

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

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## **EXPLANATORY NOTES**

### **THE ACT – OVERVIEW**

3. [Part 1](#) of the Act includes a number of new controls on the sale of tobacco, the sale and promotion of a nicotine vapour product (“NVP”) and on smoking outside hospital buildings. Chapter 1 contains provision which puts a prohibition on selling NVPs to persons under the age of 18, a power to ban the sale of NVPs from vending machines, a prohibition on the purchase of NVPs on behalf of a person under the age of 18 and a requirement for retailers of NVPs to be on a Register and related provision about banning orders. It also includes controls which apply to the sale of both NVPs and tobacco products: a requirement on retailers to operate an age verification policy, a prohibition on unauthorised sales by persons under the age of 18 and a statutory due diligence defence. Chapter 2 contains regulation-making powers which enable certain forms of advertising and promotion of NVPs to be prohibited or restricted. Chapter 3 contains provision related to prohibiting smoking in designated smoke-free outdoor areas on NHS hospital grounds.
4. In summary, Part 1 of the Act—
  - introduces the offence of selling a NVP to a person under the age of 18,
  - introduces the offence of failing to operate an age verification policy at premises where tobacco products and NVPs are offered for sale,
  - introduces the offence of allowing a tobacco product, cigarette papers or a NVP to be sold by a person under the age of 18 without authorisation,
  - provides powers to introduce the offence of selling a NVP from a vending machine,
  - introduces the offence of carrying on a NVP business whilst unregistered or from unregistered premises,
  - provides for a due diligence defence against certain tobacco product and NVP related offences,
  - makes it an offence for a person aged over 18 to purchase a NVP for a person under the age of 18 (commonly known as “proxy purchase”),
  - provides powers to make regulations containing prohibitions or restrictions on NVP advertisements and brand-sharing and to make related offences,
  - provides powers to make regulations prohibiting or restricting giving away a NVP or a coupon for a NVP and to make related offences,
  - provides powers to make regulations prohibiting or restricting a sponsorship agreement which promotes NVPs and to make related offences,

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- makes it an offence to smoke outside a NHS hospital building within an area designated by regulations and makes related offences as well as powers to make regulations on the detail.

## **Commentary on Sections**

### **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.
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.
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—

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- 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.

#### ***Chapter 2 – Advertising and Promotion of Nicotine Vapour Products***

##### ***Section 17 – Advertising and brand sharing***

53. **Section 17(1)** of the Act contains a wide power for the Scottish Ministers to make regulations to prohibit or restrict advertising and brand-sharing of NVPs. The powers could, for example, be used to prohibit or restrict the advertising of NVPs on billboards, product displays, bus stops, posters, leaflets, banners, brochures and certain published material in Scotland. Regulations could also prohibit or restrict unrelated branded products or services being used in NVP branding, and vice versa. The regulations can only apply to an activity in the course of a business. **Section 17(2)** contains a non-exhaustive list of the kind of provision which may also be made in regulations, covering enforcement, offences, penalties, defences and exceptions e.g. there could be an exception made for specialist trade shops and an exception allowing certain forms of advertising and promotion at point of sale.
54. **Section 17(3)** specifies the maximum penalty which regulations may prescribe for offences as, on summary proceedings, imprisonment not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) or both and, on conviction on indictment, imprisonment not exceeding two years or an unlimited fine or both.
55. **Section 17(4)** defines certain expressions used in section 17. In particular, the definition of “nicotine vapour product advert” concerns a “published advertisement” whose purpose or effect is to promote a NVP, but it also includes a product “display” whose purpose or effect is to promote a NVP. The word “advertisement” is not defined and bears its ordinary meaning. A wide definition of “published” is provided to make clear that this term covers any way of making an advertisement available to the public in Scotland; it is, for example, not limited to print media and can cover electronic and audio-visual media.



### **Section 18 – Free distribution and nominal pricing**

56. **Section 18(1)** of the Act contains a power for the Scottish Ministers to make regulations to prohibit or restrict in the course of a business the giving away of NVPs (and coupons for those products) for free including retailing them for a nominal sum. **Section 18(2)** contains a non-exhaustive list of the kind of provision which may also be made in regulations, covering enforcement, offences, and penalties, defences and exceptions. It also makes clear that regulations can make further provision about the circumstances in which a product or coupon is to be treated as being made available for a nominal sum.
57. **Section 18(3)** specifies the maximum penalty which regulations may prescribe for offences as, on summary proceedings, imprisonment not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) or both and, on conviction on indictment, imprisonment not exceeding two years or an unlimited fine or both.

### **Section 19 – Sponsorship**

58. **Section 19(1)** of the Act contains a power for the Scottish Ministers to make regulations to prohibit or restrict a person in the course of a business entering into a sponsorship agreement where the purpose or effect of anything done as a result of the agreement promotes a NVP. Subsection (4) defines “sponsorship agreement”. It can include the sponsorship of an event, activity or person in, or connected to, Scotland. **Section 19(2)** contains a non-exhaustive list of the kind of provision which may also be made in regulations, covering enforcement, offences, and penalties, defences and exceptions.
59. **Section 19(3)** specifies the maximum penalty which regulations may prescribe for offences as, on summary proceedings, imprisonment not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) or both, and on conviction on indictment, imprisonment not exceeding two years or an unlimited fine or both.

## **Chapter 3 – Smoking Outside Hospitals**

### **Section 20 – Smoking outside hospitals**

60. **Section 20** of the Act amends Part 1 of the Smoking, Health and Social Care (Scotland) Act 2005 (“the 2005 Act”).

#### **Section 20(2)**

61. **Section 20(2)** inserts new sections 4A, 4B, 4C and 4D into the 2010 Act. The new sections contain powers for the Scottish Ministers to designate no-smoking areas around certain buildings on certain NHS hospital grounds and provide for related duties, offences and penalties. Each new section is considered in turn below.

#### **Section 4A: Offence of permitting others to smoke outside hospital building**

62. Subsection (1) makes it an offence for a person who has management and control of a no-smoking area to knowingly permit smoking there.
63. Subsection (2) provides that a person knowingly permits smoking if the person should have known that someone was smoking in the no-smoking area.
64. Subsection (3) provides that it is a defence for an accused to show that the accused (or an employee or agent of the accused) took all reasonable precautions and exercised all due diligence to avoid committing the offence, or that there were no lawful and reasonably practicable means by which the accused could have prevented the smoking in the no-smoking area. The onus is, however, on the accused to prove this.
65. Subsection (4) provides that a person who commits the offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).

#### **Section 4B: Offence of smoking outside hospital building**

66. Subsection (1) makes it an offence for a person to smoke within the no-smoking area outside a hospital building.
67. Subsection (2) provides that it is a defence if the accused can prove that the accused did not know, and could not reasonably be expected to have known, that the area in which the accused was smoking was a no-smoking area. This might arise in instances where, for example, no-smoking signs had been removed or had failed to be displayed. The onus is, however, on the accused to prove this.
68. Subsection (3) provides that a person who commits the offence of smoking in a no-smoking area is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1,000).

#### **Section 4C: Display of warning notices in hospital buildings and on hospital grounds**

69. Subsection (1) places a duty on Health Boards to prominently display signs at every entrance to the hospital grounds.
70. Subsection (2) requires the person in management and control of each building on a hospital ground to prominently display signs at the entrance to each building. Subsection (5) makes it an offence for a person to fail to comply with this requirement. It also makes it an offence to fail to comply with requirements which may be set out in regulations made under subsection (4).
71. Subsection (3) provides that a sign must state that it is an offence to smoke in the no-smoking area outside a hospital building or knowingly permit smoking there.
72. Subsection (4) gives the Scottish Ministers a power to make regulations which may provide further detail as to the manner of display, form and content of the no-smoking signs.
73. Subsection (5) provides that a person who commits an offence of failing to display signage at the entrance to hospital buildings in compliance with this section is liable to a fine not exceeding level 3 on the standard scale (currently £1,000).

#### **Section 4D: Meaning of “no-smoking area outside a hospital building” and related expressions**

74. Subsection (1) defines the meaning of “no-smoking area outside a hospital building”. It is an area lying immediately outside the hospital building. It is bounded by a perimeter of a specified distance from the building. However, the area is limited to being within, and thereby cannot fall outside of, hospital grounds. Subsection (2) gives a power to the Scottish Ministers to make regulations prescribing the specified distance. The regulations can also make further provision about determining the perimeter around a building, for example they could make detailed provision on how to determine the starting point outside a building from which the specified distance is to be measured.
75. Subsection (3) defines “hospital”, “hospital building” and “hospital grounds” for the purposes of this section. A hospital means a health service hospital as defined in section 108(1) of the National Health Service (Scotland) Act 1978. A hospital building is simply a building on hospital grounds. Hospital grounds covers land in the vicinity of a hospital which is associated with it.
76. Subsection (4) allows the Scottish Ministers to make regulations which can—
  - (a) exclude certain hospitals altogether from the ban on smoking outside hospitals,

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- (b) include certain land within the meaning of hospital grounds e.g. land which might not necessarily be in the vicinity of, or associated with, a hospital, so that it can be caught by a no-smoking area,
  - (c) exclude certain land from the meaning of hospital grounds e.g. land which despite being in the vicinity of, and associated with, a hospital, is not to be caught by a no-smoking area,
  - (d) make further provision to elaborate on the meaning of “hospital grounds” e.g. criteria could be set out for determining whether land is to be regarded as associated with a hospital or not,
  - (e) provide that certain buildings on hospital grounds are not to be regarded as hospital buildings for the purposes of the ban on smoking outside hospitals, and thereby, remove these buildings from having a perimeter applied from them, and
  - (f) provide that certain land within a no-smoking area is to be exempt from that area so that it is not an offence to smoke there or permit others to do so.
77. Subsection (5) allows regulations made under subsection (4) by the Scottish Ministers to make provision modifying the application of section 4C so that, for example, signage requirements can be adjusted, as appropriate, to take account of exceptions and other provision made by those regulations.

### **Section 20(3) to (8) of the Act**

78. **Section 20(3)** of the Act amends section 5(1) (proceeding for offences under sections 1 to 3) of the 2005 Act to include the offences contained in new sections 4A, 4B and 4C(5) within section 5; and section 20(4) amends the title of section 5 to reflect this change. This links the start of the time limit for summary proceedings to the point at which the Crown is passed sufficient evidence on the offence to justify bringing a prosecution. This will prevent any lengthy or extended hearing processes consequential to the issuing of a fixed penalty notice under Part 1 of the 2010 Act resulting in a subsequent prosecution for that offence being time barred.
79. **Section 20(5)** amends section 6(2) (fixed penalties) of the 2005 Act to include the offences contained in new sections 4A, 4B and 4C(5) within section 6(2). This means that only an individual (or, put another way, a “natural person”) can be issued with a fixed penalty notice in relation to these offences i.e. fixed penalty notices cannot be issued to bodies corporate etc. who may be accused of committing these offences.
80. **Section 20(6)** amends section 7 (powers to enter and require identification) of the 2005 Act to apply it appropriately in relation to the offences contained in new sections 4A, 4B and 4C(5). It provides an authorised officer of a local authority, for the area in which the hospitals falls, with powers to enter and search hospital grounds and to require identification (name and address) from an accused or a person with information about the offences.
81. **Section 20(7)** amends section 40 (regulations or orders) of the 2005 Act so that regulations made under new section 4D(2)(a) and (4)(a) are subject to the affirmative procedure.
82. **Section 20(8)** amends, and renames, schedule 1 (fixed penalty for offences under sections 1, 2 and 3) to the 2005 Act to account for the new offences in sections 4A, 4B and 4C(5) for which fixed penalty notices may be issued.

### **Part 2 – Duty of Candour**

83. **Part 2** of the Act introduces a duty of candour in health and social care settings.

84. **Part 2** of the Act creates a legal requirement for health and social care organisations to inform people (and their families) when they have been harmed (either physically or psychologically) as a result of the care or treatment they have received. There will also be requirements for organisations to prepare and publish reports in relation to the duty of candour.

## **Duty of candour procedure**

### ***Section 21 – Incident which activates duty of candour procedure***

85. **Section 21** describes incidents which give rise to the duty of candour procedure. The responsible person (defined in section 25) is required to follow the duty of candour procedure where the person has provided someone with a health service, a care service, or a social work service, and in the course of providing that service an unintended or unexpected incident has occurred which has resulted in certain outcomes. The outcomes need to relate to the incident rather than being attributable to the person's illness or condition. The decision as to whether the outcome relates to the incident is to be made by a registered health professional who was not involved in the incident itself.
86. The outcomes are set out in subsection (4) and cover a range of physical and psychological effects as well as death.
87. Subsection (5) provides the Scottish Ministers with the power to make regulations to amend the list of outcomes in subsection (4). Under section 32(2), any such regulations would be subject to the affirmative procedure.

### ***Section 22 – Duty of candour procedure***

88. The duty of candour procedure, which covers actions to be taken by responsible persons, will be set out in regulations made using the power in subsection (1). Those regulations will be subject to negative procedure. Responsible persons are defined in section 25(1) and include Health Boards (both territorial and Special Health Boards), the Common Services Agency (which operates under the name of NHS National Services Scotland), independent health care services, local authorities and other providers of care services and social work services. Generally, individuals providing health, care or social work services are not included in the "responsible person" definition. However, for care services, individuals providing a service who make arrangements with others to assist with the provision of the service, are included in the definition of "responsible person".
89. Subsection (2) gives detail as to what the regulations may, in particular, make provision about. This includes taking actions to meet with and apologise to the "relevant person" (see paragraph 92 below) and provide support to them, as well as asking the "relevant person" whether they would like to receive an account of the incident or information about further steps taken. Subsection (2) also includes detail on recording and monitoring incidents and providing training and support to those carrying out the duty of candour procedure.
90. Subsection (3) gives a definition of 'relevant person' for the purposes of the section and the duty of candour procedure, which is the person who has received the health service, care service, or social work service, or a person acting on behalf of that person where that person has died or lacks capacity, or for other reasons cannot make decisions about the service provided to them.

### ***Section 23 – Apologies***

91. **Section 23** defines 'apology' in relation to the duty of candour provisions and subsection (2) provides that any apology or other steps taken which are in accordance with the duty of candour procedure set out in regulations made under section 22 cannot be taken by itself to be an admission of negligence or a breach of a statutory duty. This means that there is not to be taken to be a link between giving an apology (or otherwise

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following the duty of candour procedure) in relation to an incident and acknowledgment of any wrong-doing. This does not prevent individuals affected from taking further action in relation to an incident.

### **Section 24 – Reporting and monitoring**

92. Responsible persons who provide health services, care services or social work services in a financial year are required to prepare and publish reports. These reports are not to identify individuals. The reports must include the following information (but responsible persons can also include other information if they wish)—
- details about the incidents that have occurred,
  - information on the organisation’s compliance with the duty of candour procedure,
  - information about policies and procedures and whether there have been changes to these policies and procedures resulting from incidents that have occurred.
93. In order to assist with monitoring the extent to which the duty of candour procedure has been followed, there is a power for certain bodies to require responsible persons to provide them with information. These same bodies are to be notified when the annual reports are published. The particular bodies with the power to require information (and who are to be notified) vary depending on the responsible person. So, for example, Health Boards are linked to the Scottish Ministers, independent health service providers are linked to Healthcare Improvement Scotland, while providers of care services or social work services are linked to Social Care and Social Work Improvement Scotland (SCSWIS, which operates under the name of the Care Inspectorate).

### **Interpretation**

#### **Section 25 – Interpretation of Part 2**

94. **Section 25(1)** defines certain terms used in Part 2.
95. “Care service” is defined by reference to section 47(1) of the Public Services Reform (Scotland) Act 2010 (“the PSR Act”) and covers the following: support services, care home services, school care accommodation services, nurse agencies, child care agencies, secure accommodation services, offender accommodation services, adoption services, fostering services, adult placement services, day care of children and housing support services. Each of those services is further defined in Schedule 12 to the PSR Act.
96. “Health service” is defined to cover services under the national health service continued under section 1 of the National Health Service (Scotland) Act 1978 and also independent health care services. Independent health care services are independent hospitals, private psychiatric hospitals, independent clinics, independent medical agencies and independent ambulance services (section 10F(1) of the 1978 Act).
97. “Social work service” is defined by reference to section 48 of the PSR Act. Section 48 defines such services by reference to local authority social work services functions (whether the services are provided by the local authority or by other persons that the local authority has entered into an arrangement with). Social work services functions are then listed in schedule 13 to the PSR Act which lists a range of statutory functions.
98. “Registered health professional” is defined by reference to section 60(2) of the Health Act 1999. Section 60(2) covers professions regulated under various enactments and also professions that might be regulated in the future by an Order in Council made using the powers in section 60. Those professions are: doctors, dentists, professions complementary to dentistry, optometrists, dispensing opticians, osteopaths, chiropractors, pharmacists, pharmacy technicians, nurses, midwives, arts therapists, biomedical scientists, chiropodists, podiatrists, dietitians, hearing aid dispensers,

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occupational therapists, operating department practitioners, orthoptists, paramedics, physiotherapists, practitioner psychologists, prosthetists, orthotists, radiographers, speech and language therapists.

99. “Provide” is defined for a health service, a care service, or a social work service as meaning to carry on or manage such a service. The term “provide” in relation to such services is already defined in other legislation in a similar way (see, for example, section 105 of the PSR Act). The definition makes clear that the term operates in the same way here.
100. Subsection (2) provides the Scottish Ministers with the power to make regulations to amend the definition of “responsible person” in subsection (1). Under section 32(2), any such regulations would be subject to the affirmative procedure.

### **Part 3 — Ill-Treatment and Wilful Neglect**

101. **Part 3** of the Act establishes offences relating to the wilful neglect or ill-treatment of adults receiving health care or social care. There are two main offences in this part: an offence that applies to care workers, and an offence that applies to care providers.

#### **Offences by care workers and care providers**

##### ***Section 26 – Care worker offence***

102. **Section 26** sets out the care worker offence and the penalty for conviction. “Care worker” is defined in section 28(1) and covers care workers (employees and volunteers), their managers and supervisors, and directors or similar officers of organisations. The offence is committed where a care worker is providing care for another person and ill-treats or wilfully neglects that person. If providing that care is only incidental to the worker’s other activities (for example, where the worker is a cleaner) then such a person would not fall within the “care worker” definition (and the same principle applies in relation to care by a “care provider”) (section 28(4)). Section 26(2) provides the penalties for those convicted of the care worker offence: on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both); and, on conviction on indictment, to imprisonment for a term not exceeding five years or a fine (or both).

##### ***Section 27 – Care provider offence***

103. **Section 27** sets out the care provider offence that will apply to providers of health or social care services. Care provider is defined in section 28(3) and covers both legal persons (corporate bodies, partnerships and unincorporated associations) and individuals who have others working for them. The care provider offence is committed if a three-stage test is met—
  - an individual is ill-treated or wilfully neglected by someone providing health care or social care on behalf of the care provider,
  - the care provider’s activities are organised in such a way as to be a gross breach of the duty of care owed to the individual, and
  - were it not for that gross breach, the ill-treatment or wilful neglect would not have occurred (or would have been less likely to occur)
104. **Section 27(3)** defines “relevant duty of care” for the purposes of this offence and provides further detail on what is meant by a “gross” breach of that duty. Section 27(4) provides the penalties for those convicted of the care provider offence: on summary conviction, to a fine not exceeding the statutory maximum; and, on conviction on indictment, to a fine.

### ***Section 28 – Meaning of “care worker” and “care provider”***

105. **Section 28** sets out various definitions.
106. Subsection (5) defines “adult health care” and “adult social care”. “Adult health care” is defined as services provided to individuals aged 18 or over and is described by reference to the National Health Service (Scotland) Act 1978 to include services provided under the national health service and services from independent providers. “Adult social care” is defined by reference to certain services listed in section 47(1) of the Public Services Reform (Scotland) Act 2010. Those services are support services, care home services, nurse agencies and housing support services (where provided to those aged 18 or over) and offender accommodation services and adult placement services (where provided to those aged 16 or over).

### ***Section 29 – Disclosure of conviction for offence under section 26***

107. **Section 29** amends schedule 8A of the Police Act 1997 to insert the section 26 care worker offence. Schedule 8A contains a list of offences which must always be disclosed on all types of higher level disclosure. The inclusion of this offence on the ‘Offences which must always be disclosed’ list means that no matter how old the conviction is, it will always be disclosed by Disclosure Scotland on a higher level disclosure.

## **Remedial orders and publicity orders**

### ***Section 30 – Power to order offence to be remedied or publicised***

108. **Section 30** makes provision for the court to make a remedial order or a publicity order in respect of a care provider where that care provider has been convicted of an offence under section 27(1) (the “care provider offence”). A remedial order will require the care provider to take steps (specified in the order itself) to remedy matters relating to the gross breach (described in paragraph 103 above). Any order made must specify a compliance period within which requirements made in the order must be complied with. Where a care provider fails to comply with either a remedial order or a publicity order, the care provider commits an offence (subsection (10)). Subsection (11) sets out the penalties for non-compliance with an order: on summary conviction, to a fine not exceeding the statutory maximum; and, on conviction on indictment, to a fine.

### ***Section 31 – Remedial and publicity orders: prosecutor’s right of appeal***

109. **Section 31** makes amendments to the Criminal Procedure (Scotland) Act 1995 to enable the prosecutor, in both solemn and summary proceedings, to appeal against a decision of the court not to make a publicity order or a remedial order.

## **Ill-treatment and wilful neglect of mentally disordered person**

### ***Section 32 – Penalty for ill-treatment and wilful neglect of mentally disordered person***

110. **Section 32** makes amendments to the existing offence in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The amendments change the penalty for an offence under section 315 from a maximum of two years imprisonment on indictment to a maximum of five years imprisonment. This section also amends section 315 to update the definitions of “provides care services” and “care services”. “Care services” are defined by reference to section 47(1) of the Public Services Reform (Scotland) Act 2010 and cover support services, care home services, nurse agencies, secure accommodation services, offender accommodation services, adult placement services and housing support services.

## **Part 4 - Provision of Communication Equipment**

111. **Part 4** of the Act places a duty on the Scottish Ministers to provide or secure communication equipment.

### ***Section 33 – Duty to provide or secure communication equipment***

112. **Section 33** of the Act inserts new section 46A into the National Health Service (Scotland) Act 1978 (“the 1978 Act”). Section 46A places a duty on the Scottish Ministers to provide or secure the provision of communication equipment, and the support in using that equipment, to any person who has lost their voice or has difficulty speaking (both children and adults). The equipment and support is to be provided to such an extent as the Scottish Ministers consider necessary to meet all reasonable requirements.
113. Whilst the duty is being placed on the Scottish Ministers, there is provision within the 1978 Act which allows for the Scottish Ministers’ functions under that Act (such as this new duty) to be delivered by Health Boards.

## **Part 5 — Final Provisions**

### ***Section 34 – Regulations***

114. This section provides that regulation-making powers in the Act also include the power to make different provision for different purposes and can make certain ancillary provision, for example, transitional provision. It also provides for which parliamentary procedure applies to each power in the Act.

### ***Section 35 – Ancillary provision***

115. This section gives the Scottish Ministers the power by regulations to make incidental, consequential, transitional, transitory and savings provision. This power allows free-standing ancillary provision to be made, which aids the implementation of the Act.

### ***Section 36 – Commencement***

116. This section provides that the Scottish Ministers can commence the provisions of the Act by regulations, with the exception of this section and sections 34, 35, and 37, which will come into force the day after Royal Assent.

### ***Section 37 – Short title***

117. This section describes the short title of the Bill as it is enacted as the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016.