



The Society of Chief Officers of Trading Standards in Scotland, SCOTSS, is pleased to respond to the Health and Sport Committee Call for Evidence on the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill.

On behalf of the Society I welcome the opportunity to respond. I am happy for this response to be shared widely with relevant stakeholders and to be published and trust that you find the Society's comments constructive and worthy of further examination.

Gordon Robb,

Chair of SCOTSS,

4<sup>th</sup> August 2015.

## Introduction

SCOTSS is the professional body representing the lead officers for Scottish Local Authority Trading Standards Services.

Trading Standards Services carry out the Enhanced Tobacco Sales Enforcement Programme (ETSEP) coordinated by SCOTSS. This consists of a programme agreed with Scottish government of test purchases from tobacco retailers (target 10% of premises) and business advice and support visits (target 20% of premises). We believe this programme has been successful not only in lowering the number of sales nationally but also in raising the importance to businesses of sound management controls and training in relation to age restricted products overall.

The national average of sales to underage test purchase volunteers has been reducing in the past 4 years.

<b>Year</b>	<b>No. Premises</b>	<b>Test Purchases</b>	<b>1<sup>st</sup> Failures</b>
2011/12	16403	1468 (8.9%)	297 (19.8%)
2012/13	11114	1408 (12.7%)	241 (17.1%)
2013/14	9488	1303 (13.7%)	197 (15.1%)
2014/15	9262	968 (10.5%)	116 (12.0%)

We welcome the proposed amendments and would like the Committee to consider specific points which arise either from our experience of enforcing the Tobacco and Primary Medical Services Act 2010 (TPMS) in relation to tobacco or from the extension of age restriction to NVPs.

Our views are restricted to the subject of sale or supply of nicotine vapour products (NVPs) and consequential proposed amendments to the TPMS relating to tobacco products.

## **1 Vicarious liability**

The presumption in the TPMS is that any person who sells tobacco to an underage person may commit an offence. Enforcement authorities have interpreted this as covering both serving staff and registered owners as appropriate and Scottish Government confirm that this was the intention. This is based on the case law principle of 'master and servant' or vicarious liability of the employer for the actions of the employee.

However, some local authorities report some retailers and, on a few occasions, local procurators fiscal, have questioned this view. Other statutes enforced by Trading Standards tend to use the word 'supply' rather than 'sell' which avoids the discussion as to whether a person without title to the goods can actually sell.

Our concern is that extending the offences to NVPs will mean that businesses that have no prior experience of operating proof of age schemes will now require to operate one and the same issues as before in terms of who may commit an offence will arise.

## **2 Warning notice**

Should the seller of NVPs receive a banning order they are under a legal duty to display a notice that they have been banned from selling NVPs. However, there is no requirement to display a warning notice that it is an age restricted product and an offence to sell it to someone underage.

The TPMS re-stated earlier legislation that a warning notice: "Please Note it is Illegal to Sell Tobacco Products to Anyone Under the Age of 18" must be displayed. We suggest that NVPs should be added to this requirement although a single notice covering both products should be accepted where both products are sold.

## **3 Banning orders**

There have been several recent difficulties with banning orders. Four banning orders were granted in 2014-15 but two local authorities report that the owner of the business that was banned transferred the lease to a family member and continued to trade from the premises.

Presently section 16 of the TPMS seeks to prevent this situation by use of ancillary banning orders. Local authorities can seek ancillary orders to prevent those banned from 'having a connection to a tobacco business.' However, there are problems with this. It is difficult and time consuming to prove that someone 'has a connection' to a tobacco business. And assuming an order is granted this requires local authority monitoring to ensure compliance which is disproportionate to the problem.

These problems are dissuading local authorities from seeking banning orders as they are being circumvented by those receiving the ban.

A much improved outcome would be achieved by placing a ban on the **premises** from selling tobacco products. These powers are currently available to Licensing Boards in

respect of underage alcohol sales where the premises licence can be reviewed and if necessary suspended or revoked.

#### **4 Relevant offences**

One Council reports that a local retailer who received a banning order was subsequently found in possession of counterfeit tobacco after his ban ended. The sale of counterfeit and illicit tobacco are offences under reserved legislation and not included as relevant offences within the TPMS when considering banning orders.

We are not clear on the competency of including offences under reserved legislation within the TPMS but should this prove not to be a barrier we would like this issue to be considered. A conviction under the Trade Marks Act 1994 for selling counterfeit tobacco products should be used as an indicator of a person's fitness to be registered to sell tobacco.

#### **5 Financial Memorandum**

As stated in the FM, there is a lack of robust data at present on the actual numbers of premises selling NVPs. The introduction of controls, the requirement for age verification and other factors could potentially lead to a proportion of current sellers discontinuing the sale of NVPs. On the other hand use of NVPs according to recent studies show In the UK a rapid increase from about 700,000 e-cigarette users to 2.1 million in 2014. The e-cigarette market is worth an estimated £93.1 million per annum and is expected to be worth about £340 million in 2015.<sup>1</sup>

Premises that currently sell other age restricted products such as tobacco, alcohol or fireworks for example, should already have a proof of age scheme in operation. However, for those that do not, the assistance from local authorities to help introduce a proof of age scheme in order to sell NVPs will place a greater demand on Trading Standards resources.

Whilst Scottish government made resources available on the introduction of the ETSEP, Trading Standards Services have suffered around 15% staff reductions in recent years, greater than the overall average of 10% for other Council services.<sup>2</sup> Test purchase operations are resource intensive but continue to contribute to an improvement in the failure rate across Scotland.

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<sup>1</sup> E-cigarette uptake and marketing - a report commissioned by Public health England by Prof Linda Bauld et al Stirling University.

<sup>2</sup> Audit Scotland Report 2013 Protecting Consumers