

# HEALTH (TOBACCO, NICOTINE ETC. AND CARE) (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### THE ACT – OVERVIEW

#### **Part 1 – Tobacco, Nicotine Vapour Products and Smoking**

##### *Chapter 1 – Sale of Tobacco and Nicotine Vapour Products*

#### **Nicotine vapour products**

##### *Section 1 – Nicotine vapour products*

5. **Section 1** of the Act amends the Tobacco and Primary Medical Services (Scotland) Act 2010 (“the 2010 Act”) by including a definition of “nicotine vapour product” at section 35A (meaning of “nicotine vapour product”). Other amendments made by the Act to the 2010 Act depend on this definition.
6. The first part of the definition (section 35A(1)(a)) covers devices intended to enable the inhalation of nicotine-containing vapour by an individual. The kinds of devices caught include those which contain nicotine and typically mimic conventional smoking behaviour e.g. devices commonly known as “e-cigarettes”, “e-cigars” and “e-shisha”. However, the definition is not limited to these kinds of devices. Vapour does not need to be visibly inhaled or exhaled. A hand-to-mouth action is not required.
7. The second part of the definition (section 35A(1)(b)) covers devices which are intended to enable the inhalation of vapour by an individual which do not contain nicotine. These devices are identified by reference to the devices in the first part of the definition: they must be intended to resemble (e.g. by shape, colour or texture) and be operated in a similar way (e.g. the method of inhalation or the way the device is activated or powered). This part of the definition is, therefore, reliant on the first part.
8. The third part of the definition (section 35A(1)(c)) covers items which are intended to form part of a device within the first or second parts of the definition e.g. a cartridge, a mechanical part or an electrical component. Accordingly, an item which is not intended to be used as part of a device caught by the definition does not fall within this part of the definition.
9. The fourth part of the definition (section 35A(1)(d)) covers substances intended to be vaporised by a device caught by the definition and any item containing such a substance. This can include, amongst other things, liquids (e.g. those commonly known as “e-liquid”) and refill containers which hold liquid. It covers substances which contain nicotine as well as those which do not. It covers substances which are intended to be mixed together to form a new substance where the intention is that the substances are to be vaporised in a device caught by the definition.
10. Finally, there are some exclusions from the definition (section 35A(2)). Tobacco and smoking related products (within the meaning of section 35(2) of the 2010 Act) are

excluded. Medicinal products and medical devices are excluded by reference to the meaning of those expressions in the Human Medicines Regulations 2012 and the Medical Devices Regulations 2002, respectively. It should also be noted that nicotine at very high concentrations is already subject to regulation by the Poisons Act 1972 by virtue of the Poisons Rules 1982.

## **Sale and purchase of tobacco and nicotine vapour products**

### ***Section 2 – Sale of nicotine vapour products to persons under 18***

11. **Section 2(1)** inserts a section 4A (sale of nicotine vapour products to persons under 18) into the 2010 Act.
12. Section 4A(1) makes it an offence for a person to sell an NVP to a person under the age of 18. The person who sells can be an individual (e.g. an employee) or a legal person (e.g. a body corporate) or both depending on the circumstances; where it is a legal person then section 34 (offences by bodies corporate etc.) of the 2010 Act may be relevant.
13. Section 4A(2) provides a defence for a person accused of an offence under section 4(1) where that person believed the customer was aged 18 or over and took reasonable steps to establish the customer's age. The reasonable steps are those provided for in section 4A(3). This includes being shown identification such as a passport, a driving licence or such other identification as may be prescribed in regulations made subject to negative procedure (by virtue of section 40(3) of the 2010 Act) by the Scottish Ministers (section 4A(4)). Section 4(5) provides that the penalty for committing the offence in section 4A(1) is, on summary conviction, a fine not exceeding level 4 on the standard scale (currently £2,500).

### ***Section 3 – Age verification policy***

14. **Section 3(1)** of the Act inserts section 4B (age verification policy) into the 2010 Act.
15. Section 4B(1) and (2) require a person who carries on a tobacco or NVP 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 (for example, it does not apply to premises, such as a warehouse used to service internet sales, which are used only to despatch tobacco or NVPs). Section 35 (interpretation) of the 2010 Act contains a definition of "tobacco business". Section 8(2) of the Act 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.
16. 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 an NVP who appears to that person to be under the age of 25 or such older age as may be specified in the policy. 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).
17. Section 4B(5) provides that the Scottish Ministers may issue guidance on matters relating to age verification policies. It sets out a number of things which, in particular, the guidance may contain. The guidance is intended to assist retailers to operate an age verification policy e.g. by setting out appropriate identification which young-looking customers should be asked to produce. Guidance can also cover related matters e.g. training. Section 4B(6) requires a person operating a policy to have regard to the guidance; this means a person must have regard to the guidance when establishing a policy and thereafter during the operation of the policy.

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(Scotland) Act 2016 (asp 14) which received Royal Assent on 06 April 2016*

18. Section 4B(7) provides that a person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 2 on the standard scale (currently £500).
19. Section 3(2) of the Act amends section 40(4) (orders and regulations) of the 2010 Act to make any regulations made under section 4B(4) subject to affirmative procedure.

#### ***Section 4 – Sale by persons under 18***

20. Section 4(1) of the Act inserts section 4C (sale of tobacco or nicotine vapour products by persons under 18) into the 2010 Act.
21. 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.
22. Section 4C(4) requires the authorisation to be recorded and kept at premises where a person under 18 has been authorised to make sales. 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.
23. If an authorisation is not recorded and kept in accordance with section 4C(4) and regulations made under section 4C(5), then section 4C(6) provides that the authorisation is deemed not to have been made. That means the person under 18 is not authorised and the responsible person is liable for the offence under section 4C(1) if the responsible person allows the person under 18 to make a sale.
24. Section 4C(7) provides that a responsible person who commits an offence under section 4C(1) is liable on summary conviction to a fine not exceeding level 1 on the standard scale (currently £200).

#### ***Section 5 – Defence of due diligence for certain offences***

25. Section 5(1) of the Act inserts section 4D (defence of due diligence for certain offences) into the 2010 Act.
26. Section 4D(1) and (2) provides a due diligence defence for a person (or any employee or agent of that person) charged with the offence of—
  - selling a tobacco product to a person under the age of 18 (in section 4(1) of the 2010 Act),
  - selling a NVP to someone under the age of 18 (in section 4A(1) of the 2010 Act, inserted by section 2 of this Act), or
  - allowing the sale of a tobacco product or NVP by an unauthorised person under 18 (in section 4C(1) of the 2010 Act, inserted by section 4 of this Act).
27. The defence is that the accused (or the employee or agent of that person, as the case may be) took all reasonable precautions and exercised all due diligence to prevent the offence from being committed.

#### ***Section 6 – Purchase of nicotine vapour products on behalf of persons under 18***

28. Section 6(1) of the Act inserts section 6A (purchase of nicotine vapour products on behalf of persons under 18) into the 2010 Act.

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29. Section 6A(1) makes it an offence for a person aged 18 or over to buy or attempt to buy a NVP on behalf of a person aged under 18. This is commonly known as a ‘proxy purchase’ offence. Section 6A(2) provides that a person who commits this offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5,000).

### ***Section 7 – Extension of vending machine prohibition***

30. Section 7 of the Act contains an enabling power for the Scottish Ministers to make regulations to amend section 9 (prohibition of vending machines for the sale of tobacco products) of the 2010 Act so that it includes vending machines for the sale of NVPs. The effect of such an amendment would be to make a person who has the management or control of premises on which a vending machine for the sale of NVPs is available commit an offence and be liable to the penalty set out in section 9(2) of the 2010 Act (on summary conviction a fine not exceeding level 4 on the standard scale, currently £2,500).

## **Register of tobacco and nicotine vapour product retailers**

### ***Section 8 – Register of tobacco and nicotine vapour product retailers***

31. Section 8(1) of the Act amends section 10(1) (Register of tobacco retailers) of the 2010 Act to require that the Scottish Ministers keep a Register of persons carrying on a NVP business. This is in addition to the existing requirement in section 10 which requires the Scottish Ministers to keep a Register of persons carrying on a tobacco business. As amended, section 8(1) means that the Scottish Ministers must keep a single Register covering: tobacco businesses and NVP businesses, and consequently, businesses which are both tobacco and NVP businesses.
32. Section 8(2) of the Act 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.

### ***Section 9 – Registration and changes to the Register***

33. Section 9 of the Act amends sections 11 to 14 of the 2010 Act to make changes to registration and the Register (as established by section 10 of the 2010 Act).
34. Section 11 of the 2010 Act concerns the application for registration and addition of premises etc. on the Register. Section 9(1)(a) amends section 11(2) 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 Act) it is an offence for an unregistered person to carry on a tobacco or NVP business.
35. Section 9(1)(b) inserts subsection (2A) into section 11 which requires an applicant, in relation to each premises, to state whether the applicant proposes to carry on a tobacco business, a NVP business or both. Under section 11(3)(a) of the 2010 Act the Scottish Ministers cannot grant an application if required information is missing or the application is not made in the correct form and manner, as set out by section 11(2).
36. Section 11(3)(b) of the 2010 Act bars the Scottish Ministers from granting an application if an applicant is banned, under a tobacco retailing banning order, from carrying on a tobacco business at any premises specified in the application. Section 9(1)(c) amends this provision to refer to a “tobacco and nicotine vapour product banning order” to account for the changes made to banning orders by section 10 of the Act.
37. When an application meets the requirements, the Scottish Ministers must grant the registration and update the Register in accordance with section 11(4) (for new applicants) or (5) (for updates) of the 2010 Act. Section 9(1)(d) and (e) of this Act

amends section 11(4) and (5) to require the Scottish Ministers to enter information in the Register on NVP businesses and businesses which are both tobacco and NVP businesses. Section 9(2) of the Act amends section 12 (certificates of registration) of the 2010 Act. Certificates of registration issued by the Scottish Ministers under section 12 must now state whether the premises noted against a person's entry in the Register are premises at which the person carries on a tobacco business, a NVP business or both.

38. **Section 9(3)** of the Act amends section 13(1) (duty to notify certain changes) of the 2010 Act so that a registered person is under a duty to inform the Scottish Ministers if that person is no longer carrying on a NVP business at the address noted in the person's entry in the Register. Section 13(2) of the 2010 Act continues to require notice to be given within three months of the date of the change to which it relates. A failure to comply with this duty is an offence under section 20 of the 2010 Act (as amended by section 11 of the Act).
39. **Section 9(4)** of the Act amends section 14 (changes to and removal from Register) of the 2010 Act. This requires the Scottish Ministers to amend the Register if a tobacco and NVP banning order is made against a registered person. The Scottish Ministers may remove a person from the Register if they are not satisfied that the person is carrying on a tobacco or NVP business; they must notify the person and re-instate the entry where that person notifies them no later than 28 days after notice of the removal is given under section 14(4)(a) that the person is still carrying on a tobacco or NVP business. Note that there is no automatic reinstatement once a tobacco and NVP banning order expires – a fresh application is required under section 11 of the 2010 Act.

### ***Section 10 – Tobacco and nicotine vapour product banning orders***

40. **Section 10(1)** of the Act amends section 15 (tobacco retailing banning orders) of the 2010 Act to allow a person carrying on a tobacco or NVP business to be the subject of an application for a retailing banning order, now renamed a “tobacco and nicotine vapour product banning order”. Applications are made by a local authority to the sheriff. Where an order is made a person is banned from carrying on a tobacco business and a NVP business at the premises specified in the order for the period of time stated in the order (which cannot exceed 24 months). A sheriff may make an order where, in addition to other prerequisites in section 15(3), there have been three or more “relevant enforcement actions” in respect of each premises specified in the order. At present, section 15(3) requires the person who is the subject of the application for an order to have been the subject of the relevant enforcement actions. Now, as amended, a relevant enforcement action can relate to an offence committed by, or fixed penalty notice issued to, an employee or agent of the person who is the subject of the application in addition to that person. Additionally, the Act adds to the list of “relevant enforcement actions” in section 15(4) a conviction for an offence under section 92(1)(b) or (c) of the Trade Marks Act 1994 (unauthorised use of a trade mark) where the goods in question include tobacco products, smoking related products or NVPs.
41. **Section 10(2)** of the Act amends section 16 (tobacco retailing banning orders: ancillary orders) of the 2010 Act so that reference is now made to a tobacco and NVP banning order. Section 16 as amended allows local authorities to apply to the sheriff for an ancillary order in respect of NVP businesses as well as tobacco businesses.
42. The application for an ancillary order can be made along with an application for a tobacco and NVP banning order or it can be made at a later date once a banning order is in place. The order can be sought against “P” who is the person against whom the banning order is being sought or has already been made. An ancillary order can be sought by the local authority banning P from being connected to or seeking to control another person carrying on a NVP or tobacco business at the premises to which the banning order relates.
43. In addition, where P is not an individual (e.g. where P is a company or partnership), an ancillary order can be sought to ban any person connected to P from carrying on

a tobacco or NVP business at the premises or from being connected to a person who carries on such a business at those premises.

44. **Section 10(3)** of the Act amends section 17 (tobacco retailing banning orders etc.: appeals) of the 2010 Act to change references from “tobacco retailing banning order” to “tobacco and nicotine vapour product banning order”. This allows for an appeal to be made against such an order to the sheriff principal (or when established, the Sheriff Appeal Court).
45. **Section 10(4)** of the Act amends section 18 (tobacco retailing banning orders etc.: notification to Scottish Ministers) of the 2010 Act to change the reference from “tobacco retailing banning order” to “tobacco and nicotine vapour product banning order”. Section 18 requires the sheriff to notify the Scottish Ministers on making a tobacco and NVP banning order or an ancillary order. The sheriff principal must notify the Scottish Ministers of the outcome of any appeal (or when established, the Sheriff Appeal Court).
46. **Section 10(5)** of the Act 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 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.

### ***Section 11 – Offences relating to the Register***

47. **Section 11** of the Act amends section 20 (offences relating to the Register) of the 2010 Act to extend the existing offences as a consequence of the Register being revised to include NVP businesses. Unregistered persons commit an offence. It is an offence for a person to carry on a tobacco or NVP business from premises other than those noted in that person’s entry in the Register. It is an offence for a person to fail to notify changes to that person’s entry in the Register. It is an offence for a person to breach a tobacco and NVP banning order or an ancillary order. Section 11(4) of the 2010 Act continues to set out the different levels of penalty for these offences. This Act does not change the penalty levels.

### ***Section 12 – Public inspection of the Register***

48. **Section 12** of the Act amends section 21 (public inspection of Register) of the 2010 Act. The Scottish Ministers must continue to make available for public inspection, and free of charge at all reasonable times, a list of all premises on the Register. Rather than the list comprising only premises at which tobacco businesses are carried on or proposed to be carried on, it now in addition must list premises where persons carry on or propose to carry on NVP businesses and businesses which are both tobacco and NVP businesses.

### **The 2010 Act: miscellaneous**

#### ***Section 13 – Power to exclude certain premises***

49. **Section 13** of the Act amends section 35 (interpretation of Part 1) of the 2010 Act to define “vehicle” and to include a regulation-making power for the Scottish Ministers enabling them to exclude specified kinds of aircraft or ship, boat or other water-going vessel.

### ***Section 14 – Presumption as to contents of container***

50. **Section 14** of the Act amends section 33 (presumption as to contents of container) of the 2010 Act. This section of the 2010 Act currently contains a presumption in prosecutions for displaying tobacco products (and smoking related products) or for selling tobacco to persons under 18. The presumption is that the contents of a container are what would be expected given the packaging. The presumption can be rebutted by the accused or another party in a trial. As amended by the Act, the presumption now applies in the case of the following offences—
- selling a tobacco product to a person under the age of 18 (section 4),
  - selling a NVP to a person under the age of 18 (section 4A),
  - failing to operate an age verification policy (section 4B),
  - allowing the sale of a tobacco product or NVP by an unauthorised person under 18 (section 4C),
  - purchasing of tobacco by a person under 18 (section 5),
  - purchasing a tobacco product or NVP on behalf of a person under 18 (section 6 and 6A),
  - managing or controlling premises on which a tobacco vending machine is available for use (section 9).

### ***Section 15 - Part 1 of the 2010 Act: miscellaneous***

51. **Section 15** of the Act makes a number of amendments to the titles and headings of provisions in the 2010 Act to reflect the amendments made by sections 1 to 14 of the Act.

## **Interpretation**

### ***Section 16 – Meaning of “the 2010 Act”***

52. **Section 16** of the Act defines references in Part 1 of the Act to “the 2010 Act” as being to the Tobacco and Primary Medical Services (Scotland) Act 2010.