

FROM THE MINISTER OF HEALTH



Department of
Health

An Roinn Sláinte

Mánnystrie O Poustle

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Your Ref:

Our Ref: SUB-1164-2024

Date: 25 March 2024

Dear *Speaker,*

Notice of laying of Legislative Consent Memorandum: Tobacco and Vapes Bill

In accordance with standing Order 42A, I attach a copy of a legislative consent memorandum for laying before the Assembly.

The draft motion to be tabled is:

"That this Assembly endorses the principle of Northern Ireland's inclusion in the UK Tobacco and Vapes Bill insofar as the provisions of that Bill relate to matters falling within the legislative competence of the NI Assembly".

Further information can be obtained from Bryan Dooley Ext. 22267 if required.

Yours sincerely

Robin Swann MLA
Minister of Health

LEGISLATIVE CONSENT MEMORANDUM

Tobacco and Vapes Bill

Draft legislative Consent Motion

1. The draft motion, which will be tabled by the Health Minister, is:

“That this Assembly endorses the principle of Northern Ireland’s inclusion in the UK Tobacco and Vapes Bill insofar as the provisions of that Bill relate to matters falling within the legislative competence of the NI Assembly”.

Background

2. This memorandum has been laid before the Assembly by the Health Minister under Standing Order 42A(2). The Tobacco and Vapes Bill was introduced in the House of Commons on 20 March 2024. The latest version of the Bill can be found at:

<https://bills.parliament.uk/bills/3703/publications>

Summary of the Bill and its policy objectives

3. The Bill is intended to make provision about 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 vapes and other nicotine products. The Bill includes a range of measures covering:
 - i. Tobacco age of sale (as outlined above)
 - ii. E-cigarettes/vapes, which include regulation making powers to:
 - Allow all administrations in the UK to regulate point of sale displays for vapes and other nicotine products (each administration will be required to bring forward regulations separately).
 - Allow all administrations in the UK to restrict vape and other nicotine product flavours and packaging, which will be achieved through UK wide regulations with consent of devolved administrations. On this, DHSC judge that a single regulation

regime across the whole of the UK is the most appropriate means of ensuring a coherent and operable enforcement regime regarding these products.

- Allow the NI Executive to introduce age of sale requirements for non-nicotine vapes and banning the free distribution of vapes (note that Scotland already have these provisions and that measures will be included on the face of the Bill for England and Wales- i.e. without the need for further regulations).
4. In October 2023, UK Government (UKG) announced its intention to create a smoke free generation in England by stopping children who turn 14 this year (or younger) from ever legally being sold cigarettes.
 5. The current legal age of sale for tobacco is 18. The Westminster Bill will make it an offence for anyone born on or after 01 January 2009 to be sold tobacco products by amendments to existing age of sale legislation. These measures are in line with measures originally brought forward in New Zealand (although a subsequent government in NZ announced their intention to repeal the measures) and recommendations of the Khan Review from 2022.
 6. There is no intention to criminalise smoking. The policy intention is for a gradual phasing out of tobacco use, and the measures proposed have the advantage of not introducing restrictions on people who can already legally smoke (which would be the effect if we were to simply raise the age of sale, for example, from 18 to 21). Rather the impact would only be felt when children currently aged 15 and under (who are not currently legally permitted to be sold tobacco) turn 18 (i.e. from 1 January 2027). The Bill will also make the necessary age-related changes in respect of existing compulsory retail signage and proxy purchasing offences.
 7. The key UKG proposals in relation to e-cigarettes (vapes) include restricting flavours, plain packaging and bans on point-of-sale displays. The intention is to address the unacceptable marketing of these products towards children and young people.
 8. Whilst e-cigarettes may have a role to play in helping people to stop smoking, the long-term harms of continued use are unknown. The Institute of Public Health in Ireland has taken forward a rapid review of evidence on our behalf (still in draft) and early findings point to reliable evidence that vaping does act as a gateway to tobacco smoking amongst young people. This substantiates our view that measures to address the appeal of these products to children are justified.

9. The consumption of nicotine in children and adolescents has deleterious impacts on brain development, leading to long-term consequences for brain development and potentially leading to learning and anxiety disorders (WHO). The UKG command paper relating to these proposals, published 5 October 2023, also notes that there are also some health risks associated with the other ingredients in vapes. For example, propylene glycol and glycerine (components of e-liquids) can produce toxic compounds if they are overheated. The long-term health harms of inhaling colours and flavours are unknown, but they are certainly very unlikely to be beneficial.
10. In addition, there are growing concerns about social and educational harms of vaping with increasing numbers of post-primary school children at risk of disciplinary action including suspensions as schools attempt to deal with the numbers vaping on school premises.
11. The Bill will also address current legal loopholes in relation to free distribution of nicotine products (and non-nicotine vapes) and allow for restrictions relating to nicotine containing vapes to be extended to non-nicotine vapes.

Provisions which deal with a Transferred Matter- Parts 3, 4, 5 and 6

12. The key proposals are considered transferred matters and therefore fall within the competence of the NI Assembly. Part 3 relates specially to NI and sets out matters relating to public health:
 - (i) Amendments to current age of sale legislation in relation to tobacco and associated provisions for NI (clause 48).
 - (ii) Power to restrict tobacco sales offences to retail settings (clause 49) (in line with restrictions imposed on sales offences in GB, this will allow us to take stock of the position and, if necessary, restrict the measures to retail settings only. This may become necessary should the gradually increasing legal age of sale have later practical implications for those buying tobacco in line with their business).
 - (iii) Power to make provision about warning statements (clause 50).
 - (iv) Power to regulate non-nicotine vapes age of sale (clause 51).
 - (v) Power to restrict nicotine product sales offences to sale by retail (clause 52). This provides similar regulatory making provision in relation to vapes as clause 49 does for tobacco (see point ii).
 - (vi) Power to make regulations prohibiting the free distribution of nicotine products and non-nicotine vapes in the course of business (clause 53).
 - (vii) Power to regulate displays of vaping and nicotine products (clause 54).

- (viii) Power to make consequential amendments (clause 55)
 - (ix) Amendment of Tobacco Retailers Act 2014 to update the list of offences that are classified as a tobacco, nicotine or non-nicotine vape offences. This clause also provides a regulation making power to amend the definition of a tobacco, nicotine or non-nicotine vape offence to add other related offences which would count towards a restricted premises order (clause 56).
 - (x) Power to make consequential provision (clause 57).
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13. Part 4 of the Bill provides the Secretary of State with regulation making powers in relation to product requirements i.e. packaging, content, and flavours. It is envisaged that any such regulations will apply to the whole of the UK. Depending upon the nature of any future regulations, these **may** concern transferred functions relating to consumer protection and/or public health. Accordingly, clause 67 sets out that the Secretary of State must obtain consent where regulations relate to matters falling within the legislative competence of the Northern Ireland Assembly. Clauses 58-60 are reinstatements of existing provisions (set out in the UK Children and Families Act 2014) relating to tobacco product requirements, while clauses 60-62 provide similar new regulation making powers in relation to product requirements for vaping and nicotine products. The consent mechanism at clause 67 reflects that which was previously established by the Children and Families Act 2014, namely that consent to future regulations would be sought from The Executive Office (TEO) in Northern Ireland where matters are transferred.

14. Part 5 of the Bill provides the Secretary of State with UK wide regulation making powers in relation to potential extension of e-cigarette notification systems to non-nicotine vapes and other nicotine products. The existing legislation in this area (set out in the Tobacco and Related Products Regulations 2016) concerns provisions on notification, reporting and vigilance requirements. In particular, producers are currently required to notify before placing **nicotine containing** vaping products and refill containers on the UK market. The Medicines and Healthcare products Regulatory Agency (MHRA) publishes all notifications for Great Britain on an ECIG portal and they are notified on EU-Common Entry Gate in respect of Northern Ireland.

15. Part 5 also provides regulation making powers to amend existing provisions in relation to the information that must be notified or supplied (to allow for new data requirements or remove current data requirements). It also provides a regulation making power to allow for exceptions to the current duty to publish information (for example a notification might be removed where a fee has not been paid

16. Any future regulations under Part 5 may contain elements of transferred (consumer protection) matters for Northern Ireland and therefore consent may be required. To retain consistency with part 4, that consent role for any future regulations has been allocated to the Executive Office.
17. Part 6 includes a number of general provisions related to regulation procedure, transitional provisions and commencement etc. and is therefore considered as engaging the legislative consent process.
18. A copy of the Bill has been shared with the Departmental Solicitor's Office (DSO) and they have confirmed that the provisions set out within Parts 3, 4, 5 and 6 of the Bill, are, at least in part, within the legislative competence of the NI Assembly and therefore engage the legislative consent process of the NI Assembly.

Reasons for making the Provisions

19. In Northern Ireland, more than 2,000 people die every year from smoking attributable conditions. In fact, the smoking attributable death rate in Northern Ireland is significantly higher than the rate in England. In addition to the unacceptable human costs, our hospitals spend in excess of £200m every year treating smoking-related conditions and there is detriment to our economic productivity through the impact of ill-health on the workforce. Tobacco use is a huge threat to public health, but it is a threat that is entirely preventable.
20. There is also growing local concern in relation to youth vaping. Whilst vaping may have a role to play in helping some people to stop smoking, the current marketing of these devices to young people and children is unethical, and robust action is required to address this.
21. The measures are in keeping with the strategic direction of the current NI Tobacco Control Strategy and the identified need to extend our successor strategy to address youth vaping concerns.

Reasons for utilising the Bill rather than an Act of the Assembly

22. Whilst the matters in question fall within the competence of the NI Assembly, there are a number of compelling reasons for Northern Ireland to be included in the Bill and why the alternative option (i.e. bringing forward separate NI primary legislation) would be less desirable:
 - i. To progress NI primary legislation would be time consuming and it is likely that bringing forward local measures would result in a delay

(versus the provisions immediately available in rest of the UK) due to other pressures on this small administration and also the strong possibility that litigation by the Tobacco Industry directed at NI if we bring forward our own primary legislation on these issues. If there are such delays, NI's population would be at a disadvantage in terms of progressing significant public health measures which will deliver benefits to individuals, the health service and the economy.

- ii. Whilst these are transferred matters, the overwhelming public support for the measures in NI, expressed through the consultation published in January 2024 (see below), underpins the rationale to seek the same provision as the other devolved administrations in respect of the opportunity for inclusion in the Bill. We are likely to face considerable public criticism if the NI Assembly were to reject this opportunity.
- iii. There is a clear efficiency in inclusion in UK wide legislation that would allow for the NI Assembly's time to be spent on local measures that do not have an immediate alternative legislative vehicle available.
- iv. Given the significance of these public health matters, along with the public support, there would appear to be little political gain in insisting on taking forward separate primary legislation when that poses a risk that we will not be able to implement at the same speed as England, Scotland and Wales.

Consultation

23. The results of the public consultation were published on 29 January 2024 and can be found at: [Creating a smokefree generation and tackling youth vaping consultation: government response - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/creating-a-smokefree-generation-and-tackling-youth-vaping-consultation-government-response). There was particularly strong support for the measures from people in Northern Ireland. The consultation received 27,025 responses from individuals, of which 1,221 were from Northern Ireland. This made up 4.5% of the total responses (from individuals) which represents a proportionately high response in terms of the NI population. In relation to individual responses:

- 62.5% of UK respondents reported they were in favour of the smoke-free generation (age of sale) proposal, **with the highest support coming from NI - 79%** (second highest was Scotland with 65.5% supporting the proposal). Support was similarly much higher in NI for the other proposals.

- **75.6% in NI supported a restriction on vape flavours** (46% in all of UK – 52% of all UK responses disagreed).
- When asked '*Which option do you think would be the most effective way to restrict vapes to children and young people?*', **85.3% in NI supported a restriction on the display of vapes – that is to be kept behind the counter and not to be displayed, similar to tobacco products** (68.5% across all of UK).
- When asked '*Which option do you think would be the most effective way for the UK Government and devolved administrations to restrict the way vapes can be packaged and presented to reduce youth vaping?*', **66% in NI supported prohibiting the use of all imagery and colouring and branding (standardised packaging) for both the vape packaging and vape device** (45.8% across all of UK).
- Whilst not included in this Bill, **90.4% in NI were in favour of restricting the sale and supply of disposable vapes** (79.3% in all UK). That particular issue is being taken forward by The Minister for the Environment, Agriculture and Rural Affairs.

Human Rights and Equality

24. The DHSC is of the view that the Bill is compatible with the Convention of Rights. There is no evidence to suggest that the smokefree generation policy will have a significant impact on people living in rural areas. As smoking prevalence is higher in more deprived areas, it may have more of a positive impact on health in deprived rural areas. The policy will not have a direct impact on existing smokers, as a result, this policy is not expected to directly impact adults already living with protected characteristics or in more deprived areas. However, it is likely to ensure that future generations in these groups will have lower smoking rates and therefore improved health outcomes. Overall, DHSC does not assess this policy to have a negative impact on any protected characteristic or other groups assessed.
25. The policy proposal is considered to be compliant with age discrimination legislation (Equality Act 2010 and ECHR Article 14) as there is an objective and reasonable justification behind them – the reduction of harm from smoking to public health, which data and the consultation support.
26. In addition, our local rural screening confirms the same conclusion as DHSC i.e. that there is no significant impact.
27. In respect of Article 2 of the Windsor Framework, no diminution of rights has been identified.

Financial Implications

28. Further restrictions on tobacco and e-cigarettes would likely come with some additional enforcement and communications costs. However, several of these measures are not new e.g. enforcement measures are already in place in relation to tobacco age of sale and age of sale of nicotine vapes. While the exact costs will need further consideration, it is worth noting that in the long term some additional expenditure is likely to be justified. Hospital treatment costs for tobacco attributable disease are in excess of £200m per year and in 2023 the British Heart Foundation reported that the estimated annual cost to society of smoking in Northern Ireland is around £400million. Any regulations made subsequently under the powers relating to e-cigarettes/vapes will be subject to further equality screening.

Summary of Regulatory Impact

29. UK government have completed a UK wide impact assessment which is summarised below.
30. Smoking places a significant cost on society. ASH estimates that the total costs of smoking in England are £17 billion per year. Uplifting this estimate based on the relative size of the population in England compared to the whole of the UK, the government estimates the costs of smoking to the UK to be around £21 billion per year. This includes a £17 billion loss to productivity per year through smoking related lost earnings, unemployment, and early death, as well as costs to the NHS and social care sector of £2.3 billion and £1.3 billion respectively.
31. In relation to costs, the analysis shows the overall reduction in tobacco consumption over 30 years in the UK is expected to reduce profits for tobacco retailers by £2,291m, and for tobacco wholesalers by £506m. It is expected that tobacco retailers will incur familiarisation costs of £9m, costs due to increased time to check people's IDs of £117m and costs to put up new signage in shops of £0.2m. These costs are in 2027 prices.
32. The reduction in tobacco consumption would also reduce the amount of tobacco duty collected by HMRC. It is estimated that the cumulative reduction in tobacco duty receipts over 30 years in the UK would be £26,061m. However, this reduction in the tobacco duty revenue represents a transfer from the government collecting this tax to the people in society previously paying the tax. The people that no longer take up smoking because of this policy benefit from an increase in the amount they can spend on other goods and services and the government loses an equal amount.

Therefore, this reduction in tax revenue does not make society as a whole better or worse off.

33. In relation to financial benefits, the analysis showed, that over 30 years, the expected benefits in the UK accrued from the health benefits of a reduction in the number of people taking up smoking would result in monetised QALYs gains from fewer deaths of £480m. There will also be wider societal benefits, including productivity gains of £24,588m, reduced healthcare usage costs of £3,263m, reduced social care usage costs of £1,955m, and reductions in fire costs associated with smoking of £1,029m. These benefits are in 2027 prices. The benefits of the policy will continue beyond 30 years and increase in size due to the nature of the policy option. From 2066 onwards the benefits are estimated to outweigh the costs, including the loss in duty revenue, and over a longer time period the benefits are estimated to be significantly higher than the costs. For example, the policy is estimated to provide a total net benefit of over £60 billion by 2100. With the new legal age of sale, local authorities would need to check the same number of businesses, and the government expects it to take the same amount of time to investigate any potential offences. Local authorities may incur some additional costs to familiarise themselves with the new law, but do not expect this to be a significant cost.
34. To discourage non-smokers and young people from taking up vaping and to raise revenue to help fund public services, the government has introduced a new excise duty on vaping products. Registrations and approvals for the tax will start from 1 April 2026, and the tax will take effect from 1 October 2026. To support the role vapes can play in helping smokers give up cigarettes, tobacco duty will also be increased to maintain the financial incentive to choose vaping over smoking. The government published a consultation on the design of the new duty on 6 March 2024.
35. Given that tobacco smoking contributes to the risk of developing more than 50 serious conditions, local health charities spend much time and resource dealing with the consequences of smoking. We would expect that any reduction in smoking rates will have a significant positive impact for health charities' work and objectives.
36. In relation to the vaping provisions, the measures are primarily intended to reduce youth access and appeal. The sale of such products to under 18s is already prohibited so the impact would primarily be felt by those making illegal sales. However, a regulatory impact assessment will be completed in relation to subsequent regulations progressed under the powers.

Engagement to date with the Health Committee

37. The Minister of Health has written to the Chair of the Health Committee to advise the Committee about his intention to seek Legislative Consent to the inclusion of a number of provisions that deal with transferred matters within the Tobacco and Vapes Bill. Prior to the introduction of the Bill, the Chief Medical Officer and tobacco policy officials briefed the Committee at their meeting on the 14 March 2024. The Committee members were supportive of the measures. Further information on the specific detail of the Bill's provisions will now be provided to the Health Committee.

Conclusion

38. It is the view of the Minister of Health that this legislation provides a significant opportunity to improve public health for people here, particularly our children and future generations. The Minister of Health, supported by advice of the Chief Medical Officer, strongly believes it is imperative that the provisions under the Tobacco and Vapes Bill are extended to Northern Ireland alongside the rest of the UK.
39. The Minister of Health considers that, in the interests of good government and consistency across the UK, in so far as the provisions of the Tobacco and Vapes Bill that deal with a transferred matter they should extend to Northern Ireland.

Department of Health
21 March 2024