

Legislative Consent Memorandum

Tobacco and Vapes Bill

Background

1. This memorandum has been lodged by Neil Gray MSP, Cabinet Secretary for Health and Social Care, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Jenni Minto MSP, Minister for Public Health & Women's Health.

2. The Tobacco and Vapes Bill ("the Bill") was introduced in the House of Commons on 5 November 2024. The Bill can be found at [Tobacco and Vapes Bill - Parliamentary Bills - UK Parliament](#)

Content of the Bill

3. As stated in the explanatory notes, the Bill will be a landmark step in creating a smoke-free UK. It will:

- create a smoke-free generation, gradually ending the sale of tobacco products across the country intended to break the cycle of addiction and disadvantage;
- enable regulation to strengthen the existing ban on smoking in public places to reduce the harms of passive smoking, particularly around children, families and vulnerable people;
- ban vapes and nicotine products from being deliberately promoted and advertised to children to stop the next generation from becoming hooked on nicotine; and
- strengthen enforcement activity to support the implementation of the above measures and provide powers to introduce a licensing scheme for the retail sale of tobacco, herbal smoking products, cigarette papers, vapes and nicotine products in England, Wales and Northern Ireland, whilst broadening our pre-existing register by including nicotine products and herbal smoking product.

4. The Bill modifies, amends, extends, and re-enacts several existing tobacco and vaping control measures to create a consistent legislative framework. These changes will help to ensure a consistent application of the law, close loopholes, improve readability and improve subsequent enforcement.

5. The Bill broadly seeks to align provisions across the UK, building on the existing legislative frameworks that apply.

6. The Bill is split into eight parts (Table 1).

Table 1: Summary of the different component parts of the Bill

Part	Territorial Extent	Summary
1	England and Wales	Parts 1 to 3 make provision regarding the sale and distribution of tobacco, vaping and nicotine products within each of the constituent nations of the UK.
2	Scotland	
3	Northern Ireland	
4	UK wide	Part 4 of the Bill gives powers to Revenue and Customs officials to seize and detain oral tobacco (snus etc) which cannot be lawfully supplied in the UK.
5	UK Wide	<p>Part 5 of the Bill contains a suite of regulation making powers to enable requirements to be set in relation to product standards, including packaging and features of products, to enable establishment of a registration scheme and for information to be provided to support registration and check for compliance with product standards, and for testing of products for quality and safety.</p> <p>These powers would enable amendment of existing requirements relating to tobacco, herbal smoking and some vaping products and the establishment of new requirements relating to tobacco, vaping, nicotine and herbal smoking products and cigarette papers.</p>
6	UK Wide	<p>Part 6 of the Bill will repeal and replace the Tobacco Advertising and Promotion Act 2002 ("TAPA"). TAPA prohibits the advertising of tobacco products and sponsorship agreements that promote such products.</p> <p>The Bill will re-enact those restrictions and extend them to herbal smoking products, cigarette papers, vaping products and other nicotine products.</p> <p>There is also a power for the Secretary of State to prohibit or restrict brand-sharing.</p>
7	Individual equivalent powers for Ministers in England, Wales, Scotland and Northern Ireland.	<p>Part 7 amends the Smoking, Health and Social Care (Scotland) Act 2005 (the "2005 Act") to allow the Scottish Ministers to make regulations designating certain premises which are not "wholly or substantially enclosed" as no-smoking premises.</p> <p>It also provides Scottish Ministers with the powers to make smoke-free places vape- and heated tobacco-</p>

		free. It also amends requirements around no smoking signage within the 2005 Act.
8	UK Wide	Part 8 of the Bill contains general provisions, which are standard in a Bill and will ensure the legislation functions effectively.

Provisions which require the consent of the Scottish Parliament

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

Part 2: Sale and Distribution: Scotland

8. Part 2 of the Bill applies to Scotland and makes various amendments to the Tobacco and Primary Medical Services Act 2010 (the “2010 Act”) and The Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (the “2016 Act”).

9. The Scottish Government considers that all of the clauses in Part 2 of the Bill require the consent of the Scottish Parliament. They make provision applying to Scotland for a purpose which is within the legislative competence of the Scottish Parliament, namely public health.

10. Insofar as the clauses in this part provide the Scottish Ministers with new powers and amend existing powers, they also alter the executive competence of the Scottish Ministers.

Clause 50 - Age of sale

11. The 2010 Act currently makes it an offence to sell tobacco products or cigarette papers to anyone under the age of 18. Clause 50(2) amends the 2010 Act to make it an offence to sell tobacco products to anyone born on or after 1 January 2009.

12. The effect is that children born on or after this date will never be able to be legally sold tobacco products. The definition of “sell” ensures that registered retailers under the age of sale will still be able to purchase tobacco products for trade purposes. Amendments are also made to update references to the defence to the offence.

13. Clause 50(3) amends the age verification policy provision in the 2010 Act, to take into account the new age of sale for tobacco products. The age verification policy is different depending on whether it is a tobacco business, herbal smoking product business vaping or nicotine product business.

14. Clause 50(4) updates the proxy purchasing offence which applies to individuals purchasing tobacco products on behalf of someone who is under the age of sale. The effect of this is that it will be an offence for a person aged 18 or over to knowingly buy or attempt to buy a tobacco product, herbal smoking product or cigarette papers on behalf of a person who is born on or after 1 January 2009.

15. Clause 50(5) amends the provision relating to the display of warning statements to align with the new age of sale restrictions. The effect is that the notice which must be displayed under section 8 of the 2010 Act must contain the following statement: “It is illegal to sell tobacco products to anyone born on or after 1 January 2009”.

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

Clause 51 – Sale of unpackaged cigarettes

17. Clause 51 creates an offence in the 2010 Act in relation to selling cigarettes not in their original packaging. This clause makes it an offence for a person to sell cigarettes other than in their original packaging, defined as the retail packaging in which cigarettes were supplied to the person for the purpose of sale.

18. Anyone who is convicted of this offence could receive a fine of up to £1,000 (level 3 on the standard scale). This is already an offence in Scotland under section 3 of the Children and Young Persons (Protection from Tobacco) Act 1991, which introduced restrictions around the sale of cigarettes that were not in their original packaging. This Bill repeals that legislation and restates the offence in the 2010 Act, ensuring the Scottish tobacco legislative framework is clear and easily accessible.

Clause 52 – Repeal of offence of purchasing tobacco products by under 18s

19. Clause 52 repeals section 5 of the 2010 Act which provides that it is an offence for someone under the age of 18 to buy or attempt to buy a tobacco product or cigarette papers. The effect of this is that it will no longer be an offence for someone under the age of 18 to buy or attempt to buy tobacco products or cigarette papers.

20. Public Health stakeholders have consistently challenged this offence, noting that it has the potential to criminalise young consumers who are addicted to nicotine. The Scottish Government also know from enforcement agencies that this is difficult, practically, to enforce. Responses to the [smokefree generation and tackling youth vaping consultation](#) also highlighted this issue, directly requesting this provision to be removed.

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

Clause 53 - Repeal of power to confiscate tobacco products from persons under 18

22. Section 7 of the 2010 Act provides for police powers in relation to the confiscation of tobacco products where there are reasonable grounds for suspecting that a person in

a public place is under the age of 18 and is in possession of a tobacco product or cigarette papers.

23. Clause 53 repeals section 7 of the 2010 Act, so that the police will no longer have powers to confiscate. In line with the position on repealing the purchase offence, this will ensure that enforcement is focused on retailers and businesses, rather than individuals who are addicted to nicotine. This is also in line with the position in the rest of the UK.

Clause 54 - Extending the tobacco legislation to cover herbal smoking products

24. Clause 54 amends provisions in the 2010 Act that apply to tobacco products to include herbal smoking products. Herbal smoking products are not currently in scope of the age of sale restrictions in the 2010 Act.

25. The changes made by clause 54 ensures alignment between Scotland and the position that already exists in the rest of Great Britain. It also aligns with the position in Scotland before 2010, when changes were made to the definition of tobacco products which meant that herbal smoking products were brought out of scope, and so closes a potential regulatory loophole.

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

27. The clause inserts a definition of “herbal smoking product” into the 2010 Act.

Clause 55 - Warning Statements

28. Section 8 of the 2010 Act requires tobacco retailers in Scotland to display a notice containing a statement that it is illegal to sell tobacco products to anyone under the age of 18. This clause amends section 8(5) of the 2010 Act to provide Scottish Ministers with a power to make regulations in relation to the size, appearance or any other aspect of the notice. This represents a slight expansion of the power currently provided in section 8(5) of the 2010 Act and ensures powers are aligned across the UK.

Clauses 56 to 58 – Ban on manufacture, sale and possession with intent to supply of snus etc

29. Clauses 56 to 58 re-enact, for Scotland, the ban on a person producing or supplying tobacco for oral use (snus) contained in regulation 17 of the Tobacco and Related Products Regulations 2016 (“TRPR”). Regulation 17, which is assimilated law having been implemented in compliance with article 17 of Directive 2014/40/EU, is being repealed by the Bill.

30. Clause 56 inserts new section 9A to the 2010 Act to include provision to ban the manufacture of relevant oral tobacco products, such as snus. Clause 57 inserts new section 9B which makes provision to ban the sale of relevant oral tobacco products. Clause 58 inserts section 9C into the 2010 Act to ban the possession of relevant oral tobacco products with intent to supply.

31. An individual convicted of an offence on indictment under new sections 9A, 9B or 9C could receive an unlimited fine, a term of imprisonment not exceeding 2 years, or both.

32. The Scottish Government is satisfied that these clauses ensure continued alignment with the requirements under Directive 2014/40/EU.

Clause 59 - Extension of vaping restrictions to nicotine products

33. This clause amends several provisions in the 2010 Act, with the effect that restrictions currently applying to vaping products are extended to nicotine products.

34. Clause 59(3) amends section 4A, making it an offence to sell nicotine products to a person under the age of 18.

35. Clause 59(4) amends section 4B, requiring that retailers operate an age verification policy in respect of sales of nicotine products. In practice this will mean that a person trying to purchase a nicotine product who looks under the age of 25 will be asked for proof of age.

36. Clause 59(5) amends section 4C, making it an offence for a retailer to allow a person under the age of 18 to sell nicotine products.

37. Clause 59(6) amends section 6A, making it an offence for someone to purchase nicotine products on behalf of someone under the age of 18 (proxy purchase).

38. Clause 59(7) updates section 9, extending the prohibition on selling tobacco or vaping products from a vending machine to herbal smoking products, nicotine products and cigarette papers.

39. As a consequence, clause 59(8) repeals the power in the 2016 Act which Scottish Ministers had exercised to extend the vending machine prohibition to cover vending machines.

Clause 60 – Meaning of “nicotine product”

40. This clause inserts the following definition of “nicotine product” which aligns with the definition used across the four nations. The definition is intended to catch nicotine products which might emerge on the market in future:

“nicotine product” is—

- a. a device which is intended to enable nicotine to be delivered into the human body,
- b. an item which is intended to form part of a device within 15 paragraph (a),
- c. nicotine, or any substance containing nicotine, which is intended to be delivered into the human body, or
- d. an item containing anything within paragraph (c).

But the following are not nicotine products

- a. a tobacco product;
- b. a smoking related product;

- c. a herbal smoking product;
- d. any device which is intended to be used for the consumption of tobacco products or herbal smoking products;
- e. a vaping product;
- f. a medicinal product;
- g. a medical device.

Clause 61 – Displays of vaping and nicotine products

41. The Bill will introduce a new power into the 2010 Act, which will allow Scottish Ministers to impose prohibitions, requirements or limitations on the retail display of herbal smoking, vaping and nicotine products (including display of prices).

42. Clause 61(3) clarifies that a product includes anything that could represent a product that is exchanged for a product at the point of sale.

43. Clause 61(4) expressly permits the creation of offences in regulations made under the new power. Clause 61(5) sets the penalty for committing an offence which would be a fine, not exceeding level 4 on the standard scale (£2,500). This is the same as the maximum penalty if convicted of a tobacco product display offence under sections 1 to 3 of the 2010 Act.

44. Clause 61(6) notes that in line with existing powers in the 2010 Act to regulate the display of tobacco products, the power does not cover “displays” on a website.

45. Finally, clause 61(7) states that before making regulations Scottish Ministers must consult any person they consider it appropriate to consult.

Clause 62 - Free distribution and discount of products

46. The Bill contains a prohibition on the free distribution and substantial discounting of tobacco, vaping, nicotine and herbal smoking products and cigarette papers. This prohibition already exists for tobacco products in TAPA, but as that legislation is being repealed the offence is re-enacted for Scotland here.

47. Clause 62 amends the 2010 Act by inserting a new section 8A (free distribution and discount of products). The new section 8A makes it an offence to give away any product, or a coupon (anything (whether in physical or electronic form) which can be redeemed for a product or service or for cash or any other benefit) to a member of the public where the purpose or effect is to promote a relevant product.

48. There are currently no restrictions on businesses distributing (for free or at a discount) vaping products, herbal smoking products, nicotine products or cigarette papers in Scotland. Scottish Ministers have a power to regulate the free distribution or nominal pricing of nicotine-vapour products in 2016 Act which will be superseded by this new offence. As such, this clause will repeal section 18 of the 2016 Act.

49. Clause 62 covers a wider range of products than can be regulated under section 18 of the 2016 Act. If Scotland was to maintain its own powers, even with amendment, this may not achieve the exact same effect as the new offences. Alignment across the UK achieves consistency for businesses operating across the UK. Taking a different

approach in regulations could also create an unintended market in Scotland for products that would be restricted in the rest of the UK.

50. This clause also makes it an offence to sell by retail a product or coupon at a substantial discount. This is to avoid a loophole in the legislation where, for example, a person could offer a relevant product for sale at a substantial discount to circumvent the restriction on free distribution.

51. This clause provides that there is a defence available where a person is charged with giving away a vaping product or nicotine product or coupon for such if they can prove it was done in accordance with arrangements made by a public authority. If this defence is satisfied, then they are not guilty of the offence. An example of this could be where a government body funds a smoking cessation programme that utilises vapes as a cessation tool and provides them for free.

52. Anyone convicted of an offence under this provision may receive a fine or may be imprisoned for a term not exceeding 2 years, or both.

53. This clause grants the Scottish Ministers a power to create further defences to the offence of giving away a vaping or nicotine product, if needed in future. This will allow defences to be added if, in future, there are circumstances where the new offence inadvertently catches programmes which are trying to encourage individuals to stop smoking by encouraging them to switch to vaping or nicotine products.

Clause 63 and 64 – Aligning definitions

54. Clause 63 updates the definition of a “tobacco product” in section 35(1) of the 2010 Act. This updated definition aligns with the definition used throughout the Bill and, accordingly, throughout the UK.

55. Clause 64 introduces schedule 8, which aligns the definition of a “vaping product” in the 2010 Act with that used elsewhere in the Bill. The terminology previously used in Scottish legislation (“nicotine vapour product”) is to be replaced by the new term “vaping product”. The definition of vaping product will specify that vapour is to include aerosol.

56. These changes will help to future-proof definitions – while products which are currently available on the UK market are all considered to be captured by the existing definition, the additional wording “consumed in any way” is intended to cover emerging products which may have novel forms of usage.

Clause 65 - Extending the tobacco and vaping register

57. As noted above, clauses 54 and 59 make provision to extend existing age of sale offences applicable to vaping products to nicotine products, and existing tobacco offences to herbal smoking products. Clause 65 introduces schedule 9, which amends Chapter 2 of the 2010 Act. The effect of those amendments is to extend the retail register requirements, currently applicable to tobacco and vaping product retailers, to nicotine and herbal smoking product retailers.

58. This will provide for additional tools of enforcement, available in cases of repeated breach of the restrictions in Chapter 1 of the 2010 Act. Furthermore, it allows authorities to keep track of how many of each type of retailer exists and which premises enforcement authorities should be including within their programme of enforcement.

Clause 66 – Crown application of 2010 Act

59. Clause 66 amends section 36 of the 2010 Act by adding a reference to the Scottish Ministers.

Clause 67 – Power to extend 2010 Act to other products

60. Clause 67 provides the Scottish Ministers with powers to amend Part 1 of the 2010 Act to extend the scope of any provision which applies in relation to a tobacco product to any device that enables a tobacco product to be consumed other than by being smoked (such as a heated tobacco device).

61. It also provides the Scottish Ministers with a power to amend Part 1 of the 2010 Act and extend the scope of any provision which applies in relation to a tobacco product to some or all smoking related products, as listed in section 35(2) of the 2010 Act.

62. The clause also provides a provision that the Scottish Ministers must consult before exercising these powers. These powers ensure that devices which enable the consumption of harmful tobacco products can be subject to the same regulatory framework as the products themselves, should this be considered necessary in future.

Part 5 – Product and information requirements etc

63. The provisions in this part extend to the whole of the UK and include various regulation-making powers exercisable by the Secretary of State in relation to product requirements for tobacco, herbal smoking vaping, and nicotine products, as well as tobacco related devices and cigarette papers.

64. Clause 111 provides that the Secretary of State must obtain the consent of the Scottish Ministers before making regulations under Part 5, if they contain provision which would be within the legislative competence of the Scottish Parliament. Further details of the powers are provided below.

65. The Scottish Government considers that the majority of the provisions within Part 5 require the legislative consent of the Scottish Parliament as they make provision for a purpose which is within the legislative competence of the Scottish Parliament, and are capable of being used to make regulations with a devolved purpose, namely public health. The Scottish Government agrees with the UK Government that clauses 95, 100 and 109 relate to reserved matters and, accordingly, do not require consent.

66. While the regulation-making powers are exercisable only by the Secretary of State, the Scottish Government considers that clause 111 alters the executive competence of the Scottish Ministers, giving them the power to grant or refuse consent for regulations to be made under the powers in Part 5 if the regulations contain provision which would be within the legislative competence of the Scottish Parliament.

Clauses 90-91 – Powers to regulate packaging and features of products

67. Clause 90 enables the Secretary of State to make regulations relating to the retail packaging of tobacco, herbal smoking, vaping and nicotine products, tobacco related devices and cigarettes papers.

68. The regulations can relate to the production, importation or supply of products. The powers are broad, and provision made under them could cover a wide range of packaging elements - including markings and information on the packaging, its appearance, materials, texture, size and shape, the means by which it is opened, and the numbers and quantities of products contained in them. A refill container containing a vaping liquid could be treated as packaging for these purposes.

69. Clause 91 enables the Secretary of State to introduce regulations regarding the features of those same products themselves, rather than their packaging. It allows regulations to be made about the markings on those products, their appearance, size, shape and other distinguishing features.

70. Currently, section 94 of the Children and Families Act 2014 (the “2014 Act”) gives the Secretary of State the power to make regulations which make provision about the retail packaging and features of tobacco products.

71. The Standardised Packaging of Tobacco Products Regulations 2015 (“SPoT”), which introduced standardised packaging of tobacco products across the UK with the aim of discouraging people from smoking by reducing the appeal of those products, were made in reliance on that power.

72. While section 94 of the 2014 Act is to be repealed and replaced by these new powers, those regulations will remain in force.

73. Regulations made under these new powers will help to reduce the appeal of these products and therefore help to create an environment that protects consumers from the harms of tobacco and nicotine, and prevents children becoming addicted to those products.

74. Both clauses will apply in relation to the production, importation or supply of such products in the course of a business, ensuring that any individual or organisation involved in the supply chain could be required to adhere to the regulations.

75. Clause 112 provides the definition of “production” and makes it clear that regulations can cover production outside the UK.

76. Under the first implementation plan of the Tobacco and Vaping Framework, the Scottish Government committed to working across the four nations on further restrictions on vaping, depending on the outcome of the smoke free generation consultation. These powers will contribute significantly to the implementation of this framework and work towards the Scottish Government’s Programme for Government goal of taking action to reduce vaping amongst young people and non-smokers.

Clause 92 – Power to regulate the flavours and content of products

77. Clause 92 provides the Secretary of State with a power to make regulations about the substances that may be included in (as well as the amount of any given substance) and the flavour of tobacco products, tobacco related devices, herbal products, cigarette papers, vaping products or nicotine products.

78. Regulations made under this power could be used to restrict the flavour of any accessories intended to be used to give flavour to any of these products. For example, regulations may prohibit certain ingredients (such as vitamins, colourings or prohibited additives) being used in these products, including additives which impart a particular flavour (taste and smell).

79. TRPR place a ban on the production or supply of flavoured cigarettes or hand-rolling tobacco in the UK. They also ban certain vitamins, colourings or additives in tobacco products. These restrictions derive from EU legislation, and were implemented by TRPR when the UK was a member of the EU. There are currently no restrictions on the flavouring of vaping or nicotine products in the UK.

80. As with clauses 90 and 91, the production, importation, and supply of products, any individual or organisation involved in the supply chain would be required to ensure products they deal with adhere to the regulations. These powers form part of the commitment (outlined in the Tobacco and Vaping Framework) to work across the four nations to introduce further restrictions on vaping.

Clause 93 – Substances released into human body and emissions

81. Clause 93 provides the Secretary of State with a power to make regulations about the nature and amount of substances and emissions that may be released by tobacco products, tobacco related devices, herbal smoking products, cigarette papers, vaping or nicotine products. The power includes making provisions about how the nature and amount of substances or emissions are determined.

82. Provisions in TRPR currently set maximum emission levels for cigarettes (which detail the measurement and verification of these emission levels), and require emissions regulating from the use of an e-cigarette to be notified to the Medicines and Healthcare Products Regulatory Agency (“MHRA”). Those provisions were derived from EU legislation and implemented relying on section 2(2) of the European Communities Act 1972, now repealed.

83. The Scottish Government considers it important that there is a power to make regulations of this nature, and that this be done on a four nations basis. These measurements help to determine the amount and type of chemicals that a person smoking or vaping takes into their body.

84. This is important because, although cigarette smokers are exposed to substantially higher levels of toxicants, both cigarettes and vapes produce a number of dangerous chemicals, such as acetaldehyde. More specifically, evidence has shown that the metal components that heat vape liquid may release harmful elemental metals, including nickel, chromium and lead, also found in tobacco smoke, which can then be transported into the aerosol and deposited into the user’s body.

Clause 94 – Non-compliant images

85. Clause 94 provides the Secretary of State with regulation making powers to prohibit a person from publishing a “non-compliant” image of tobacco products, tobacco related devices, herbal smoking products, cigarette papers, vaping products, nicotine products or of their packaging.

86. This means that if, for example, regulations were made to restrict the packaging of a vape, then it would be an offence to publish an image of a vape in packaging that did not adhere to those packaging restrictions.

87. Clause 94 extends to all products and to images from which it is possible to tell that a product (or its packaging) is in breach of regulations.

88. Under TRPR it is an offence for a person to publish or cause to be published an image of the unit pack or container pack of a tobacco product, unless that image complies with tobacco packaging and labelling requirements.

89. There is no corresponding restriction in relation to other products, and no existing power to make such provision.

90. As noted above, powers are being taken (in clauses 90 and 91) to make provision about the packaging and features of a wider range of products. This power will enable provision to be made which ensures that images cannot be published unless products in those images comply with relevant requirements regarding their packaging or features.

Clause 96 – Information

91. Clause 96 provides a power which will allow the Secretary of State to make regulations to place a requirement on producers or importers of tobacco products, tobacco related devices, herbal smoking products, cigarette papers, vaping products and nicotine products, to provide information about a product or its producer.

92. The type of information required might be the same as that required as part of registration or could include sales data or market research about a product. Under TRPR there are existing requirements regarding information producers of tobacco products and e-cigarettes must submit in relation to products. This power covers a wider range of products and will allow additional information requirements to be put in place with regards tobacco products, where that is considered necessary.

Clause 97 – Studies

93. Clause 97 provides the Secretary of State with a power to require a producer of a tobacco product, tobacco related device, herbal smoking product, cigarette papers, vaping product or nicotine product to carry out a study and submit the results in relation to the product or an ingredient in the product.

94. The regulations may make provisions about how a study is to be carried out, questions to address and content and structure of a report.

95. Under TRPR there is already a requirement for tobacco producers to carry out studies that assess the effects of ingredients on a user's health, considering the addictiveness and toxicity of certain ingredients.

96. This new power allows flexibility for different studies in respect of different products to be required to be carried out to assess the potential harms of products (whether new products to the market, or products in respect of which concerns have emerged).

97. The power ensures flexibility which is necessary as the studies requires and the products covered by the studies are likely to change over time as the market and different product types are developed.

Clause 98 – Responsible person

98. Clause 98 provides the Secretary of State with a power to require a producer of a tobacco product, tobacco related device, herbal smoking product, cigarette papers, vaping product or nicotine product to nominate an individual to be responsible for information that has to be provided in accordance with regulations made under clauses 95 (Registration), 96 (Information) and 97 (Studies).

99. Currently there is provision under TRPR requiring that a producer not based in the UK must provide the name and address of a responsible person in the UK when notifying their e-cigarette or refill container.

100. The aim of having a dedicated person responsible is to ensure information is provided to strengthen compliance and enforcement of product standards and ultimately help improve consumer safety and trust.

Clause 99 – Testing

101. Clause 99 provides the Secretary of State with a power to introduce regulations that require a person to test products to determine whether a product complies with requirements imposed in regulations made under this part of the Bill.

102. TRPR imposes requirements for measurements of tar, nicotine and carbon monoxide emissions from cigarettes and for verification of those measurement by an approved laboratory that is independent from the tobacco industry.

103. Regulations made under this power may include provision about the requirements for testing, such as how and when the tests should be carried out and who may carry out the tests. This may include detail on how many tests are required and any associated fees that should be paid in respect of the tests.

104. This enables new provision to be made to ensure products which are registered for sale comply with requirements, such as amount of nicotine which may be contained in a vape. Currently Trading Standards test products which appear to be non-compliant, and find vaping products which do not comply with existing requirements under TRPR.

105. Regulations made under this power could establish more rigorous testing regimes, with the type and frequency of tests set as appropriate depending on the potential risks associated with different products.

Clause 101 – Matters dealt with by TRPR

106. Clause 101 provides the Secretary of State with powers to make provision in regulations that is similar to any provision in TRPR, insofar as not enabled to do so by other provisions in the Bill.

107. This will ensure that any gaps are covered which may exist in the powers taken under this part relative to provision made in TRPR, which was made under the (now-repealed) power in section 2(2) of the European Communities Act 1972.

108. The power also enables provisions of TRPR to be extended in scope so they apply to tobacco products, tobacco related devices, herbal smoking products, cigarette papers, vaping products or nicotine products, as required.

109. For example, it would be possible to use this power to extend the current notification scheme so that it captures non-nicotine vapes and nicotine products.

Clause 102 – Treatment of 2016 Regulations

110. Clause 102 is a technical provision which makes clear that any power to make regulations under Part 5 of the Bill that corresponds with the provisions under TRPR should be interpreted as being made under the Bill in line with section 14 of the Interpretation Act 1978 (implied power to amend).

Clauses 103 to 113 – Supplementary and miscellaneous provision

111. Clause 103 makes express provision to ensure that powers in Part 5 include the power to create offences. It also sets out the maximum penalties that could be imposed for failure to comply with regulations which, for Scotland, would be a term of imprisonment not exceeding 2 years, an unlimited fine, or both if convicted on indictment. This is the same as the existing penalty under TRPR.

112. Clause 104 provides for provisions about enforcement to be included in regulations made under Part 5. The regulations may give the function of enforcement of the regulations to relevant enforcement authorities. The relevant enforcement authorities for Scotland are the local weights and measures authority. This aligns with similar enforcement provisions in other legislation.

113. Clause 105 provides for legislative sub-delegation to allow the Secretary of State or persons appointed under the regulations to make provision on matters dealt with by the regulations via a determination or other informal document.

114. Clause 106 provides that any regulations made under Part 5 bind the Crown.

115. Clause 107 provides that consequential provision made by regulations under Part 5 may amend, repeal or revoke any legislation (whenever passed or made).

116. Clause 108 repeals section 94 of the 2014 Act.

117. Clause 110 provides that the Secretary of State must consult with appropriate persons prior to making regulations under Part 5.

118. Clause 111 provides that the Secretary of State must obtain the consent of the Scottish Ministers before making regulations under Part 5 if they contain provision which would be within the legislative competence of the Scottish Parliament.

119. Clauses 112 and 113 contain definitions that are relevant to Part 5 of the Bill.

Part 6 (Advertising and sponsorship)

120. The Bill introduces new provisions on advertising, sponsorship and brand-sharing for tobacco, vaping, nicotine and herbal smoking products, and cigarette papers on the face of the Bill. These are intended to replicate and replace the existing regime for tobacco under TAPA and expand provisions to nicotine products, vaping products, herbal smoking products and cigarette papers.

121. The provisions in Part 6 extend to the whole of the UK.

122. Clause 123 empowers the Secretary of State to make regulations restricting brandsharing of those products – if that power is exercised to make provision which would be within the legislative competence of the Scottish Parliament, the Secretary of State must obtain the consent of the Scottish Ministers. Further details on that provision are contained below.

123. The Scottish Government considers that the majority of provisions within Part 6 require the legislative consent of the Scottish Parliament, as they make provision for a purpose which is within the legislative competence of the Scottish Parliament and, insofar as clause 123 is concerned, are capable of making regulations with a devolved purpose, namely public health.

124. The Scottish Government agrees with the UK Government that clauses 119, 126, 127 and 131 relate to reserved matters and, accordingly, do not require consent.

125. Clause 121 contains a re-framed power for the Scottish Ministers to set requirements with which specialist tobacconists must comply in order to avoid committing an advertising offence, thus altering the executive competence of the Scottish Ministers.

126. Furthermore, while the regulation-making power at clauses 123 and 133 are exercisable only by the Secretary of State, the Scottish Government considers that clause 125(5)(a) alters the executive competence of the Scottish Ministers, giving them the power to grant or refuse consent for regulations to be made under that provision if the regulations contain provision which would be within the legislative competence of the Scottish Parliament.

127. It is acknowledged within the explanatory notes to the Bill that the regulation of brandsharing is devolved and, as such, regulations making such provision with regards Scotland would require consent.

Clauses 114-118, 120-122 – Banning the advertising and sponsorship of vapes and other nicotine products

128. TAPA introduced measures to limit the marketing and promotion of tobacco products and to reduce exposure to tobacco advertising and promotional activities. TAPA also prohibited the advertising of tobacco products to the public, with an exemption for specialist tobacconists, and prohibited sponsorship agreements which promote tobacco products.

129. This Bill repeals and replaces TAPA. The clauses in Part 6 of the Bill make similar provision relating to advertising, sponsorship and brandsharing as TAPA to include herbal smoking products, cigarette papers, vaping, and nicotine products, for the whole of the UK.

130. Herbal smoking products and cigarette papers have been included within Part 6 due to the harmful nature of smoking itself. Whilst herbal smoking products do not contain nicotine or tobacco, they do contain cancer causing chemicals, tar and carbon monoxide, similar to a tobacco cigarette. Cigarette papers have also been included as they are burnt with the tobacco. This is consistent with other parts of the Bill.

131. The existing restrictions on advertising of nicotine vapes as set out in TRPR will be replaced by the provisions in Part 6 of this Bill. The settings where advertising is banned for nicotine vapes under these regulations will be captured by this part and extended to include further settings such as public transport, billboards, and posters, and capture non-nicotine vapes and nicotine products that are currently not captured. Provision made in the Bill will maintain the existing ban on tobacco advertising.

132. Currently TAPA bans the free distribution of tobacco products. Equivalent provision for Scotland is now inserted into the 2010 Act by clause 62 (free distribution and discount of products).

133. Introducing these measures within a UK-wide Bill, and covering more products, will ensure, as far as possible, that a consistent approach is taken UK-wide, supporting implementation for business, consumers and enforcement authorities.

134. The advertising and sponsorship prohibitions will be included on the face of the Bill, meaning that there will be consistency across the four nations that may not have happened if they each had separate regulation-making powers. The Scottish Government's powers to regulate advertising and sponsorship of vaping products (in the 2016 Act) will be repealed as they will become redundant through the provision made by the Bill.

135. Banning the advertising and sponsorship of vapes and other nicotine products was raised during the passage of the previous Bill and was part of the UK Government's manifesto *"Labour will ban vapes from being branded and advertised to appeal to children"*.

136. It also aligns with the Scottish Government's approach within the Tobacco and Vaping Framework where it has a commitment to progress restrictions based on the outcomes of the 2022 consultation on further tightening the rules on advertising and promotion of vapes. The consultation highlighted that children and young people should be protected from undue advertising of vapes.

Clause 114 - Publishing advertisements

137. Clause 114 makes it an offence to publish a tobacco product, herbal smoking product, cigarette paper, vaping product, or nicotine product advertisement in the UK.

138. This means including advertisements in media, for instance, publishing an advert for a vaping product in a newspaper.

Clause 115 - Designing advertisements

139. Clause 115 makes it an offence to design and make a tobacco product, herbal smoking product, cigarette paper, vaping product, or nicotine product advertisement which will be published in the UK.

140. For instance, this could include a person at a design agency who is designing a nicotine pouch advertisement.

Clause 116 - Printing advertisements

141. Clause 116 makes it an offence to print a tobacco product, herbal smoking product, cigarette paper, vaping product, or nicotine product advertisement knowing that this will be published in the UK.

Clause 117 - Distributing advertisements

142. Clause 117 makes it an offence to distribute a tobacco product, herbal smoking product, cigarette paper, vaping product, or nicotine product advertisement in the UK.

143. This could include a company that hands out leaflets which contain vape advertisements.

Clause 118 - Causing publication, designing, printing or distribution

144. Clause 118 makes it an offence to cause the publication, designing, printing or distribution of a tobacco product, herbal smoking product, cigarette paper, vaping product, or nicotine product advertisement knowing this will be published or distributed in the UK.

145. For example, this would make it an offence for someone to commission an advertising agency to create a nicotine product advert on their behalf.

Clause 120 - Advertising: defences

146. Clause 120 sets out defences for a person charged with an offence under clauses 114 to 119.

147. This includes if the advertisement is part of a communication within the tobacco product, herbal smoking product, cigarette paper, vaping product or nicotine trade between those involved in the trade at a senior level or with decision making responsibility, or if an individual specifically requests information about a product, or in a publication which is printed outside of the UK and whose market is not the UK (except for an in-flight magazine).

Clause 121 - Specialist tobacconists

148. Clause 121 provides that specialist tobacconists may continue to advertise specialist products. This clause is restating the existing law. A person does not commit an offence under clauses relating to advertisement, publication, printing, or distribution, if an advertisement is in a specialist tobacconist, is not visible from outside the specialist tobacconist and is not to advertise cigarettes or hand-rolling tobacco.

149. Clause 121 includes a power for the Scottish Ministers to set requirements for advertisements displayed in a specialist tobacconist to meet. A similar power exists in section 6 of TAPA, which this provision will replace.

150. This power is important as it means the Scottish Government will be able to control the content of advertisements within these shops to ensure that messaging etc is not inconsistent with the policy aims set out in the Tobacco and Vaping Framework.

Clause 122 - Exclusion for advertisements that are displays

151. Clause 122 provides that no offence is committed under this part if a product or other material which is displayed is subject to the law relating to displays.

152. The purpose of this provision is to avoid a display which is permitted being prohibited as an advertisement. For example, displaying a vape would not be considered an advertisement if vapes were subject to restrictions set out in legislation on their display.

153. This clause replicates the position which already exists for Scotland in the context of tobacco advertising and displays, set out in the Sale of Tobacco (Display of Tobacco Products and Prices etc.) (Scotland) Regulations 2013, but places this on the face of the Bill. The powers relied upon to make the provision in those regulations (sections 2 and 3(5) of the 2010 Act) will be repealed, as they are no longer necessary.

Clause 123 - Regulating the brand-sharing of vapes, nicotine products, herbal smoking products and cigarettes papers

154. Clause 123 contains a power for the Secretary of State to make regulations to prohibit or restrict brand-sharing of tobacco products, vaping products, nicotine products, herbal smoking products and cigarettes papers.

155. Brand-sharing is a form of indirect advertising which promotes the use of a service or product by putting its branding on other products or services, or vice versa.

156. Brand-sharing was included in the advertising ban on tobacco to make sure tobacco companies would not be able to continue to promote their brand or products on

non-tobacco products such as children's toys or e-cigarettes which could be used as an alternative to advertising.

157. The Scottish Government wishes to mirror this to ensure brand-sharing does not become an alternative means to promote uptake of vaping products. Restricting brand-sharing would, in this instance, prohibit vaping products from either carrying another product's brand on a device or packaging or have the branding of a vaping product on any other products.

158. The Secretary of State already has a similar power in TAPA for tobacco products. TAPA will be repealed by the Bill but the regulations made under it - the Tobacco Advertising and Promotion (Brandsharing) Regulations 2004 - which prohibit brand-sharing where the purpose or effect is to promote a tobacco product, will remain in force.

159. The Scottish Ministers' consent is required before exercising this power if provision made would be within the competence of the Scottish Parliament. The UK Government acknowledges that the regulation of brandsharing is within the devolved competence of the Scottish Parliament.

160. Since regulations will be taken forward on a UK wide basis (with consent), it is considered unnecessary for Scottish Ministers to have a separate power to regulate the brandsharing of vapes. Section 18 of the 2016 Act is, accordingly, to be repealed.

161. The Scottish Government considers that the advantages of a four nations approach include avoiding Internal Market Act difficulties arising, the provisions cover a wider range of products and this approach will introduce a consistent cross-UK approach to regulation which will reduce the regulatory burden on business complying. Such an approach has been successful already in respect of tobacco brandsharing.

162. The Scottish Government consulted on brandsharing as part of the 2022 consultation on tightening the rules and promotion of vapes. It has been a key policy area that public health stakeholders wish to see progress on since the 2016 Act was introduced.

Clauses 124 and 125 – Sponsorship

163. Clause 124 makes it an offence for an individual to be involved with a sponsorship agreement where the purpose is to promote a tobacco product in the course of business. This maintains the current prohibition of tobacco sponsorship in the TAPA.

164. Anyone convicted of an offence under this provision may be subject to imprisonment (for a term not exceeding 2 years) or a fine, or both.

165. Clause 125 makes it an offence to be party to an agreement and contribute in the course of a business such that this has the purpose or effect of promoting a herbal smoking product, a vaping or nicotine product and cigarette papers. The purpose of this clause is to restrict sponsorship deals that promote herbal smoking products, cigarette papers, vaping products and nicotine products to children and non-smokers.

166. For example, by prohibiting sports teams from being sponsored by a vaping company, reducing the use of these products, and particularly tackling underage use, and thus improving public health.

167. Clause 125 comes into force two months after the day on which the Bill is passed.

168. The new offences will apply to agreements entered into after that date, when contributions are made under the agreement and the purpose or effect of anything done on or after the “specified date” as a result of the agreement is to promote herbal smoking products, cigarette papers, vaping or nicotine products. The “specified date” will be specified in regulations made by the Secretary of State.

169. The Scottish Government’s policy position is that vape products should not be associated with clubs, events, activities, individuals or groups. This is an indirect form of advertising that has broad reach, especially to children and young people.

170. Advertising, brandsharing, free distribution and nominal pricing, and sponsorship are a coherent package of restrictions that combined limit the awareness of non-smokers and young people of vape products, reducing the appeal of such devices. This is also consistent with the approach taken previously on tobacco.

171. As with advertising, the sponsorship prohibitions are included on the face of the Bill. There is a consistent approach across the four nations that may not have happened if different nations had separate regulation-making powers. The Scottish Government’s powers to regulate sponsorship of vaping products (in the 2016 Act) will be repealed as they will become redundant through the provision made by the Bill.

Clauses 128 to 135 – Enforcement and miscellaneous

172. Clause 128 makes a “relevant person” (a director or manager of a company or someone with partner status in a partnership) liable for an offence under Part 6 of the Bill committed by a body, where the offence has been committed with their consent, connivance, or neglect.

173. In such cases the relevant person may be liable in addition to the body (such as the company or partnership) they are working for. This applies to offences in Part 6 as well as regulations made under that Part.

174. Clause 129 places a duty on relevant enforcement authorities to enforce the provisions in Part 6 of the Bill and regulations made under powers in Part 6. A relevant enforcement authority is a local weights and measures authority in Scotland (e.g. Local Authority Trading Standards) which is consistent with the approach under TAPA. A relevant enforcement authority is a local weights and measures authority in Scotland (e.g. Local Authority Trading Standards).

175. Clause 130 provides a power for the relevant national authority (for Scotland, the Scottish Ministers) to carry out the enforcement of a particular case or a particular type of case instead of the relevant local enforcement authority.

176. The effect of this is that the Scottish Ministers may choose to undertake the investigation and enforcement, rather than the local authority department of Trading Standards. This could arise if a local enforcement authority is unable or unwilling to undertake enforcement of a certain case.

177. Clause 132 amends the definition of “tobacco products” in TAPA, section 1 (Interpretation), to align with the definition within this Bill. While TAPA is ultimately to be repealed this will be done by regulations in future and, until that point TAPA will continue to operate. This definition change will come into force 2 months after Royal Assent, and ensure a consistent definition of “tobacco product” across all legislation from that point in time.

178. Clause 133 provides the Secretary of State with powers to amend Part 6 and the Communications Act 2003 by extending the scope to any device that enables a tobacco product to be consumed (such as a heated tobacco device), or an item which is intended to form part of such a device. Before making regulations under this clause the Secretary of State must obtain consent from Scottish Ministers if provisions of the regulations fall within the legislative competence of the Scottish Parliament.

179. This power ensures that devices that are used to consume tobacco can be subjected to the same advertisement and promotion prohibitions as tobacco products and ensures that the legislation is future-proof and flexible.

180. Clause 134 provides that Part 6 of the Bill and any regulations made under Part 6 bind the Crown.

181. Clause 135 provides the definitions for Part 6.

Part 7 (Smoke-free, vape-free and other free-from places) – clauses 142-146

182. Part 7 of the Bill applies to Scotland and makes various amendments to (the 2005 Act and the Prohibition of Smoking in Certain Premises (Scotland) Regulations (the “2006 Regulations”).

183. The Scottish Government considers that all of the clauses in Part 7 of the Bill require the consent of the Scottish Parliament. They make provision applying to Scotland for a purpose which is within the legislative competence of the Scottish Parliament, namely public health.

184. Insofar as the clauses in this part provide the Scottish Ministers with new powers and amend existing powers, they also alter the executive competence of the Scottish Ministers.

185. The Bill includes provisions to amend the 2005 Act to broaden the type of places that can be designated smoke-free spaces, and to provide powers to designate some smoke-free areas as vape-free and heated tobacco-free spaces. Only smoke-free spaces can be so designated. The Bill also includes provision about signage for these spaces, mirroring the provisions for smoke-free signage.

186. The ability to expand smoke-free spaces (and introduce vape- and heated tobacco-free places) is strongly supported by the Chief and Deputy Chief Medical Officer for Scotland, as well as CMOs across the UK. It is also included as a key component for consideration within the Tobacco and Vaping Framework.

187. The changes detailed below could enable the Scottish Government to designate outdoor spaces as well as communal residential spaces (such as stairwells) as smoke-free in line with its commitment to explore this within the Tobacco and Vaping Framework, and simplifies our powers and makes it more user-friendly. In addition to the changes to section 4 (power to designate smoke-free spaces), the Bill will make various changes to section 3 (signage) and will repeal sections 4A to 4D of the 2005 Act (smoke-free hospital grounds).

188. Whilst vaping is less harmful than smoking there is a risk to people's health from vape aerosol, for example aerosols have been linked to asthma attacks. The long-term harms of vaping or using heated tobacco products is still not well-understood and it is important that children and young people as well as non-smokers are not unduly exposed to these devices.

189. To protect public health, and particularly that of children, the Scottish Ministers may want to extend existing smoke-free places to also become vape-free and heated tobacco-free.

190. In addition, if smoke-free spaces become vape-free and heated tobacco-free spaces, and the signage requirements were the same for all three bans, the overall signage requirements could be burdensome for business and difficult for the public to quickly understand.

191. To simplify the legislation and make it more user-friendly, the Bill removes the prescriptive requirements of signs that is currently in section 3 of the 2005 Act and provides the Scottish Minister with broad powers so that regulations will contain all details about what signs should look like and where they should be located.

192. The powers will enable the Scottish Government to maintain the status quo, by amending its existing signage regulations to include requirements that are currently on the face of the 2005 Act. It will also give Scottish Ministers the flexibility to make provision in future about signage where premises are also vape- and/or heated tobacco-free, or to roll back on requirements for indoor spaces to reduce the burden on business, but create bespoke requirements for different types of premises, notably outdoor premises.

193. This will ensure that signage requirements will work for new spaces that are designated. It could also help to alleviate, or avoid unnecessary burden on businesses, whether by reducing signage requirements for some premises or by aligning some requirements with the rest of the UK, which could benefit cross-border businesses.

194. Importantly the drafting also allows for Scottish Ministers to create exceptions in relation to signage. This may be required in future if the Scottish Government designates certain communal residential spaces, such as stairwells.

Clause 142 – No-smoking premises in Scotland

195. This clause makes amendments to existing smoke-free places legislation to simplify the legislation and enable expansion of restrictions to cover certain outdoor public places.

196. The Bill amends section 4 of the 2005 Act to allow the Scottish Ministers to make regulations designating certain premises which are not “wholly or substantially enclosed” as no-smoking premises, provided they are open to the public or used as a workplace, and only while they are open to the public or used as a workplace.

197. “Open to the public” and “workplace” are defined in the provision. The clause permits exceptions to be included in regulations, and enables the Scottish Ministers to identify in regulations certain groups of people who will be able to designate certain areas to be not smoke-free.

198. Changes are also made to section 4 to simplify the existing power to designate spaces that are wholly or substantially enclosed and ensure that their use in future works alongside the new power to designate outdoor spaces. The amendments do not have the effect of revoking the the 2006 Regulations and they remain in place.

199. The Bill makes consequential amendments to the 2006 Regulations to ensure that the effect of the Scottish Government’s existing smoking ban does not change despite the change to the enabling power for the 2006 Regulations.

200. To simplify matters and help with public understanding of restrictions as well as enforcement, the Bill will repeal sections 4A to 4D of the 2005 Act, which are the Scottish Government’s existing provisions relating to smoking outside of hospital buildings. The repeal will take effect on a date decided by the Scottish Ministers, with the intention to replicate (and perhaps extend) the existing prohibition in regulations coming into force on the same date. This will ensure that there is potential for flexibility in future about how smoking in hospital grounds is restricted and will ensure that they can be treated consistently with other outdoor smoke-free spaces where appropriate.

201. Any expansion on the ban, to cover more of hospital grounds, would be subject to consultation. Regulations to designate premises as smoke-free will be subject to the affirmative procedure.

Clause 143 – No-smoking signs in Scotland

202. Clause 143 amends the 2005 Act requirements around no-smoking signs. The clause sets out that a person who has management or control of no-smoking premises must ensure the relevant no-smoking signs are displayed in or near a premises.

203. The clause provides powers for the Scottish Ministers to make regulations which specify the display and design requirements of no-smoking signs, how and where the signs are to be displayed and to create exceptions.

204. This will enable flexibility about what signage requirements should apply to different types of premises and also enable alignment with the rest of the UK where

appropriate, which is beneficial for businesses and for clarity around signage requirements.

Clause 144 – Vape-free premises in Scotland

205. The Bill adds a new Chapter 2 to Part 1 of the the 2005 Act to provide a power for the Scottish Ministers to prescribe premises as being vape-free, but only as far as they are already smoke-free.

206. It will be an offence for a person to use a vape in vape-free premises and for the person having management or control of vape-free premises to permit someone to use a vape there. These offences mirror the offences for smoke-free premises.

207. A new section in the 2005 Act will enable the Scottish Ministers to specify requirements relating to vape-free signage in regulations. It is an offence for the person having management or control of vape-free premises to fail to display signs in or near the premises in accordance with any requirements in those regulations. This mirrors the signage offence for smoke-free premises.

Clause 145 – Heated-tobacco free premises in Scotland

208. The Bill adds a new Chapter 3 to Part 1 of the 2005 Act to provide a power for the Scottish Ministers to prescribe premises as being heated tobacco-free, but only as far as they are already smoke-free.

209. It will be an offence for a person to use a heated tobacco device in heated tobacco-free premises and for the person having management or control of such premises to permit someone to use a heated tobacco device there. These offences mirror the offences for smoke-free premises.

210. A new section in the 2005 Act will enable the Scottish Ministers to specify requirements relating to heated tobacco-free signage in regulations. It is an offence for the person having management or control of heated tobacco-free premises to fail to display signs in or near the premises in accordance with any requirements in those regulations. This mirrors the signage offence for smoke-free premises.

Clause 146 - Amendments consequential on sections 142-145

211. This clause introduces schedule 18, which contains amendments that are consequential on sections 142 to 145.

Part 8 (General) - Clauses 160-162 and 165-171

212. The provisions in Part 8 of the Bill are general provisions, expected to be included in primary legislation. This Part contains provision about the exercise of regulation-making powers, who can make consequential and transitional provision, commencement and extent.

213. Most but not all of the clauses in Part 8 apply and extend to Scotland. Those that do extend to Scotland require consent and are summarised below.

Clause 160 – Further consequential amendments

214. This clause introduces schedule 21, which contains various consequential amendments to legislation from across the UK, including to the 2010 Act. These are changes to legislation considered necessary in consequence of the Bill, including the clauses already described above.

Clauses 161, 162 and 170 – Consequential and transitional provisions

215. The Scottish Ministers will have the ability to make consequential, transitional and saving provision in connection with the coming into force of Part 2 and sections 140 to 144 and schedule 17 (smoke-free, vape-free and other free-from places: Scotland).

216. The Secretary of State has the power to make provision that is consequential on any other aspect of the Act that extends to Scotland. Since, as explained throughout this memorandum, a number of provisions of the Act are within the legislative competence of the Scottish Parliament, some consequential provisions could be within devolved competence.

217. The Secretary of State can also make transitional or saving provision in connection with the coming into force of any provision of the Bill.

Clauses 165 and 166 – Regulations general and procedure

218. These clauses set out the procedure for and scope of regulation-making powers that are in the Bill (but not those that are being amended into pre-existing legislation).

Clause 167 – Extent

219. This clause sets out which provisions extend to which parts of the UK.

Clauses 168 and 169 – Commencement

220. Some provisions containing regulation-making powers and boilerplate provisions come into force immediately. Other provisions come into force after 2 months or 6 months or on 1 January 2027 and the remaining provisions can be brought into force by regulations. A summary of the commencement of provisions extending to Scotland is in the table below.

Provisions coming into force immediately	Regulation-making powers in Part 2 (sections 55, 61, 62, and 67). Part 5. Part 8, except section 160 and schedule 21.
Provisions coming into force after 2 months	Alignment of the definition of “tobacco product”. Prohibition on sponsorship (vaping and nicotine and other products). Crown application and interpretation of Part 6.
Provisions coming into force and 6 months	Part 2, except regulation-making powers, provisions relating to the age of sale of tobacco products, and the extension of retailer register in Scotland.

Provisions coming into force on 1 January 2027	Age of sale of tobacco provisions.
Provisions commencing by Regulations by the Scottish Ministers	Extension of retailer register in Scotland. Provisions relating to smoke-free, vape-free and heated-tobacco free spaces in Scotland.
Provisions commencing by Regulations by the Secretary of State	The remainder of Part 6. Section 160 and schedule 21 (consequential amendments)

Clause 171 – Short title

221. The short title is the Tobacco and Vapes Act 2024.

Reasons for seeking a Motion on Legislative Consent

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

223. The UK Government has identified (within Annex A of the explanatory notes) that the consent of the Scottish Parliament is required in relation to the majority of provisions which extend to Scotland.

224. The exceptions are Part 4, clauses 95, 100 and 109 in Part 5, clauses 119, 126 and 127 in Part 6 and clause 158 in Part 7 – which are considered to relate to a number of different reserved matters as listed in schedule 5 of the Scotland Act 1998.

225. The Scottish Government agrees with the UK Government’s position that all other provisions which extend to Scotland require the consent of the Scottish Parliament, for the reasons set out in the relevant sections above.

Part 2 – Sale and distribution: Scotland

226. As outlined above, the provisions in Part 2 of the Bill (clauses 50 to 67) amend Acts of the Scottish Parliament to make provision relating to the sale and distribution of tobacco, herbal smoking, vaping and nicotine products and cigarette papers. Changes are made to offences and restrictions on the face of the 2010 Act, as well as to powers which exist in the 2010 Act and repealing powers in the 2016 Act on vending machines and free distribution. In addition, new-regulation making powers for Scottish Ministers and new provisions are inserted into the 2010 Act.

227. Whilst equivalent provision could be made in Scottish Parliament legislation, given the close working relationship between the relevant UK Government teams and their devolved counterparts, and the shared policy goals in this space, it was considered desirable to accept the offer to work with the UK Government on their Bill rather than seek to bring forward a Scottish Bill in the same timescales.

228. This approach ensures that the drafting approach and the timescales for implementation are aligned, ensuring a coherent and consistent public health approach (which will assist in communicating changes) and reduces the likelihood of regulatory divergence which can impact on businesses. It will also ensure that there is one process with which relevant stakeholders can engage as the Bill progresses through the UK Parliament.

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

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

Part 5 – Product and information requirements etc

231. The provisions in Part 5 of the Bill (clauses 90 to 113) provide the Secretary of State with powers to make regulations in relation to product requirements and information/notification requirements for tobacco, herbal smoking, vaping and nicotine products, tobacco related devices and cigarette papers.

232. The key purpose of the powers in clauses 90 to 92 is to ensure that there are sufficient powers to introduce restrictions which will reduce the availability and appeal of these products.

233. The primary purpose of the remaining powers in Part 5 is to improve product safety standards, monitoring and consumer confidence in products which are on the market.

234. The Scottish Government is of the view that the majority of powers within Part 5 are capable of being exercised to make provision which is within the legislative competence of the Scottish Parliament, namely public health.

235. Importantly, where such provision is included within regulations, the consent of the Scottish Ministers is required before the regulations are made to support policy alignment across the UK.

Clauses 90 to 92

236. The Scottish Parliament gave its consent for the powers for the Secretary of State to make regulations governing the retail packaging, content and appearance of tobacco products, which is in section 94 of the Children and Families Act 2014. That power, which is being repealed and replaced by the Bill, requires that the consent of the Scottish Ministers is obtained before regulations are made which contain devolved provision.

237. The legislative consent memorandum lodged at the time noted that separate standardised packaging regimes could present significant difficulties – for businesses,

enforcement authorities and consumers. The powers have most notably been exercised to make the SPoT Regulations 2015.

238. The effect of those regulations will not be changed by the Bill and will remain in place. The consent of Scottish Ministers was obtained in advance of the making of those regulations.

239. Clauses 90 to 92 allow regulations to be brought forward to restrict the retail packaging, content and appearance of a wider range of products in addition to restrictions in place for tobacco products.

240. The Scottish Government's Tobacco and Vaping Framework noted that a four nations approach is desirable for regulating vapes and it has committed to continuing to work with the UK Government and other devolved nations to develop legislation in this area.

241. As with equivalent regulation of tobacco, separate standardised packaging regimes or restrictions on appearance or flavours would likely present a number of difficulties for businesses, enforcement authorities and consumers and would be against the Scottish Government's New Deal for Business approach.

242. Regulations cannot be made which contain devolved provision without the consent of the Scottish Ministers, in recognition of the significant devolved interest in any provisions which could be made under these powers.

243. As has been the case in developing regulations made under the existing powers in the Children and Families Act 2014, the Scottish Ministers expect to work closely with the relevant UK Government departments and the other devolved administrations in developing regulations which will be made using the powers. This includes work to mandate packaging inserts for tobacco, which has been running in parallel with the Bill development process 1.

Clauses 93 to 94, 96 to 99, 101 to 108 and 110 to 113

244. Current provision on product standards, labelling, product safety requirements, testing, registration, information and safety of tobacco products, herbal smoking products and electronic cigarettes (nicotine vapes) are primarily contained in TRPR. TRPR does not currently contain provision which regulates novel nicotine products, or non-nicotine vapes – products which have become more prominent on the market in recent years.

245. Those regulations were made exercising the power in section 2(2) of the European Communities Act, which has been repealed in the wake of the UK's exit from the European Union.

246. Importantly these new powers will enable existing provision in TRPR to be updated to cover products insofar as not already regulated, and to strengthen the existing requirements in relation to all products.

247. The provisions in TRPR are complex representing a mixture of devolved and reserved subject matter. It is considered that the majority of the new powers in Part 5 are capable of being exercised to make provision which is within the legislative competence of the Scottish Parliament, namely public health.

248. In the event that the powers are exercised to make such provision, the consent of the Scottish Ministers would be required in advance of regulations being made. However it would not be within the legislative competence of the Scottish Parliament to make provision on all elements which are within the scope of these powers.

249. As the purpose of any provision made under the powers in clauses 95 and 100 of the Bill would relate to the reserved subject matter of product safety the consent of the Scottish Parliament is not sought in respect of those powers.

250. Given the complex mix of devolved and reserved subject matter within the scope of these powers, it is considered necessary for any regulation to be made by the Secretary of State (with the consent of the Scottish Ministers insofar as regulations contain provision within devolved competence).

251. In addition having a single UK regulatory framework which covers all products which are used with or in association with tobacco and nicotine containing products reduces difficulties for enforcement authorities, businesses and consumers in understanding which products meet the relevant standards. The Scottish Ministers expect to be kept closely updated by the relevant UK Government departments regarding any developing regulations which will be made using the powers which will also allow the Scottish Government to meet its commitments under the New Deal for Business.

252. The Scottish Government recommends that consent is given to the relevant provisions in Part 5.

Part 6 – Advertising and sponsorship

253. As noted above, in 2002 TAPA introduced comprehensive measures to limit the marketing and promotion of tobacco products. The provisions in Part 6 will repeal and replace TAPA, and extend those measures to cover herbal smoking, vaping and nicotine products and cigarette papers.

254. The Scottish Parliament gave its consent to TAPA back in 2001. At the time it was considered preferable to legislate on a UK-wide basis both from a technical and legal standpoint. In addition, it was noted that it would be difficult to enforce this kind of legislation in a Scotland-only context. This remains the case in 2024 especially given the wider range of products now on the market.

255. The Scottish Parliament legislated to give the Scottish Ministers powers in the 2016 Act to restrict the advertising and promotion of nicotine vapour products. In 2022 the Scottish Government [published a consultation](#) seeking views to make regulations under the 2016 Act.

256. Increasingly it has become clear that a Scotland-only approach would face limitations, some practical and some legal. The range of products is also now much wider than when the 2016 Act was developed.

257. The provisions in Part 6 support Scottish Government policy, to reduce the exposure of children and young people to vapes and nicotine products and do so on a UK-wide basis. Part 6 provisions renders the powers in sections 17 and 19 of the 2016 unnecessary given their wider scope.

258. If the Scottish Ministers were to retain the 2016 Act powers, and proceed with its own Scotland-specific restrictions rather than work with the UK Government and other devolved administrations on a four nations approach this could result in inconsistencies which might be exploited by industry and would be more limited, reducing the effectiveness of those restrictions. The Scottish Government considers that the advantages of a four nations approach include avoiding Internal Market Act difficulties arising, the provisions cover a wider range of products and this approach will introduce a consistent cross-UK approach to regulation which will reduce the regulatory burden on business complying.

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

Part 7 – Smoke free places, vape free places and other free from places

260. As outlined above, the Scotland-specific provisions in Part 7 of the Bill (clauses 142 to 146) amend the existing powers to designate no-smoking premises in the 2005 Act, and introduce new powers to designate such premises as vape-free and heated tobacco free premises.

261. While these provisions are contained within an Act of the Scottish Parliament, and could be amended by Scottish Parliament legislation, it is considered desirable to accept the offer to work with the UK Government on their Bill rather than seek to bring forward a Scottish Bill in the same timescales. Work on reviewing smoke free spaces is already underway as part of the Tobacco and Vaping Framework and will support this work.

262. This approach provides the opportunity for alignment across the UK, while ensuring that any future decisions on the spaces regulated by these powers are the decision of the Scottish Ministers and, ultimately, the Scottish Parliament. It will also ensure that there is one process with which relevant stakeholders can engage as the Bill progresses through the UK Parliament. Including amendments to existing powers through the UK Bill ensures that the Scottish Government does not lack equivalent powers and lags behind the rest of the UK on public health measures.

263. Regulations made under these new and amended powers will be subject to the affirmative procedure. The Scottish Parliament will, therefore, have the opportunity to closely scrutinise the content of those regulations.

264. The Scottish Government recommends that consent is given to clauses 142 to 146.

Part 8

265. The provisions in Part 8 of the Bill are general provisions, expected to be included in primary legislation. The Scottish Ministers will have the ability to make transitional or savings provision in connection with the coming into force of Part 2 and the Scottish clauses in Part 7 – this is considered appropriate as those relate to devolved matters, and extend to Scotland only. On that basis it is appropriate for the Scottish Ministers to have a power to make transitional provision.

266. The Scottish Government recommends that consent is given to the provisions in Part 8.

EU Alignment

267. Officials have considered the Bill's likely impact on the Scottish Government's policy to maintain alignment with the EU.

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

Part 2

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

Part 5

Vapes

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

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

271. The EU Commission is reviewing its legislative framework with the next EU Work Programme update not expected until spring 2025 (at the earliest). Officials will continue to engage with Scottish Government officials based in Brussels as the policy statements for the 2024-2029 legislative mandate are developed to understand what further regulation on vaping products could be proposed. It could be several years,

though, before further EU law takes effect. Some EU Member States are therefore considering further national measures, including the Republic of Ireland, which has recently consulted on further regulation of tobacco and nicotine inhaling products.

272. This includes proposed measures regulating point of sale retail displays, appearance and flavours of nicotine inhaling products, similar to the powers included in Parts 2 and 5 of the Bill.

273. The power in clause 61 will be exercised to introduce restrictions on the display of vaping products and nicotine products. Depending on the outcome of the EU Commission review, EU legislation may be taken forward to regulate in this area.

274. At present we do not have any detail on those proposals, but will keep this under review and assess the overall position as it relates to the Scottish Government's policy of alignment as its own proposals are further developed.

275. The powers in clauses 90 to 92 will be exercised to introduce restrictions on the content, flavouring and packaging of vaping products and nicotine products. As with displays, depending on the outcome of the EU Commission review, EU legislation may be brought forward to take similar action.

276. The Secretary of State must obtain the consent of the Welsh Ministers, the Scottish Ministers and the Executive Office in Northern Ireland if making regulations under Part 5 which contain provision which is within devolved competence. The Scottish Government will therefore assess the overall alignment position during the development of regulations and this will be factored into a decision on whether to consent.

277. Additional powers in Part 5 are intended to be exercised either to amend or repeal and replace provisions in the TRPR, the assimilated law which implemented the TPD.

278. The UK Government has indicated its intention is to replace the system of notification under those regulations with a new registration system, with the aim of improving product safety and consumer confidence. A number of additional powers in the Bill would help in the establishment of this system.

279. It is likely that the majority of provisions to create a new registration system would relate to the reserved matter of product safety and, as such, would not be within the devolved competence of the Scottish Parliament.

280. We will, however, work closely with the UK Government as they develop their plans to better understand the impact of any changes on our continued alignment with EU law.

281. To the extent that regulations contain provision within devolved competence and the consent of the Scottish Ministers is required, the position with regards alignment will be factored in to the decision on whether to consent.

282. The Bill repeals Part 7 of the TRPR, which implemented the cross-border advertising restrictions contained in the TPD. Those restrictions are now covered by Part 6 of the Bill, which sets out more extensive restrictions on the advertising of vaping products. The Scottish Government is satisfied that Scotland will remain aligned with the EU on these points.

Tobacco products

283. The regulation making powers in clauses 90 to 92 can introduce regulations about the retail packaging, flavours and product requirements of tobacco products, re-enacting existing powers in the Children and Families Act 2014 with modifications. These powers can be exercised for the whole of the UK by the Secretary of State with the consent of the Scottish Ministers insofar as regulations contain provision within the devolved competence of the Scottish Parliament.

284. The TPD banned the use of flavourings in cigarettes and roll your own tobacco. Those restrictions were implemented for the whole of the UK in the TRPR, making it an offence to produce or supply flavoured cigarettes or hand rolled tobacco in the UK. That offence remains on the statute book and is not affected by the provisions in the Bill.

285. The power in clause 92 could be used to make further provision regarding flavours for tobacco products, should there be a need for any changes to those existing restrictions.

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

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

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

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

290. As noted above, numerous powers in Part 5 of the Bill are intended to be used to amend or repeal and re-enact provisions of TRPR. The detail of those proposals is not yet known. The Scottish Government will continue to work closely with the UK Government to understand the detail, working to strengthen the systems while stressing the importance of continued alignment. Insofar as regulations contain provisions which

relate to matters within the devolved competence of the Scottish Parliament, alignment considerations will factor in to any decision to consent to the regulations.

291. The Bill also repeals regulation 17 of TRPR, which implemented the ban on supply and production of oral tobacco (snus). That ban will be re-enacted for Scotland through the amendments to the 2010 Act contained in clauses 56 to 58, and thus Scotland will continue to align with the position in EU law.

Consultation

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

293. The consultation received nearly 28,000 responses from individuals and organisations across the UK and the joint government [response](#) was published on 29 January 2024. The collective findings have informed the measures in the Tobacco and Vapes Bill.

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

295. Officials from across the four nations have been working closely on the development of the Bill including provisions and the resultant Bill aligns with the ambitions and actions set out in the [Tobacco and Vaping Framework - A roadmap to 2034](#) which was published in November 2023.

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

297. Although there has been no public consultation on the wider provisions now included in this re-introduced Bill around sponsorship, advertising, brand-sharing and nominal pricing the Bill builds on discussions at both UK Government and Scottish Parliament Committee¹ evidence sessions as well as the previous [consultation](#) on vaping in 2022, which focused on regulations included in the 2016 Act.

298. The consultation on tightening the rules on advertising and promotion of Vapes ran in spring 2022. There were 757 responses to the consultation. It found that:

- 51% of respondents agreed with limiting vaping products to cessation aids only;

¹ [Meeting of the Parliament: HSCS/21/05/2024 | Scottish Parliament Website](#)

- 48% of respondents supported making brand-sharing an offence;
- Industry respondents generally disagreed with limitations on free distribution as this was seen as a way to raise awareness and encourage take up of vaping;
- Public health stakeholders raised concerns over the use of sponsorship as a method of reaching out to children and young people; and
- In general industry respondents and those with links to industry were less supportive of further restrictions on vaping products.

299. The powers to extend smoke-free spaces and create additional aerosol free-spaces has not been consulted on but any change to what is considered smoke-free will be fully consulted before regulations are brought to Parliament. This work has already begun as part of the Tobacco and Vaping Framework and supported by ASH (Scotland).

Financial implications

300. Under the previous UK Government's command paper on its plans to create a smoke-free generation, a number of funding announcements were made in relation to tobacco and vapes. Within these announcements, extra funding was announced for enforcement agencies, including HMRC and Border Force and Trading Standards in England (approx. £5m) every year for the next five years.

301. As a result of the total package of funding announcements, the previous UK Government indicated that £8 million would be made available to Scotland through the Barnett formula in 2024-25, a proportion of which may be expected by Local Authorities to be allocated to them for enforcement in Scotland (which would be proportionately c£500k/year based on the UK allocation for Trading Standards). However, consequential funding provided to the Scottish Government is not ringfenced for a specific purpose and it is for Scottish Ministers to direct how that funding is used.

302. Officials will continue to explore with COSLA any resourcing considerations in relation to the provisions in the Bill including how the Scottish Government could work in partnership to maximise any future compliance through awareness raising, and provision of guidance, reducing enforcement action required by local authorities.

Conclusion

303. The Scottish Government recommends consent to the provisions relevant to Scotland in this Bill.

Draft Legislative Consent Motion

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

"That the Parliament agrees that the relevant provisions of the Tobacco and Vapes Bill, introduced in the House of Commons on 5 November 2024, relating to the supply of tobacco, vapes and other products, including provision prohibiting the

sale of tobacco to people born on or after 1 January 2009 and provision about the licensing of retail sales and the registration of retailers; to enable product and information requirements to be imposed in connection with tobacco, vapes and other products; to control the advertising and promotion of tobacco, vapes and other products; and to make provision about smoke-free places, vape-free places and heated tobacco-free places, so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
November 2024

This Legislative Consent Memorandum relates to the Tobacco and Vapes Bill (UK legislation) and was lodged with the Scottish Parliament on 21 November 2024

Tobacco and Vapes Bill – Legislative Consent Memorandum

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