretary of State to make regulations about the flavour of tobacco products. The powers allow the Regulations to provide for how the flavour of a product is determined, and for the creation of offences.

38. Clause 60 provides powers for the Secretary of State to introduce regulations regarding other tobacco product requirements, and is broadly restating existing powers. This power relates to the products themselves, rather than their packaging. It allows regulations to be made about the markings on tobacco products, their appearance, size, shape and other distinguishing features.

## Clause 61, 62 and 63 – vaping and nicotine product requirements

39. Clauses 61, 62 and 63 introduce powers for the Secretary of State to introduce product requirements for vaping products or nicotine products. “Nicotine Product” is defined at clause 70, and is intended to capture any other forms of consumer nicotine products such as nicotine pouches.

40. Clause 61 provides the Secretary of State with a power to regulate the retail packaging of vaping products or nicotine products. The power is intended to align with the power to make regulations conferred by clause 58 in respect of the retail packaging of tobacco products, described above. The scope of the power is

identical, except that it applies to vaping products and nicotine products rather than tobacco.

41. Clause 62 provides the Secretary of State with a power to make regulations about the substances that may be included in, and the flavour of, vaping products or nicotine products. Unlike tobacco products and hand rolled tobacco, there are currently no restrictions on the flavour of vaping products or nicotine products. The scope of the power is otherwise identical to the powers for regulating the flavour of tobacco products in clause 59.

42. Clause 63 provides the Secretary of State with a power to make regulations about other product requirements for vaping products and nicotine products. The power to make regulations conferred by this aligns with the power to make regulations conferred by clause 60 in respect of other product requirements of tobacco products, described above.

43. Scottish Government published its refreshed Tobacco and Vaping Framework in 2023, setting out decisive action to achieve our goal of a tobacco-free Scotland by 2034. Under the first implementation plan of the framework, the Scottish Government committed to working across the four nations on further restrictions on vaping products depending on the outcome of the smoke free generation consultation. This legislation will therefore contribute significantly to the implementation of this framework and work towards the Scottish Government's Programme for Government goal of taking action to reduce vaping amongst young people and non-smokers.

## Clauses 64 to 70 – supplementary provision and interpretation

44. Clauses 64 to 68 make supplementary provision. Clause 64 provides powers to include provision about enforcement in regulations made under Part 4, including powers to confer functions on relevant enforcement authorities and powers to enable a national authority to take over the duties of enforcement authorities. For Scotland, the relevant enforcement authority would be local weights and measures authorities. The relevant national authority in Scotland would be the Scottish Ministers.

45. Clause 65 provides that provisions in Regulations can bind the Crown. Clause 66 provides for powers to amend other legislation.

46. Clause 67 places a requirement on the Secretary of State to obtain consent from devolved administrations to Regulations made under Part 4. It is a requirement that consent is obtained from the Scottish Ministers, if the regulations contain provision which would be within the legislative competence of the Scottish Parliament.

47. Clause 68 repeals section 94 of the Children and Families Act 2014, as the provisions in that Act are being re-stated in the Bill and so it is no longer required.

48. Clauses 69 and 70 provide for definitions relevant to Part 4.



## Part 5 – notification requirements etc for vaping and nicotine products

49. Part 5 extends to Scotland and is concerned with notification and reporting requirements in the Tobacco and Related Products Regulations 2016 (the “2016 Regulations”).

50. Clause 71 of the Bill provides Secretary of State with a power to make regulations in order to apply and extend certain relevant provisions of the 2016 Regulations to vaping products and nicotine products which are not currently within the scope of the 2016 Regulations. The relevant provisions of the 2016 Regulations relate to matters such as the requirement to notify the Secretary of State when introducing products to market; measures which may be taken by the Secretary of State where it considers that a product is unsafe; and requirements to publish and make public information which has been provided in compliance with the regulations. Part 5 also includes a power for the Secretary of State to amend by regulation the information that must be notified or provided under the 2016 Regulations (clause 72) and to create exceptions in relation to the duty to publish information (clause 73).

51. Scottish Government and UK Government officials agree that the provisions in Part 5 are reserved, as they relate to product safety (reservation C8 of schedule 5 of the Scotland Act). As such, the provisions in Part 5 are not considered to require the legislative consent of the Scottish Parliament and there are no requirements for the Secretary of State to seek consent before making regulations.

## Part 6 - General

52. Part 6 also extends to Scotland and contains various standard provisions in relation to regulation-making powers (clause 76), procedure for regulations (clause 77), extent (clause 78), commencement (clause 79), and transitional provision (clause 80). Clause 80 confers a power on Scottish Ministers to make transitional or savings provision in connection with the coming into force of any provision of Part 2.

53. The Scottish Government consider that the provisions in Part 6, with the exception of clause 75 (application to Parliament) which does not extend to Scotland, require the legislative consent of the Scottish Parliament as they make provision relating to a purpose which is within the legislative competence of the Scottish Parliament, namely public health. Clause 80 alters the executive competence of the Scottish Ministers.

## Reasons for seeking a legislative consent motion

54. Under Rule 9B.1 of the Standing Orders of the Scottish Parliament, the Scottish Ministers are to lodge an LCM in respect of a “relevant Bill”. A “relevant Bill” is one which makes provision applying to Scotland for any purpose within the

legislative competence of the Scottish Parliament or which alters that legislative competence or the executive competence of the Scottish Ministers.

55. The UK Government has identified (within Annex C of the explanatory notes) that the consent of the Scottish Parliament is required in relation to all provisions which extend to Scotland, with the exception of the provisions in Part 5 (clauses 71 to 73) which relate to notification requirements for vaping and nicotine products. The Scottish Government agrees with the UK Government position as set out in that Annex, for the reasons set out in the relevant sections above.

## Part 2 – sale and distribution: Scotland

56. As outlined above, the provisions in Part 2 of the Bill (clauses 37 to 47) amend Acts of the Scottish Parliament to make provision relating to the sale and distribution of tobacco products and herbal smoking products. Changes are made to offences and restrictions on the face of the 2010 Act, as well as to powers which exist in the 2010 Act and the 2016 Act. In addition, new regulation-making powers for Scottish Ministers and new provisions are inserted into the 2010 Act.

57. While equivalent provision could be made in Scottish Parliament legislation, given the close working relationship between the relevant UK Government teams and their devolved counterparts, and the shared policy goals in this space, it was considered desirable to accept the offer to work with the UK Government on their Bill rather than seek to bring forward a Scottish Bill in the same timescales. This approach ensures that the drafting approach and the timescales for implementation are aligned, ensuring a coherent and consistent public health approach, which can assist in communicating changes, as well as reducing unnecessary regulatory divergence which can impact business. It will also ensure that there is one process with which relevant stakeholders can engage as the Bill progresses through the UK Parliament.

58. Insofar as new powers are being granted to the Scottish Ministers to make regulations, regulations made under them will be subject to the affirmative procedure. The Scottish Parliament will, therefore, have the opportunity to closely scrutinise the content of those regulations.

59. The Scottish Government recommends that consent is given to the provisions in Part 2.

## Part 4 – product requirements

60. The provisions in Part 4 of the Bill (clause 58 to 63) provide the Scottish Ministers with powers to make regulations in relation to product requirements for tobacco products, vapes and other nicotine products. The primary purpose of the provisions is to ensure there are sufficient powers to introduce restrictions which would reduce the availability and appeal of these products. The provisions empower the Secretary of State to make regulations which may include provision which is within devolved competence (provided that the consent of the Scottish Ministers is

obtained if regulations do contain provision within the legislative competence of the Scottish Parliament).

61. We note that the Scottish Parliament gave [its consent](#) for the powers for the Secretary of State to make regulations governing the retail packaging, content and appearance of tobacco products, which is in section 94 of the Children and Families Act 2014. That power, which is being repealed and replaced by the Bill, requires that the consent of the Scottish Ministers is obtained before regulations are made which contain devolved provision. As noted in the legislative consent memorandum lodged at the time, separate standardised packaging regimes would almost certainly present significant difficulties – for businesses, enforcement authorities and consumers. The powers have most notably been exercised to make the Standardised Packaging of Tobacco Products Regulations 2015. The effect of those regulations will not be changed by the Bill and those regulations will remain in place. The consent of Scottish Ministers was obtained in advance of the making of those regulations.

62. Clause 58 restates the existing power in section 94(6) of that Act to make provision about the retail packaging of tobacco products. Clause 59 restates the existing power to make provision about tobacco flavours in section 94(8) of that Act, with some minor modifications. Clause 60 of the Bill restates the power to make provision about the requirements for tobacco products that are set out in section 94(8) of that Act. Clause 67(b) requires that the Scottish Ministers' consent be obtained before regulations containing devolved provision are made.

63. Clauses 61 to 63 introduce new powers for the Secretary of State to make regulations governing the retail packaging, content and appearance of vapes. These powers are broadly equivalent to the tobacco powers described above.

64. As set out in the Scottish Government tobacco and vaping framework roadmap, the Scottish Government considers that a four nations approach is desirable when it comes to regulating vapes and it has committed to work with the UK Government and other devolved nations to develop legislation in this area. As with equivalent regulation of tobacco, separate standardised packaging regimes or restrictions on appearance or flavours would likely present a number of difficulties for businesses, enforcement authorities and consumers. Regulations cannot be made which contain devolved provision without the consent of the Scottish Ministers, in recognition of the significant devolved interest in any provisions which could be made under these powers. As has been the case in developing regulations made under the existing powers in the Children and Families Act 2014, the Scottish Ministers expect to work closely with the relevant UK Government departments and the other devolved administrations in developing regulations which will be made using the powers.

65. The Scottish Government recommends that consent is given to the provisions in Part 4.

## Part 6

66. The provisions in Part 6 of the Bill are general provisions, expected to be included in primary legislation. The Scottish Ministers will have the ability to make

transitional or savings provision in connection with the coming into force of Part 2 – this is considered appropriate since all provisions within Part 2 relate to devolved matters, and extend to Scotland only. On that basis it is appropriate for the Scottish Ministers to have a power to make transitional provision.

67. The Scottish Government recommends that consent is given to the provisions in Part 6.

## EU alignment

68. Officials have considered the Tobacco and Vapes Bill's likely impact on the Scottish Government's policy to maintain alignment with the EU.

69. Since 2016, the EU [Tobacco Products Directive \(2014/40/EU\)](#) (TPD) has regulated the manufacture, display and sale of tobacco and related products. In the UK, the Directive was implemented on a UK wide basis, via a number of statutory instruments. The Directive aims to improve the functioning of the internal market for tobacco and related products, while ensuring a high level of health protection for European citizens.

## Part 2

70. It is for EU Member States to legislate on age of sale requirements. The provisions in Part 2 of the Bill are considered to be consistent with the EU's stated policy aim to stop people taking up smoking.

## Part 4

### Vapes

71. Under the TPD there are a number of rules which apply to e-cigarettes including:

- Minimum standards of safety and quality such as nicotine levels and tank sizes.
- Notification of ingredients by the manufacturer.
- Packaging and labelling rules, including health warnings.
- A ban on cross-border advertising in print, broadcast and online.

72. The EU Commission is reviewing its legislative framework and it is likely that further regulation on vaping products will be proposed in 2024. It could be several years, though, before further EU law takes effect. Some EU Member States are therefore considering further national measures, including the Republic of Ireland, which has recently consulted on further regulation of tobacco and nicotine inhaling products. This includes proposed measures point of sale retail displays, appearance and flavours of nicotine inhaling products, similar to the powers included in Part 4 of the Bill.

73. The powers in clauses 61 to 63 will be exercised to introduce restrictions on the content, flavouring and packaging of vaping products and nicotine products. Depending on the outcome of the EU review, EU legislation may be brought forward to take similar action. The Secretary of State must obtain the consent of the Welsh Ministers, the Scottish Ministers and the Executive Office in Northern Ireland if making regulations under Part 4 which contain provision which is within devolved competence. We will therefore assess the overall alignment position during the development of regulations and this will be factored into a decision on whether to consent.

## Tobacco products

74. Part 4 of the Bill also contains regulation making powers which can be exercised for the whole of the UK, so that the Secretary of State can introduce regulations about the retail packaging, flavours and product requirements of tobacco products.

75. The TPD banned the use of flavourings in cigarettes and roll your own tobacco, and was implemented for the whole of the UK the Tobacco and Related Products Regulations 2016 (the TRPR), making it an offence to produce or supply flavoured cigarettes or hand rolled tobacco in the UK. That offence remains on the statute book and is not affected by the provisions in the Bill.

76. The power in clause 59 could be used to make further provision regarding flavours for tobacco products, should there be a need for any changes to those existing restrictions.

77. The TPD was amended by Commission Delegated Directive (EU) 2022/2100 to remove certain exemptions for heated tobacco products. The deadline for implementation by EU member states was 23 October 2023.

78. As a result the EU requirements prohibiting the use of flavouring in tobacco products now apply to heated tobacco products, and Member States can no longer choose to exempt heated tobacco products from requirements to display health warnings and other general information on packaging.

79. The TRPR currently makes provision for restricting characterising flavours, such as menthol, vanilla and fruit flavours – but only for cigarettes and hand rolling tobacco. In order to align with the changes to the TPD, the TRPR would need amended to make similar provision for heated tobacco products.

80. The Scottish Government consider that making such provision is likely to relate to a reserved matter, specifically the C8 technical standards reservation. The powers in the Bill could, potentially, provide an additional route for introducing or extending the existing restrictions on flavouring for heated tobacco products. The Scottish Government will engage with UK Government on opportunities for alignment, and continue to press the UK to extend restrictions.

## Consultation

81. A four nations consultation on Creating a Smoke Free Generation and Tackling Youth Vaping was held in 2023. The consultation built on recommendations from the independent Khan review in 2022, which set out a comprehensive set of recommendations to tackle continued smoking rates and youth vaping in the UK.

82. The consultation received nearly 28,000 responses from individuals and organisations across the UK and the joint government response was published on 29 January 2024<sup>3</sup>. The collective findings have informed the measures in the Bill.

83. Over 63% of respondents agreed with the policy of “creating a smokefree generation”. There were also high levels of support to prohibit proxy purchases on behalf of anyone born on or after 1 January 2009, to include all tobacco products, herbal smoking products and cigarette papers within the scope of the policy and reflect the new age of sale in updated retail warning notices.

84. Officials from across the four nations have been working closely on the development of the Bill including provisions and the resultant Bill aligns with the ambitions and actions set out in the Tobacco and Vaping Framework<sup>4</sup>: A roadmap to 2034 which was published in November 2023.

85. The ambition of the Bill is to create the first smokefree generation. It will introduce measures to stop people from ever starting smoking and becoming addicted to tobacco products, as well as stopping vaping products from being deliberately targeted at children. This directly aligns with, and takes forward actions from, the Scottish Government’s Tobacco and Vaping Framework.

## Financial implications

86. To help support the enforcement of underage sales of tobacco products, an extra £30 million will be provided to enforcement agencies in England every year for the next five years. As a result of this funding announcement, the Treasury have advised that the Scottish Government can expect around £8 million through the Barnett formula in 24-25 though this is yet to be formally confirmed through the budget process.

87. All decisions on funding beyond this period will be taken at the next spending review, but the UK Government have advised they have Treasury approval for this spending package until 28-29. They have provided assurance that the Scottish Government can expect this funding in future years and still plan for it.

88. Barnett formula funding is not currently ringfenced for a specific purpose. The Scottish Government are therefore liaising with Health Finance colleagues on the potential for these consequential to be allocated to the tobacco control team budget for the implementation of the tobacco action plan and enactment of this legislation.

89. Decisions on the availability of consequential to tobacco control will be taken in the context of significant wider budgetary challenges facing the Health and Social

Care portfolio in 2024-25 and beyond. The detailed impact assessments to be undertaken on the financial implications of these measures will help inform the expected minimum budgetary requirement for delivering the activities set out above which will support the budget planning process.

## Conclusion

90. The Scottish Government recommends consent to the relevant provisions.

## Draft Legislative Consent Motion

91. The draft motion, which will be lodged by the Cabinet Secretary for NHS Recovery, Health and Social Care, is:

92. “That the Parliament agrees that the relevant provisions of the Tobacco and Vapes Bill, introduced in the House of Commons on 20 March 2024, relating to the supply of tobacco, vapes and other products, including provision prohibiting the sale of tobacco to people born on or after 1 January 2009; and to enable product requirements to be imposed in connection with tobacco, vapes and other products, so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government  
April 2024

This Legislative Consent Memorandum relates to the Tobacco and Vapes Bill (UK legislation) and was lodged with the Scottish Parliament on 2 April 2024

# Tobacco and Vapes Bill – Legislative Consent Memorandum

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