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Health Bill [HL] Tobacco Control Provisions

Bill 97 of 2008-09

This briefing on the tobacco control provisions of the Health Bill [HL] has been prepared for the second reading debate in the House of Commons. Second reading is due on 8 June 2009.

The overriding aim of this Bill is to improve the quality of NHS care and services and to improve public health. Part 3 of the Bill contains miscellaneous provisions, including measures to protect children and young people from the harm caused by smoking. The provisions include a prohibition on the display of tobacco displays at the point-of-sale (i.e. in shops) and to prohibit or impose requirements on the sale of tobacco products from vending machines. Although the five tobacco control clauses (and Schedule 4) are only a very small part of a large Bill, they have proved to be contentious. In particular, the provision to prohibit tobacco displays provoked a great deal of debate during all stages of the Bill's progress through the House of Lords.

This Research Paper provides information on current legislation and policy in respect of the display and sale of tobacco products from retail premises and vending machines. It also outlines the proposals in the Bill for further tobacco controls.

The other aspects of the Health Bill are covered by a separate Research Paper 09/48.

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Summary

The Health Bill [HL] is a Government Bill introduced in the House of Lords by Lord Darzi of Denham on 15 January 2009 as HL Bill 18 of 2008-09. It completed its stages in the House of Lords on 12 May 2009 and passed to the House of Commons where it had its first reading on 13 May 2009 as Bill 97 Of 2008-09. It is expected to have its second reading on 8 June 2009. In this Paper all references to individual clauses use the numbering of the Bill as introduced in the House of Commons.

In May 2008, the Department of Health consulted on the *Future of Tobacco Control*, and sought views from stakeholders and the public on further action to:

- reduce smoking rates and health inequalities caused by smoking
- protect children and young people from smoking
- support smokers who want to quit

Following this, part 3 of the Health Bill includes provisions on new tobacco controls. Specifically, the provisions would amend the following legislation:

- *Tobacco Advertising and Promotion Act 2002 (TAPA 2002)*
- *Children and Young Persons (Protection from Tobacco) Act 1991 ('the 1991 Act')*
- *Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991 (the 1991 NI Order)*

Clause 20, together with Schedule 4, of the Bill would (except in relation to Scotland) remove the current automatic exclusion for specialist tobacconists from the legislation banning tobacco advertising provided by section 6 of the TAPA 2002. Instead, clause 20 would give power to the Secretary of State, the Welsh Ministers and the Department of Health, Social Services and Public Safety in Northern Ireland (DHSSPSNI) to make separate regulations on when and where tobacco specialists may be exempt.

Clause 21 of the Bill would (subject to certain exclusions) prohibit the display of tobacco products at the point of sale in the course of a business (i.e. in shop display units, often referred to as 'gantries'). Clauses 22 and 23 would amend the 1991 Act and the 1991 NI Order to give power by regulations to the Secretary of State, the Welsh Ministers and the DHSSPSNI to prohibit or impose requirements on the sale of tobacco products from vending machines. Also under clause 21, powers are given to the Secretary of State, the Welsh Ministers and the DHSSPSNI to regulate (but not prohibit) the display of prices of tobacco products and (Secretary of State only) the display of tobacco products and their prices in the course of a business on a website where such products are offered for sale.

Clause 24 would give effect to Schedule 4. This Schedule would make various minor and consequential amendments.

Implementation of these proposals would be subject to further consultation. Measures to remove tobacco displays would not come into force until 2011 for larger shops and 2013 for smaller businesses. This is to allow smaller retailers time to adjust and refit their shops.

Restrictions on vending machines would come into force in 2011, and their effectiveness in reducing underage sales would be reviewed over at least two years to see whether a full ban would be necessary and proportionate.

The Bill's provisions for further tobacco controls provoked strong opinions both from those who supported and opposed the measures. However, this Research Paper is concerned only with the background to, and the main provisions of, the new tobacco controls and their progress through the House of Lords. It does not seek to provide a summary of the different views of all interested groups on either the perceived value to health or the perceived cost to business of implementing the new controls.

The five tobacco clauses would have the same territorial extent as the enactments which the provisions seek to amend. This means that the TAPA 2002 extends to the whole of the UK, the 1991 Act extends to England and Wales and Scotland, and the 1991 (NI) Order extends to Northern Ireland only. However, the amendments made to the TAPA 2002 by clauses 20 and 21, and those to the 1991 Act made by clause 22, would not apply in relation to Scotland.

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I Introduction

The Health Bill [HL] is a Government Bill introduced in the House of Lords by Lord Darzi of Denham on 15 January 2009. It completed its stages in the House of Lords on 12 May 2009 and passed to the House of Commons where it is due to have its second reading on 8 June 2009.

Following the Department of Health's consultation on the *Future of Tobacco Control*, part 3 of the Health Bill includes provisions on new tobacco controls.¹ Specifically, the provisions would amend the following legislation:

- *Tobacco Advertising and Promotion Act 2002 (TAPA 2002)*
- *Children and Young Persons (Protection from Tobacco) Act 1991 ('the 1991 Act')*
- *Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991 (the 1991 NI Order)*

Clause 20, together with Schedule 4, of the Bill would give power to the Secretary of State, the Welsh Ministers and the DHSSPSNI to make separate regulations on when and where tobacco specialists may be exempt from the legislation banning tobacco advertising. Clause 21 of the Bill would (subject to certain exclusions) prohibit the display of tobacco products at the point of sale in the course of a business (i.e. in shop gantries). Clauses 22 and 23 would amend the 1991 Act and the 1991 NI Order to give power by regulations to the Secretary of State, the Welsh Ministers and the DHSSPSNI to prohibit or impose requirements on the sale of tobacco products from vending machines.

It is the Government's intention that measures to remove tobacco displays would not come into force until 2011 for larger shops and 2013 for smaller businesses. This is to allow smaller retailers time to adjust and refit their shops. Restrictions on vending machines would come into force in 2011, and their effectiveness in reducing underage sales would be reviewed over at least two years to see whether a full ban would be necessary and proportionate.

II Background

A. Current legal position

1. Sale of tobacco products to children from retail outlets

The starting position is that, under the 1991 Act, it is an offence for any person to sell tobacco products to anyone under the age of 18 years, even if they look older. The legal age for buying tobacco products in England, Wales and Scotland rose from 16 to 18 on 1 October 2008. Tobacco products include cigarettes, cigars, loose rolling tobacco and rolling paper. This is the case whether or not the cigarettes are for the young person's

¹ Department of Health, *Consultation on the Future of Tobacco Control*, 31 May 2008, Crown 287904, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085114

own use. The maximum fine on conviction for selling tobacco products to a person under the age of 18 years is £2,500.

Retailers are required to display a clear notice stating “It is illegal to sell tobacco products to anyone under the age of 18”. This sign must have letters at least 36mm high, be A3 size (297mm x 420 mm) and be visible where tobacco products are sold. A retailer who failed to display could face a fine of up to £1,000.

Retailers must only sell cigarettes in packets of 10 or more in their original packaging. It is illegal to sell loose cigarettes or split packets.

2. Sale of tobacco products to children from vending machines

The 1991 Act applies equally to over-the-counter sales and vending machines. Therefore, it is an offence to allow persons under the age of 18 years to obtain cigarettes from vending machines; it is the responsibility of the retailer to ensure that no one under the age of 18 uses the machine. It follows from this that the cigarette vending machine must be properly sited so that it is under the supervision of a member of staff and not accessible to a person under 18.

A notice must be displayed on every vending machine used for the sale of cigarettes stating that ‘this machine is only for the use of people aged 18 or over’. The notice must not be less than 60mm x 100mm with the letters being no less than 6mm in height. It is an offence not to exhibit this warning sign and both the owner of the machine or the premises may be liable to prosecution. If a retailer fails to display the warning notice, the maximum fine on conviction is £1,000.

If a cigarette vending machine is accessible to a young person and they are able to buy cigarettes from it, a court may order its re-siting or removal. Anyone who sells cigarettes by vending machine to someone under the age of 18 is liable to prosecution. The maximum fine on conviction for selling tobacco products to a person under the age of 18 years is £2,500.

Various councils have provided written guidance for retailers about the appropriate site for a cigarette vending machine. Suggestions include:

- The machine should not be put in an unsupervised area such as an entrance, corridor or hallway.
- The machine should be sited near to a bar or counter which is regularly staffed.
- Ensure that a member of staff who would be able to challenge an underage purchaser can see the machine and the customers using it.
- Staff should ask for proof of age if they have any doubt about the age of the person using the machine.

Voluntary guidelines from the National Association of Cigarette Machine Operators (NACMO), to managers of sites where machines are located, state that machines should be sited in places where children cannot access them and should be in full view of the person responsible for the premises, or an employee.

3. Tobacco advertising displays in retail outlets

The TAPA 2002 introduced a ban on advertising and the publication of tobacco advertisements. Specifically, section 8 of the Act makes it an offence to display tobacco products in a place if the display is against rules prescribed by the Minister:

A person who in the course of a business displays or causes to be displayed tobacco products or their prices in a place or on a website where tobacco products are offered for sale is guilty of an offence if the display does not comply with such requirements (if any) as may be specified by the appropriate Minister in regulations.

An advertisement for cigarettes or hand rolling tobacco can only be displayed in shops at the 'point of sale' subject to the *Tobacco Advertising and Promotion (Point of Sale) Regulations 2004* (known as the 'Point of Sale Regulations') which came into force on 21 December 2004.² For the purposes of the Regulations, 'point of sale' is defined as a point within any fixed or moveable premises at which a gantry or display unit is fixed. If there is more than one point of sale on the premises, then the advertisement can only be displayed at one of them. However, if the premises are occupied by more than one business, then each business within the premises may have one point of sale.

The Regulations limit tobacco advertising at the retail point of sale to a maximum space of the equivalent of an A5 size piece of paper. It is permissible for gantries to display specific brand advertising within the A5 size restrictions. These Regulations also require the display of a health warning about the dangers of smoking and the NHS Smoking Helpline number. Retailers are also required to display a notice on the legal age of sale of tobacco products.

In practice, corner shops and other retail outlets display tobacco products predominantly in gantries or large shelving units behind the cash till. In large supermarkets, tobacco products are sold from separate kiosks or sales areas, generally sited close to the store entrance. It is not unusual for brands of cigarettes to be stored by creating arches of cigarette packs at the top of the gantry.

4. Tobacco advertising on vending machines

The Point of Sale Regulations 2004 also control the amount of tobacco advertising that is permitted on vending machines. Where it is not possible to see the products inside a tobacco vending machine, advertising is restricted to the following:

- The picture of the packet which is for sale from the machine.
- The picture may not be larger than the largest face of the packet in question.
- It must include one of the health warnings 'Smoking kills' or 'Smoking seriously harms you and others around you'. The health warning must occupy at least 30% of the surface area of the advertisement and be surrounded by a black border between 3-4mm thick; it must not interfere with the text.

² SI 2004/765

If more than one different tobacco product is for sale from the machine than a picture of some or all of the products may be shown. This is to enable purchasers to select what they want to buy.

If it is possible to see the product within the machine, a tobacco advertisement is still permitted on the machine. However, it must be no larger than A5 in area, 30% of the advert must include the health warning:

- 'Smoking kills' or
- 'Smoking seriously harms you and others around you' and
- The NHS smoking helpline number

The retailer must also ensure that the machine on their premises complies with these requirements. Failure to do so is a criminal offence carrying a maximum penalty of a £5,000 fine or 6 months imprisonment or both.

5. Specialist tobacconists and the sale of smoking accessories

Specialist tobacconists must meet the requirements of the TAPA 2002, the Point of Sale Regulations 2004 and the Tobacco Advertising and Promotion (Specialist Tobacconists) Regulations 2004.

As outlined above, the TAPA 2002 bans the advertising and promotion of tobacco products. However, Section 6(1) of the Act provides an explicit exemption if the tobacco advertisement:

- is in or fixed to the outside of the premises of a specialist tobacconist;
- is not for cigarettes or hand-rolling tobacco; and
- complies with any requirements specified by the appropriate Minister in regulations in relation to tobacco advertisements on the premises of specialist tobacconists.

In effect, specialist tobacconists are treated differently to other retailers; all advertising (including window displays) for cigarettes and hand rolling tobacco is banned, but it remains legal for them to advertise cigars, pipe tobacco and snuff. However, advertising inside or on the outside of specialist tobacconists is required to carry a government health warning and information on the NHS smoking helpline. If the advertisement itself is over 75 cm² in area, a warning measuring 22.5cm² plus the 3mm to 4mm black border is required. If the advertisement is under 75 cm² in area, a warning covering 30 per cent of the advertisement's area plus the black border is required. Section 6(1) of the TAPA 2002 also enables the Secretary of State to make regulations to specify further conditions in relation to advertising in specialist shops to ensure that this exemption is not used inappropriately.

For the purposes of the TAPA 2002, a specialist tobacconist is a shop selling tobacco products by retail, where more than half of sales on the premises are of cigars, snuff, pipe tobacco and smoking accessories (such as pipes, lighters and papers).³ This

³ Section 6(2) *Tobacco Advertising and Promotion Act 2002*

explicit exemption was made because the Government took the view that specialist tobacconists sell products which are generally not bought or used by children and young people. It has been estimated that there are 50 such shops throughout the country.⁴

In respect of the advertising of cigarettes or hand rolling tobacco, specialist tobacconists must comply with the same rules as general retailers of tobacco products (i.e. the Point of Sale Regulations 2004). Thus only one advertisement is permitted on the premises, and this must be at the point of sale. The advertisement is restricted in size to A5. The advertisement must be in a two-dimensional format, and may comprise a single advert, or more than one, provided that the total surface area does not exceed A5 size. The advertisement for cigarettes or hand rolling tobacco must also include a health warning as specified in the Regulations.

B. Enforcement of legislation

1. Restricted premises and restricted sales orders

On 1 April 2009, new sanctions came into force to tackle retailers who persistently commit tobacco offences by selling tobacco products to persons under the age of 18 years.⁵

Local authority trading standards offices may now apply to a Magistrates Court for a restricted premises order or a restricted sale order or, in certain circumstances, both orders. A restricted premises order means that the retail business at the location where the tobacco offences took place is prohibited from selling tobacco products for a period of up to 12 months – to be determined by the court. This means that no tobacco sales may take place from those business premises. A restricted sale order means that a named person within a business is prohibited from selling tobacco or from having any management role in any premises relating to tobacco sales within a business for a period of up to 12 months – to be determined by the court. This means that the business premises may still sell tobacco products but that the named individual may not. The order will apply to the named individual regardless of where they are employed. The sanctions are triggered if three ‘tobacco offences’ are committed (the last of which must have led to a conviction) within a period of two years.

These orders are part of a new system of ‘negative licensing’ which aims to tackle those retailers who persistently sell tobacco to underage people. According to the Government, such court orders are a last-resort action for trading standards officers; to tackle those who persistently sell tobacco products to young people under the age of 18 years and where advice and support has failed to gain compliance.⁶

⁴ HL Deb 6 May 2009 c554

⁵ Sections 12A and 12B *Children and Young Persons Act 1933* (as amended by the *Criminal Justice and Immigration Act 2008*)

⁶ HL Deb 9 March 2009 cc419-420GC

2. Role of Trading Standards Services

Local authority trading standards services have responsibility for the enforcement of legislation relating to the sale of age-restricted products such as tobacco, alcohol and fireworks. The Local Authorities Coordinators of Regulatory Services (LACORS) is the local government central body responsible for overseeing local authority and related services in the UK.

In 2006, LACORS published a report on 'The implementation of the Point of Sale Regulations'.⁷ It concluded that although technical compliance with the point of sale regulations has been good, there was a growing problem with the use of counter-top devices such as clocks and counter mats to draw attention to tobacco products. Also, many retailers were found to have been stacking multi-packs of cigarettes thereby creating large virtual advertisements:

Compliance post implementation

A survey of tobacco control activities was conducted with Trading Standards Authorities for the year 2004-5. Data relating to the levels compliance with the Point of Sale Regulations was collected with the following findings:

A total of 83 Local Authorities responded to the on-line survey representing 57% of all local Authority Trading Standards Services in England. 64% of respondents had carried out visits to premises to check compliance with the new legislation with in excess of 5,500 visits being made.

37% had responded to complaints or enquiries, and 58% had offered some form of guidance to businesses.

Overall, the levels of compliance have been found to be high. This includes compliance of vending machines in retail outlets.

There have however been growing numbers of enquiries raised in terms of compliance as they appear to fall into the category of 'display'.⁸

In this report, LACORS concluded that further regulation was necessary to control the display of tobacco products:

The evidence presented in this report would suggest that tobacco manufacturers have found another effective means of effectively promoting their tobacco products without contravening the Point of Sale Regulations. Evidence from Local Authority Trading Standards would suggest that this is an ongoing issue with the companies continually trying to push the boundaries ever further.

Given that the primary purpose of the legislation is to protect public health by reducing tobacco promotion and therefore consumption of tobacco products, it would appear that further regulation is now required to control the display of tobacco products. Without such regulation, it is anticipated that ever more

⁷ Local Authorities Coordinators of Regulatory Services (LACORS), 'Report on the Implementation of the Point of Sale Regulations', 2006, <http://www.lacors.gov.uk/lacors/upload/11092.pdf>

⁸ Ibid page 3

inventive means are likely to be employed to promote tobacco products to the general public.⁹

In respect of tobacco vending machines, LACORS conducted a survey of test purchases of tobacco products by young people across England for a six months period from 1 October 2007 to 31 March 2008.¹⁰ Different types of retailers were targeted during the operation, including independent newsagents, large national retailers, off licences and petrol stations. The survey found that young people were able to buy cigarettes from coin-operated vending machines on more than four in ten occasions, with a number of councils reporting a 100% successful purchase rate. LACORS concluded that vending machines were the most successful way for young people to get hold of cigarettes; they were almost twice as successful compared to other ways tested such as purchasing cigarettes from a newsagent, off licence or petrol station kiosk. Significantly, the survey found an almost two-fold increase in illegal sales of tobacco products to minors compared with the same period in 2006/7. The research in 2006-07 took place when the minimum age for the purchase of tobacco was 16, while the second survey took place after the raising of the legal minimum age from 16 to 18 years.

C. Consultation on the future of tobacco control

The Department of Health signalled its intention to consult on the next steps in tobacco control in its Cancer Reform Strategy published on 3 December 2007.¹¹ *Consultation on the Future of Tobacco Control* was duly published on 31 May 2008.¹²

1. Scope of the consultation

The consultation was described by the Department of Health as the first step in developing a new national tobacco control strategy. This paper sought views from stakeholders and the public on further action to:

- reduce smoking rates and health inequalities caused by smoking
- protect children and young people from smoking
- support smokers who want to quit
- help those who cannot quit

In the context of considering how children and young people could be prevented from ever starting smoking, the consultation paper set out the Department's position on point of sale tobacco displays:

Reducing the impact of smoking on health and well-being in our communities means we need to support smokers to quit, but we need to do as much as we can to protect young people from starting to smoke in the first place. Youth

⁹ Ibid page 12

¹⁰ Local Authorities Coordinators of Regulatory Services (LACORS), 'Test Purchasing of Tobacco products, Results from Local Authority Trading Standards', 1 October 2007 to 31 March 2008

¹¹ Department of Health, Cancer Reform Strategy, 3 December 2007, Crown 283524

¹² Department of Health, Consultation on the Future of Tobacco Control, 31 May 2008, Crown 287904, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085114

smoking is a serious public health problem, and over eight in ten current smokers say they started smoking regularly before the age of 19. Over the past decade, the government has taken significant action to reduce smoking uptake by young people, and to support young people who want to quit, but more still needs to be done to prevent future generations suffering poor health caused by tobacco.

Controlling the display of tobacco in retail environments

Since the implementation of a comprehensive ban on tobacco advertising in the UK, concern has been expressed about how prominently tobacco products are now displayed in newsagents, supermarkets and corner shops. The number and size of tobacco displays appears to have grown in many premises.

The main reason for controlling the display of tobacco products at the point of sale is to protect children and young people from the promotion of tobacco. Research shows that young people are highly receptive to tobacco promotion and can be influenced to take up smoking as a result. Tobacco promotion familiarises potential customers with the product and can stimulate impulse purchases among those not intending to buy cigarettes and, importantly, among smokers who are trying to quit.¹³

The Department of Health highlighted the fact that a number of jurisdictions have either taken action to limit or prohibit the display of tobacco products or have plans to do so, including: Iceland (2001), Thailand (2005), British Virgin Islands (2007), and Canada (provinces of Saskatchewan, Manitoba, Nunavut, Prince Edward Island, British Columbia, New Brunswick, Northwest Territories, Nova Scotia, Ontario, Quebec, Alberta, Yukon Territory).¹⁴

The consultation paper sought views on what the Government should do to reduce the demand for tobacco products among young people and to reduce the availability of tobacco products to them. Specifically, it questioned whether there should be further controls on the display of tobacco products in retail environments, and proposed three options:

- do nothing (i.e. retain current restrictions, monitoring enforcement of relevant legislation)
- regulate point of sale display more strictly by further restricting permitted advertising space and/or restricting display space or other ways in which tobacco products are displayed
- require retailers to remove tobacco products from display.

In setting out its rationale for limiting young people's access to tobacco products from vending machines the Department of Health said:

¹³ Ibid page 7

¹⁴ Ibid paragraph 3.26

Limiting young people's access to tobacco products

While tobacco vending machines account for only 1% of the overall UK market in tobacco sales, a disproportionate number of young people under the minimum legal age for sale of tobacco obtain cigarettes from this source. Tobacco vending machines are 'self-service', which means that currently there are no routine age checks carried out prior to purchase. There are a number of ways in which access to tobacco from vending machines can be limited to ensure that only people aged 18 or over can purchase from the machines. A number of countries have already prohibited or restricted the sale of tobacco from vending machines.¹⁵

It has been estimated by the National Association of Cigarette Machine Operators (NACMO) that there are 71,448 tobacco vending machines in the UK minus Scotland (the consultation did not cover Scotland), of which 78% of machines are located in public houses, 10% located in clubs, 7% in hotels or restaurants, 3% in shops, 1% in bingo halls and 1% elsewhere.¹⁶

The Department of Health referenced the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC), which was ratified by the UK in 2004 and encourages measures to ensure that tobacco vending machines are not accessible to minors. It also referenced a 2003 European Council Recommendation that suggests that Member States should restrict tobacco vending machines to locations accessible to persons over the age set for purchase of tobacco products in national law, or otherwise regulate access to the products sold from such machines in an equally effective way. The WHO European Strategy for Tobacco Control goes further, stating that strategic national actions to restrict availability of tobacco to young people should include banning its sale through vending machines.¹⁷

The consultation paper questioned whether there should be further controls on the sale of tobacco products from vending machines to restrict access by young people. Again, the Department of Health presented three options:

- retain the status quo
- require mechanisms on all tobacco vending machines to restrict access by young people
- prohibit the sale of tobacco from vending machines.

The consultation closed on 8 September 2008.

2. Responses to the consultation paper

The Department of Health published in December 2008 a report on the responses to its consultation on the 'Future of tobacco Control'. In this report, it stated that it had received over 96,000 responses with strong arguments canvassed both for and against the

¹⁵ Ibid, page 7

¹⁶ Department of Health, 'Impact Assessments for the Health Bill', 21 May 2009, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_099765

¹⁷ Ibid, paragraphs 3.55 and 3.56

proposals.¹⁸ The responses can be viewed in full in the report.¹⁹ It is not the purpose of this section to provide a summary of all responses but rather to provide a ‘taste’ of the main arguments.

a. Tobacco advertising displays at point of sale

According to the Department of Health’s report, stricter controls on point of sale tobacco displays were favoured by approximately 84 per cent of respondents, with the vast majority preferring the third option of removing tobacco products from display. However, almost all of the 10,570 responses received from small retailers were against the proposal to prohibit tobacco product displays at the point of sale in retail outlets. The most common reasons cited were:

- the perceived unfair burden on small retailers
- economic loss to retailers from loss of trade
- shop refitting costs
- stimulation of the illicit tobacco market
- health and safety and customer care concerns
- since displays do not encourage purchases, lack of displays will not therefore discourage purchases

The Association of Convenience Stores, representing 33,000 independent retailers, claimed that initiatives to stop young people buying tobacco had led to an increase in proxy purchasing and had encouraged young people to seek out illicit traders instead.²⁰ Some respondents (mainly small retailers) suggested combating proxy purchasing by prosecuting people who buy cigarettes for those underage.

Other organisations were also opposed to the proposal to prohibit tobacco displays in shops. For instance, the response of FOREST, an organisation concerned with smokers’ rights, was that display restrictions would ‘denormalise’ smoking and stigmatise the use of legal products and that this was an improper basis for regulation.

The Tobacco Manufacturers Association (TMA) believed the proposal to be unsupported by robust evidence that it would achieve the stated public health benefit. Specifically, the TMA has argued that there is no evidence on the basis of international examples (i.e. Canada and Iceland) or available data that a display ban would accelerate the already existing decline in youth smoking in the UK.²¹ The TMA has also expressed concern that the Department of Health’s report on the consultation does not mention the TMA’s position on alternative regulatory solutions, such as: proof of age schemes; the law on underage sales to be more strongly enforced; and a crack down on the illegal trade in tobacco. Some TMA members have also proposed the criminalisation of proxy purchasing.

¹⁸ Department of Health, Consultation on the Future of Tobacco Control – Consultation Report, December 2008, http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382

¹⁹ Ibid

²⁰ Ibid

²¹ Letter from Chris Ogden, Chief Executive of Tobacco Manufacturers’ Association to Andrew Black of the Department of Health, 22 December 2008

The trade magazine *Independent Retail News* has conducted its own survey of 780 retailers and found that 85 per cent disagreed with the proposed ban on the display of tobacco products in stores, 88.2% said it would take longer to serve customers and 79.4% cited security concerns. A similar proportion, 88.5%, thought costs would rise as a result of the proposal and 78.8% feared a loss in tobacco sales.²² The National Federation of Retail Newsagents responded that there was no connection between tobacco displays and smoking, and called for independent research.²³

Conversely, many health charities supported a prohibition on point of sale tobacco displays in retail outlets. For instance, Cancer Research UK submitted evidence to show that displays were a well established retail and marketing tool that influenced would-be quitters. Health charities argued variously that since the ban on tobacco advertising under the TAPA 2002, point of sale displays had been used by manufacturers as a marketing tool; gantries and tobacco packets were designed to enhance the appeal of smoking; prominent displays made it appear that smoking was more common than it actually is; point of sale displays influenced young people to smoke; and if tobacco products were out of sight, smoking would be reduced.

ASH, a public health charity campaigning to eliminate the harm caused by tobacco, responded that when tobacco displays were banned in some Canadian provinces, manufacturers continued to pay retailers for tobacco storage units. Heart of Mersey, a local health charity, argued that England should follow Canada's example, where tobacco manufacturers were obliged to disclose the amount they spent on marketing.

A number of local authorities responded, including Nottingham City NHS Stop Smoking Services who submitted evidence of their own survey. This survey found that 63 per cent of clients were tempted to start smoking again because of point of sale tobacco displays, 75 per cent said they would not be tempted if tobacco products were not displayed and 44 per cent responded that they purchased tobacco on impulse.²⁴

b. Further restrictions on tobacco vending machines

In respect of tobacco vending machines, the Department of Health stated that further controls were favoured by 80,501 respondents, 90 per cent of whom preferred the third option of a total ban on the sale of tobacco products from vending machines.

A number of groups said that the existing voluntary agreements to restrict underage access to machines were not working. For example, the Trading Standards Institute found that test purchases from vending machines had a higher failure rate (i.e. tobacco was sold to children) than those from retail premises. They also found that the voluntary code on the placement of machines was not being adhered to, and that staff sometimes

²² *Independent Retail News*, <http://www.talkingretail.com/news/independent-news/11695-tobacco-display-ban-announced.html>

²³ Department of Health, Consultation on the Future of Tobacco Control – Consultation Report, December 2008, http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382

²⁴ Ibid

helped children to purchase tobacco from the vending machines. After an intensive programme of activities aimed at premises whose compliance with underage legislation was poor, London Trading Standards gained a 100 per cent success rate on test purchases. However, as the programme was very resource intensive, they favoured an outright ban on tobacco vending machines.

Conversely, where respondents were opposed to further controls on the sale of tobacco through vending machines, the most common arguments were that:

- controls restricted free trade, particularly in relation to pubs
- the cost of implementing restrictions would outweigh the benefits
- the controls would not have an impact on smoking by young people

Submissions from NACMO pointed out that tobacco vending machines account for only 1 per cent of tobacco sales and questioned the need for any action, given the impact on the livelihoods of cigarette machine operators and the possibility of the complete destruction of the industry. The association also argued that the proper siting of tobacco vending machines in licensed premises acted as a safeguard. The Association of Licensed Multiple Retailers questioned the research put forward by the Government in their consultation paper, and suggested that the existing voluntary code on the placement of vending machines could be converted into a statutory one. Similarly, the British Institute of Inn-keeping also opposed a total ban of tobacco vending machines; it favoured a proof of age card scheme instead.

3. Statement on the consultation by the Health Secretary

On 6 December 2008, the Secretary of State for Health, Alan Johnson, made a statement on the findings of the consultation. He announced the Government's intention to bring forward legislation for further tobacco controls:

The Secretary of State for Health (Alan Johnson): Smoking remains the single greatest cause of preventable death and is one of the primary causes of health inequality in the United Kingdom. The Government have an important responsibility to protect children and young people from smoking. We remain particularly concerned that in Great Britain, nearly seven in ten adults who have ever smoked regularly say that they started smoking regularly before they were 18 years old.

Over the past decade, the Government have achieved a great deal in tobacco control. To build on this success in promoting public health, the Government have committed to develop a new national tobacco control strategy.

To guide the development of this new strategy, the Department published the consultation on the future of tobacco control in May 2008 to enable stakeholders and the wider public to provide input from the earliest stages. Today we published a report summarising the more than 96,000 responses the Department received. The report has been placed in the Library and copies are available to hon. Members from the Vote Office.

The Government now intend to bring forward primary legislation in two areas of tobacco control to protect children and young people from smoking.

We will bring to an end the practice of exposing children to the ubiquitous promotion of tobacco products in retail environments by removing the display of tobacco at the point of sale. According to Cancer Research UK, since the ban on advertising of tobacco introduced by the Tobacco Advertising and Promotion Act 2002, display of tobacco in retail environments has become the primary source of tobacco marketing for young people. We believe that taking action on display of tobacco at the retail point of sale should not represent a significant financial burden on retailers.

We also plan further controls on the sale of tobacco from vending machines, by seeking powers to either remove machines or require age restrictions to limit the easy access young people have to this source of tobacco. Vending machines are one of the most common and easily accessible sources of cigarettes for young people.

Before bringing legislation on point of sale display and tobacco vending machines into force, the Government will work closely with retailers and other stakeholders to develop regulations setting out detailed requirements. We will aim to ensure requirements do not place unnecessary costs or burdens on the retail industry. We will also ensure ample lead-in time before any legislation is commenced to support businesses to prepare.

As part of their consultation, the Government also sought views on whether to bring forward innovative proposals on tobacco packaging. We believe that more needs to be done to develop our understanding of how the packaging of tobacco products influences smoking by both adults and young people. The Government will therefore keep tobacco packaging under close review.

The significant health risks associated with smoking are well documented. We believe these proposals are an important, effective and proportionate step in protecting children and young people from the dangers of tobacco use.²⁵

III Health Bill - Part 3 new tobacco controls

A. Clauses 20 to 24 and Schedule 4

Part 3 of the Bill contains miscellaneous provisions, including new tobacco controls introduced by clauses 20 to 24 and Schedule 4. These provisions would amend the following legislation:

- *Tobacco Advertising and Promotion Act 2002 (TAPA 2002)*
- *Children and Young Persons (Protection from Tobacco) Act 1991 ('the 1991 Act')*
- *Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991 (the 1991 NI Order)*

This summary of the provisions draws on the Explanatory Notes that accompany the Bill.²⁶

²⁵ HC Deb 9 December 2008 cc46-7WS

²⁶ Bill 97- EN

1. Clause 20 – specialist tobacconists

Currently, section 6(1) of the TAPA 2002 explicitly excludes specialist tobacconists from the legislation banning tobacco advertising in respect of certain specialist tobacco products. This means that all advertising (including window displays) for cigarettes and hand rolling tobacco in specialist tobacconists is banned, but it remains legal for them to advertise cigars, pipe tobacco and snuff both inside or on the outside of their premises. In effect, specialist tobacconists enjoy an automatic exclusion in respect of the advertising of certain specialist tobacco products.

However, clause 20 together with Schedule 4 would remove this automatic exemption for specialist tobacconists except in relation to Scotland. Instead, clause 20 would insert a new subsection A1 at the beginning of section 6 of the TAPA 2002. Under this new subsection, powers would be given to the Secretary of State, the Welsh Ministers and the DHSSPSNI to make separate regulations on when and where tobacco specialists may be exempt from the prohibition on tobacco advertising under section 2 of the TAPA 2002. The effect of paragraph 3 of Schedule 4 would be to amend section 6(1) of the TAPA 2002 to limit its application to Scotland. In effect, clause 21 would allow the Government to extend the existing rules on tobacco advertising to specialist tobacconists, while still being able to exempt them where that is deemed appropriate.

2. Clause 21 – prohibition of tobacco displays

Clause 21 prohibits the display of tobacco products in England, Wales and Northern Ireland. Currently, under section 8 of the TAPA 2002, the Secretary of State has the power to impose requirements on the display in England, Wales and Northern Ireland of tobacco products or their prices in a place or on a website where such products are offered for sale.

Clause 21 would insert new sections 7A to 7D into the TAPA 2002 to replace section 8 in so far as it relates to England, Wales and Northern Ireland (section 8 would continue to have effect in its existing form for Scotland). Under new section 7A it would be an offence for a person, in the course of a business, to display tobacco products, or cause tobacco products to be displayed, in a place in England, Wales, or Northern Ireland. Under new section 7A, the appropriate Minister would be given the power to define in regulations the meaning of “place” and ‘display’.²⁷

The obvious effect of a prohibition on the display of tobacco products would be that shelving in shops, known as gantries, would have to be covered up. It is not envisaged by the Government that cigarette packets would have to be moved and stored elsewhere.²⁸ The Government has already said that it has no intention of dictating that tobacco products have to be located in any particular place, such as under the counter or overhead.²⁹ Retailers would be free to cover the gantry as they saw fit provided that they

²⁷ For the purposes of new sections 7A to 7D of clause 21 of the Health Bill, the ‘appropriate Minister’ means the Secretary of State in relation to England, the Welsh Ministers in relation to Wales, and DHSSPSNI in relation to Northern Ireland.

²⁸ HL Deb 9 March 2009 c390GC

²⁹ Ibid

comply with the regulations. Although subject to consultation, it is thought that the approach likely to be taken in regulations would be to define the maximum area of display that it would be legal to reveal at any one time.³⁰

Recognizing that some customers might like to see a particular cigarette packet before buying it, new Section 7B provides a number of exclusions to the general prohibition of tobacco displays imposed by new section 7A. The exclusions cover:

- displays in the course of a business which is part of the tobacco trade and which are for the purposes of that trade and are accessible only to persons engaged in, or employed in, the tobacco trade;
- displays made following a particular request by an individual of at least 18 years of age to purchase, or for information about, a tobacco product (to be known as ‘a requested display’); and
- where the appropriate Minister provides in regulations that no offence is committed under the new section 7A if the display complies with any requirements which are specified in the regulations.

It follows from this that it would be an offence for a shop assistant to display tobacco products to an individual aged under 18 following a request by that individual. However, new section 7B(5) provides that, for the purposes of such an offence, it is a defence that the person making the display (i.e. the shop assistant) believed the individual was aged 18 or over, and had reasonable grounds for that belief. Section 7B(6) provides that a person has reasonable grounds for so believing only if:

- the individual was asked for evidence of their age and the evidence produced would have convinced a reasonable person; or
- no person could reasonably have suspected that the person was less than 18 years of age.

Under new section 7B(7) it is a defence for a person charged with causing a requested display to an individual aged under 18 that they exercised all due diligence to avoid committing the offence.

In practice, the Government envisages that under the ‘requested display’ provision, customers could ask to see a cigarette packet and retailers could show them the pack and this would not be an offence, provided the customer was aged 18 or over. According to the Government, the real effect of the ‘requested display’ provision would be to ensure that shop assistants challenged customers who might be underage at the earliest opportunity, as soon as they asked to see a tobacco product.³¹

New section 7C is concerned with the display of prices of tobacco products in a retail outlet. Under 7C(1) the appropriate Ministers would be given the power to make regulations to impose requirements in relation to the display of tobacco prices when acting in the course of a business in a place in England, Wales or Northern Ireland.

³⁰ HL Deb 9 March 2009 c391GC

³¹ HL Deb 9 March 2009 c391GC

Under section 7C(2) a person who displays, or causes to be displayed, prices of tobacco products in breach of any such requirements would be guilty of an offence. According to the Government, it is already working with the Association of Convenience Stores and the British Retail Consortium to develop appropriate regulations on the display of products and price lists.³²

Finally, new section 7D provides regulation-making powers to control the display of tobacco products and their prices on a website where the service provider of that website is based in the UK. This new section would replace section 8(1) of the TAPA 2002 in relation to England and Wales and Northern Ireland, in so far as it applies to websites.

To summarise, the overall effect of clause 21 is that it would impose a general prohibition on the display of tobacco products. According to the Government, retailers could continue to display a generic “tobacco” or “cigarettes for sale” sign outside their shop. In practice, customers could check the availability of products and their prices on a clearly displayed, plain price list and the retailer could then select a product from a covered gantry knowing that the small number of cigarettes on display for a short period of time would not constitute an offence.³³

3. Clause 22 – restricting or prohibiting vending machines

Clause 22 of the Bill is concerned with restricting or prohibiting sales from tobacco vending machines. It would insert a new section 3A into the 1991 Act. New section 3A would give power to either the Secretary of State in relation to England or the Welsh Ministers in relation to Wales to impose by regulations requirements, or to prohibit, the sale of tobacco from vending machines. It is envisaged that the regulations may include requirements on the location of the vending machine (for instance, to be in sight of the individual managing the premises) and/or requirements on the design, construction or operation of the machine (for instance, that it have age-restricting operational requirements preventing children from being able to use the machine).

The regulations would also specify who would be held liable for breach of a requirement or a general prohibition. Under new section 3A it would be an offence for a person to breach the regulations, punishable with a fine not exceeding level 4 on the standard scale (currently £2,500). However, new section 3A(7) does allow exemptions to be made in the regulations for particular cases, should either the Secretary of State or the Welsh Ministers decide that that is appropriate. The Government has said that currently it does not see the case for any exemptions but it does not rule them out.³⁴

In addition to the prospect of a fine, clause 22(2) would make a breach of the regulations on tobacco vending machines a ‘tobacco offence’ for the purposes of restricted premises and restricted sales orders. In effect, a Magistrates’ Court would be able to impose either

³² HL Deb 9 March 2009 c391GC

³³ HL Deb 9 March 2009 c392GC

³⁴ HL Deb 9 March 2009 cc418-419GC

order in response to breaches of the new section 3A, where the conditions for imposing such orders are met.³⁵

The overriding aim of new section 3A is to bring in regulations to restrict access to vending machines by children under 18, while maintaining this source of cigarettes for adults. The intention is for these restrictions to apply from 2011. However, the Government has said that it will review the effectiveness of the new requirements over a period of two years following implementation. If it appears that restrictions are not successful in preventing underage purchases, it will reconsider moving to an outright ban on the sale of tobacco products from vending machines. To achieve two available options - regulations either to impose requirements or to prohibit tobacco vending machines - the powers given to the appropriate Minister are to be discretionary. The Government has confirmed that as a minimum, powers to regulate vending machines would certainly be used.³⁶

In determining how to take forward regulations the Government has said that it will seek the opinions of stakeholders, such as the NACMO, trade bodies, enforcement organisations and other stakeholders.³⁷ It will also look at the methods adopted by other European Member States who have introduced age-restriction mechanisms on vending machines.³⁸ It then intends to conduct a three-month formal public consultation on draft regulations following Royal Assent.³⁹ The Government has confirmed that all regulations relating to vending machines would be subject to approval by affirmative resolution of Parliament, the National Assembly for Wales or the Northern Ireland Assembly, so ensuring an appropriate opportunity for scrutiny and debate.

4. Clause 23 – restricting or prohibiting vending machines in NI

Clause 23 of the Bill is concerned with the treatment of tobacco vending machines in Northern Ireland. It would insert a new Article 4A into the 1991 NI Order. This new Article would make equivalent provision for Northern Ireland to that made for England and Wales by the new section 3A inserted in the 1991 Act by clause 22.

5. Clause 24 - Schedule 4

Clause 24 gives effect to Schedule 4. The purpose of Schedule 4 is to make various minor and consequential amendments, including:

- limiting the application of sections 6(1) and 8 of the TAPA 2002 to Scotland;
- limiting the power of the Secretary of State under section 13(5) of the TAPA 2002 to take over the conduct of proceedings in relation to offences committed in England and giving power to the Welsh Ministers to take over the conduct of proceedings in relation to offences committed in Wales;

³⁵ HL Deb 9 March 2009 cc419-420GC

³⁶ HL Deb 9 March 2009 c418GC

³⁷ HL Deb 9 March 2009 cc418-419GC

³⁸ HL Deb 9 March 2009 c418GC

³⁹ HL Deb 9 March 2009 c419GC

- amending the definition of “appropriate Minister” for the purposes of the TAPA 2002, to confer powers on the Welsh Ministers and DHSSPSNI to make regulations in relation to the new provisions about specialist tobacconists and displays and to transfer to them existing powers under section 4(3) of the TAPA 2002 (power to provide for exclusions from the section 2 prohibition on tobacco advertising); and
- provision for the procedure to be adopted in relation to regulations made by the Welsh Ministers and DHSSPSNI under the provisions of the TAPA 2002 as amended by the Bill.

Schedule 4 would also amend section 8 (displays), section 9 (prohibition of free distribution), section 11 (brandsharing) and the Schedule (information society providers) to the TAPA 2002 to give full effect to the Directive on electronic commerce (2000/31/EC). It would also repeal section 16(1A) of the TAPA 2002 (limitation of penalties for certain offences relating to information society services) to bring the penalties for offences covered by that provision into line with the penalties which apply generally for offences under the TAPA 2002.

B. Commencement and enforcement

It is the Government’s intention that regulations made under clause 21 (prohibition on tobacco displays) will be commenced and enforced from October 2011 for large shops. For smaller shops, regulations are expected to come into force in October 2013.

Regulations to restrict access to vending machines by children and young people aged under 18 years will apply from 2011. The Government intends to review the effectiveness of the new requirements over a period of two years following implementation. If it appears that restrictions are not successful in preventing underage purchases, it will reconsider moving to ban the sale of tobacco products from vending machines altogether

Local authorities’ trading standards offices will be responsible for monitoring and enforcing the prohibition on the display of tobacco products and regulations governing the sale of tobacco from vending machines.

C. European Convention on Human Rights

According to the Bill’s Explanatory Notes, the provisions at clause 21 for prohibiting the display of tobacco products, regulating the display of their prices and regulating the display of such products and their prices on websites may engage Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR), which protects the freedom of commercial expression. However, it states that the Government is satisfied that these provisions are within the margin of appreciation accorded to a state:

The main purpose of these provisions is to protect public health by protecting children and young people from the promotion of tobacco, with the aim of reducing the take up of smoking by them, and to provide an environment that supports smokers who are trying to quit. The protection of public health is an important counter-balance to unrestricted commercial expression. The proposed restrictions are within the margin of appreciation accorded to a state, justified by the

considerable evidence as to the efficacy of the proposed restrictions and proportionate. Evidence from other countries which have introduced display bans show that the potential costs for retail outlets in complying with a display ban need not be high. Such potential costs and loss of profitability of the tobacco industry would be outweighed by potential public health gains in reductions in smoking, particularly among young people.⁴⁰

On 31 March 2009, the Joint Committee on Human Rights (JCHR) published a report on its scrutiny of the Health Bill.⁴¹ However, the JCHR made no recommendations in respect of the tobacco control provisions.

IV Stages in the House of Lords

The Health Bill was introduced in the House of Lords on 15 January 2009 and had its second reading on 4 February 2009. The Bill was considered in Grand Committee between 23 February and 17 March 2009. It had its report stage over two days on 28 April 2009 and 6 May 2009 and third reading on 12 May 2009.

Although consisting of only five clauses and one schedule, the tobacco control provisions contained in Part 3 of the Health Bill dominated the second reading debate. As the Bill progressed through the House of Lords, amendments and stand-part debates were moved in respect of clauses 20 to 22. The treatment of these three clauses is considered at section B below.

A. Second reading debate

The aim of this section is to give a flavour of the views expressed on the new tobacco control provisions during second reading.

Lord Darzi of Denham, the Parliamentary Under-Secretary of State, Department of Health, provided an explanation as to why the tobacco control provisions were included in a Health Bill:

Part 3 of the Bill sets out measures to take forward the Government's aim to reduce the incidence of illness and death caused by tobacco, and in particular to reduce the number of children and young people who take up smoking. As a result of government action, we now have the lowest smoking rates in England on record—one of our proudest achievements. However, smoking remains the main cause of preventable morbidity and premature death in this country, accounting for 87,000 deaths a year in England alone. It is the primary reason for the gap in healthy life expectancy between rich and poor.⁴²

However, Lord Stoddart of Swindon (Ind Lab) argued that a Health Bill was not an appropriate Bill in which to introduce provisions that were, in his view, a restraint of trade.

⁴⁰ Bill 97-EN, paragraph 396

⁴¹ Joint Committee on Human Rights, Legislative Scrutiny: Health Bill, Eleventh Report, 31 March 2009 <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/69/6902.htm>

⁴² HL Deb 4 February 2009 c674

He also questioned why tobacco was being treated differently from other products that may be equally harmful to health:

This is a restraint of trade; it is preventing purveyors of tobacco displaying their wares. If you did that in any other industry which poses health problems, you would be getting rid of a lot of food, for example. We have heard a lot of talk about sweets and chocolate. They would be banned. You would not be able to display them to children in case their teeth were damaged or there was some other complaint. Would McDonald's be able to display or advertise its products? You could go through everything and, before very long, nothing would be on display because of being dangerous in some way.⁴³

Lord Palmer (CB) argued that although the Minister had said that the purpose of the Bill was principally to legislate for aspects of the next-stage review of the National Health Service, in his view, the tobacco provisions were 'purely consumer protection measures' and made no legal sense.⁴⁴ He also thought that the Bill's impact on the small retailer has been played down by the Department of Health:

Under the Bill, it will be an offence to display a product that it remains entirely legal to sell. As other noble Lords have said, this simply cannot make sense. One must not forget that it undermines the rights of commercial freedom under Article 10 of the European Convention on Human Rights and, indeed, is contrary to the principles of free movement of goods already enshrined in Article 28 of European Community treaty. The Department of Health claims that the purpose of the display ban is to reduce smoking among young people, and I fully support this commendable objective. However, the evidence that the department cites in support of a ban is weak, inconclusive and unconvincing. I am sure that the evidence can be well and closely scrutinised in Committee.

I am at least as concerned about how the Department of Health, in its report on the consultation undertaken on its proposals, has played down and diminished the effect that its proposals are likely to have on small-scale retailers. Those retailers are typically small businesses serving a local community. They are invariably family businesses. They are certainly not familiar with responding to government consultations, particularly when those consultations are not produced in their mother tongue, as was the case in this instance. It must not be forgotten that 76 per cent of these small businesses are owned by people from Commonwealth countries. The Bill will saddle them with a whole new raft of regulations on display, on how to deal with and serve their smoker customers, on signage and on how they must indicate prices to their customers. For them, the one-off and continuing costs of complying with the regulations will be unreasonable and completely unjustified burdens [...].⁴⁵

Other Members argued that since tobacco was a legal product, sellers must be allowed to promote it. By way of example, Lord Naseby (Con) argued that the Government should not infringe the intellectual property rights of legitimate products.⁴⁶ Whilst

⁴³ HL Deb 4 February 2009 cc722-724

⁴⁴ HL Deb 4 February 2009 cc731-2

⁴⁵ HL Deb 4 February 2009 cc731-2

⁴⁶ HL Deb 4 February 2009 c678

Baroness Knight of Collingtree (Con) argued that since smoking was a legal pursuit, to make it illegal for people to see what they can legally buy was a 'nanny state writ large'.⁴⁷

Looking at the practicalities of the new tobacco controls, some Members thought the 'requested display' provisions embodied in of Clause 21 of the Bill would be unworkable. Lords Palmer and Naseby expressed concerns about whether these measures were proportionate in the current economic circumstances, whilst Baroness Golding (Lab) argued that corner shops, who were already struggling to survive, would find it hard to implement the provisions.⁴⁸ Lord Darzi sought to reassure Members that the Government would work with trade bodies and provide all the support needed in the lead-in time for compliance to minimize any burden on businesses.⁴⁹

Tobacco smuggling was another issue raised by both supporters and opponents of the provisions. Some Members argued that new tobacco controls would lead to the loss of small shops and an increase in the already large illicit market for tobacco products.⁵⁰ Lord Faulkner of Worcester argued that tobacco smuggling not only cost an estimated £1.7 billion loss of revenue to the Exchequer in 2006-07 but was also undermining tobacco control measures and public health policy. He said that there was now a strong case for a positive licensing system, with each local authority being required to keep a list of all retailers and establishments which sell tobacco.⁵¹ The Earl of Liverpool (Con) acknowledged that children should not be encouraged to purchase tobacco products, but felt certain that the Bill's provisions were not the right way to achieve that. He argued that to make it illegal to have so-called gantry displays of tobacco products in retail premises would have a negligible impact on children's awareness of smoking; instead it would leave shopkeepers vulnerable targets to criminals, encourage the trade in illegally imported tobacco products and have a detrimental economic impact on corner shops.⁵²

Opponents of the tobacco control provisions were not persuaded by the Government's evidential case that the new tobacco controls would protect children. Baroness Goudie questioned why the second option put forward in the consultation document of tighter restrictions rather than an outright ban on tobacco displays had been discounted.⁵³ Lord Monson (CB) argued that he could not see the purpose of a new provision to prohibit the display of tobacco products at the point of sale, given that it was already a criminal offence to sell tobacco to anyone under 18. He questioned the claim by the BMA that such displays reinforce in young people notions of the glamour of smoking. Indeed, he thought hiding tobacco products behind a curtain could make them more attractive to young people.⁵⁴ Earl Howe, Conservative Spokesperson for Health, concluded that whilst he would support any reasonable and evidence-based measure that would bear down on teenage smoking, the Bill's proposal to outlaw point of sale displays of tobacco

⁴⁷ HL Deb 4 February 2009 c713

⁴⁸ HL Deb 4 February 2009 cc715-717

⁴⁹ HL Deb 4 February 2009 c755

⁵⁰ HL Deb 4 February 2009 c733

⁵¹ HL Deb 4 February 2009 c728

⁵² HL Deb 4 February 2009 cc719-720

⁵³ HL Deb 4 February 2009 c733

⁵⁴ HL Deb 4 February 2009 cc738-9

products were unjustified and repressive and the evidence to support the proposal flimsy and the data hyped.⁵⁵

In contrast, those members who supported the introduction of new tobacco controls argued variously that since levels of smoking by children remain high, particularly amongst disadvantaged groups, something had to be done. Indeed, some Members thought the Bill could have gone further. For instance, Baroness Tonge and Baroness Barker, both Liberal Democrat Spokespersons for Health, expressed regret that there was not a comprehensive strategy from the Government to counteract the illness and health inequalities that are caused by tobacco.⁵⁶ They thought it was a lost opportunity. Lord Darzi addressed this point at the end of the debate, when he confirmed that the tobacco proposals in the Bill would form one part of a new comprehensive national tobacco strategy, to be published later in 2009.⁵⁷

Lord Rea (Lab), speaking in support of the measures, highlighted studies that found levels of smoking as high as 70 per cent among women in certain deprived so-called sink estates - smoking being one small luxury available to them.⁵⁸ In making a similar point, Baroness Howarth of Breckland (CB) drew on Government statistics:

Progress is welcome, but more needs to be done, particularly in the most deprived areas of the country, where [smoking] rates can be as high as 50 per cent. Among children, it is estimated that 340,000 under the age of 16 try smoking and more needs to be done to discourage them from the habit. Four out of five smokers start before the age of 19. It is also estimated that there are currently more than 190,000 child smokers between the ages of 11 and 15 in the UK. Those are the ones whom the tobacco industry has already hooked and whose future health is in danger.

[...] Prohibition of point-of-sale displays has been implemented in nearly all provinces in Canada and has formed part of a range of tobacco control measures. These steps have coincided with a drop in smoking prevalence rates among 15 to 19-year-olds from 22 per cent in 2002 to 15 per cent in 2007. The Republic of Ireland will be bringing in a prohibition on point-of-sale displays later this year, and Scotland is considering a similar measure. I hope that the Government will not be left behind, but will keep themselves at the forefront of their previous work in terms of tobacco by making us another country that implements this vital health measure.⁵⁹

It was also argued by Baroness Howarth of Breckland and others that tobacco companies greatly value the marketing potential of point of sale displays and pack designs, despite the introduction of health warnings. Lord Faulkner of Worcester (Lab) thought the new tobacco controls necessary with one in seven 15 year-olds a regular smoker. He argued that, since the introduction of the TAPA 2002, the tobacco industry had worked hard to produce innovative measures to target new customers – one example of this being the tobacco point of sale displays which have become more eye-

⁵⁵ HL Deb 4 February 2009 c749

⁵⁶ HL Deb 4 February 2009 c681 and HL Deb 4 February 2009 c745

⁵⁷ HL Deb 4 February 2009 c754

⁵⁸ HL Deb 4 February 2009 cc693-3

⁵⁹ HL Deb 4 February 2009 cc702-704

catching. In making his points, Lord Faulkner of Worcester highlighted the case of Iceland where a similar point of sale ban had been implemented:

I am delighted that the Government have based their proposals in the Bill on research. Some of the most important research has been carried out by Professor Gerard Hastings, director of the Centre for Tobacco Control Research. He investigated the complex relationship between tobacco marketing at the point of sale and young people's intention to smoke. He found that: "In 2006, almost half—46 per cent of UK teens—were aware of tobacco marketing at point of sale".

Moreover, the likelihood of a young person stating an intention to smoke may increase by 35 per cent with each brand that they can recall having seen at the point of sale.

Bans on point-of-sale displays have been introduced in a number of jurisdictions. A useful case study is Iceland, which introduced a ban on point-of-sale displays in 2001. The result, which is contrary to the misleading briefing sent to some noble Lords by the Tobacco Manufacturers' Association, is that prevalence in 15 to 16 year-olds dropped from 18.6 per cent in 1999 to 13.6 per cent in 2003. This rate of drop was twice the rate of decline in the prior four-year period. There is similar evidence from other countries.⁶⁰

In answer to concerns raised about the economic impact of the new tobacco controls on small retailers, some Members reiterated that the provisions would not come into force until 2013, arguing, in effect, that small retailers would have sufficient time to plan ahead.

In respect of clause 22 and the introduction of further restrictions on cigarette vending machines, Lord Faulkner of Worcester, Baroness Tonge and others thought the Bill should have gone further by imposing an immediate ban on tobacco vending machines.⁶¹

The Department of Health's consultation originally included a proposal to introduce plain packaging for cigarettes. Although no such proposal is included in the Health Bill, some Members thought it should have been.

At the end of the debate Lord Darzi reiterated the Government's position, that it had carefully reviewed the evidence base and considered a prohibition on tobacco displays and age restrictions on use of vending machines to be effective and proportionate measures in preventing premature death and illness caused by smoking.⁶²

B. Grand Committee, Report Stage and Third Reading

Grand Committee consisted of seven sittings between 23 February 2009 and 17 March 2009. The tobacco control provisions contained in Part 3 of the Bill were considered at three of the seven Grand Committee sittings on 5, 9 and 11 March 2009. During Grand Committee, clauses 20 (specialist tobacconists) and 21 (the prohibition of tobacco displays) were debated on a stand part basis. In addition, a number of amendments were debated at length and were withdrawn, some on the basis that they would be

⁶⁰ HL Deb 4 February 2009 c728

⁶¹ HL Deb 4 February 2009 c681 and HL Deb 4 February 2009 c729

⁶² HL Deb 4 February 2009 cc754-6

tabled again at report stage. There were no Government defeats and no divisions on the tobacco control provisions.

The report stage of the Bill took place over two days with the tobacco control provisions dominating the second day, 6 May 2009. A number of amendments were tabled in respect of clause 21 and clause 22 (the power to prohibit or restrict sales from vending machines). An amendment moved by Earl Howe sought to remove clause 21 altogether from the Bill; this effectively led to another lengthy stand-part debate. During report, there were divisions on clauses 21 and 22 which were both won by the Government.

Given the number of debates on just five clauses and one schedule of the Bill, the tobacco control provisions were undoubtedly one of the most fought-over parts of the Bill. The substantive issues raised in Grand Committee and again during the report stage are set out below.

1. Clause 20 - specialist tobacconists

During Grand Committee, the debate on whether Clause 20 should stand part of the Bill focused on whether specialist tobacconists should continue to benefit from section 6(1) of the TAPA 2002 and be explicitly excluded from the legislation banning tobacco advertising. Earl Howe asked why the explicit exemption currently in place needs to be removed and why the existing power to make regulations under section 6(2) of the TAPA 2002 is insufficient. This point was also taken up by Lord Naseby who stressed that anyone running a specialist tobacconist shop must have a degree of certainty about their future.

Baroness Thornton, speaking for the Government, explained that clause 20 was necessary if the Government was to be consistent in its approach to remove all advertising that is regularly accessible to children. She confirmed that the Government would work with representatives of the specialist tobacco retail trade to develop the detail of how the power would be used in practice and any requirements would be introduced with a long lead-in time and would not come into effect until 2013, in line with display requirements for smaller shops.⁶³

However, Lord Naseby was not persuaded. He argued that the TAPA 2002 already made adequate provision and given that there were only 50 or so specialist tobacconist shops and the age group of those who visited such shops were not young people, he called on the Government to think about the provision once again before report and withdraw it.⁶⁴ Lord Stoddart of Swindon also argued that clause 20 was 'a large hammer to hit a very small nut'.⁶⁵ However, it was agreed that clause 20 should stand part of the Bill.

During the Bill's report stage, Earl Howe moved a probing amendment to again question why it was necessary to disapply section 6 of TAPA 2002, which already contains a regulation-making power, and replace it with another regulation-making power under

⁶³ HL Deb 5 March 2009 cc352-353GC

⁶⁴ HL Deb 5 March 2009 c353GC

⁶⁵ HL Deb 5 March 2009 c354GC

new clause 20 which would ostensibly enable the Government to achieve exactly the same thing.⁶⁶ Baroness Thornton reiterated many of the arguments she used in Grand Committee. In particular, she argued that the new regulation power under clause 20 would allow the Government to limit tobacco advertising to the inside of specialist tobacconists only, adverts would no longer be visible on the outside of their shops:

The noble Earl, Lord Howe, is right that the 2002 Act provides regulation-making powers with respect to advertisements in or outside specialist shops. However, there is explicit provision in the 2002 Act for specialist tobacconists to have adverts fixed to the outside of their premises. Regulations made under the existing powers could only specify requirements about outside adverts, not prohibit them altogether.

We want to prohibit all tobacco advertising that is visible to people who have not chosen to see it. We propose using the new regulation-making powers provided by Clause 18 [now clause 20 in the HC Bill] to ensure that advertising of specialist tobacco products is not visible outside specialist shops. However, the noble Earl is right that there is no intention to limit advertising inside shops within the current regulatory framework. We do not want to unfairly penalise specialist tobacconists. We recognise they are involved in a legitimate trade and need to be able to attract customers. They would still be able to use their window displays to inform customers about what they sell by advertising tobacco accessories, such as pipes, or by listing the tobacco products they sell. They would still be able to advertise specialist products inside their shops.⁶⁷

The amendment was withdrawn.

2. Clause 21 - prohibition of tobacco displays

a. *Debate in Grand Committee*

In Grand Committee there was a very lengthy debate on whether clause 21 should stand part of the Bill. Opening the stand part debate, Earl Howe described clause 21 as the most contentious issue in the Bill.⁶⁸ The arguments focused on the following main areas:

- Whether further regulation was necessary
- The value of the evidence and the consultation process
- Commercial freedoms
- Proportionality – the economic impact of clause 21 on small retailers

Whether further regulation was necessary

Lord Naseby argued against clause 21 on the basis that there was already regulation making powers governing displays in the TAPA 2002 and as recently as 2006 trading standards had found that there was good compliance.⁶⁹ Earl Howe questioned why the Government does not simply regulate to restrict the size and content of such tobacco

⁶⁶ Amendment 41, HL Deb 6 May 2009 c555

⁶⁷ HL Deb 6 May 2009 cc555-556

⁶⁸ HL Deb 5 March 2009 c363GC

⁶⁹ HL Deb 9 March 2009 c385GC

displays instead of banning them altogether. If some displays have changed and become more eye-catching, he reasoned that the Government could regulate to make them less attractive.⁷⁰ Similarly, Lord Stoddart questioned why tobacco restrictions come along in dribs and drabs, arguing that if it is true that smoking is more dangerous than cannabis and cocaine then it should be banned altogether. He questioned whether the Government's reluctance to do so was because of the revenue that taxation of tobacco raised.⁷¹

It was the view of Baroness Golding that young people do not purchase cigarettes from shops but obtain them from friends in the playground or from people at street corners and so on. Earl Howe concluded that the main influences on children smoking were: peer pressure; image consciousness, because it is seen as being cool; and having parents who smoke. He was unconvinced about the impact of tobacco displays on this decision.⁷²

Conversely, Lord Rea made the point that the tobacco industry pays for shop gantries to be installed and it is unlikely that it would do so if market research did not show them to be effective in promoting tobacco sales.⁷³ Lord Walton of Detchant highlighted the guidelines to the WHO Framework Convention on Tobacco Control (FCTC), which recommends that tobacco retail displays should be banned by parties to the FCTC (which includes the UK).⁷⁴

As part of a detailed explanation as to why this legislation should go through, Baroness Thornton stated that in 2007 nearly 200,000 children aged between 11 and 15 were already regular smokers. She also referenced Scotland's decision to remove tobacco displays and thought it would be a shame if it were only the children of Scotland, and indeed Ireland, who were protected from tobacco industry promotions.⁷⁵ In arguing why further regulation was necessary, Baroness Thornton described the impact of tobacco displays in shops:

Product display is a well-established marketing principle deliberately used across the retail sector. It is one of the last remaining means of promotion of tobacco since the comprehensive Tobacco Advertising and Promotion Act 2002 and subsequent regulations. In the past few years we have seen tobacco displays grow to become large, brightly-lit features of most shops, incorporating promotional aspects such as clock and tower cases. The noble Earl, Lord Howe, pointed out that our consultation document indicated a lack of research on this point. I am pleased to inform him that, since the publication of the consultation, ASH has commissioned a report on tobacco points of sale summarising evidence from 153 retail premises across 20 different local authorities. The report states:

"In all premises the packs are prominently displayed ... in such a way as to promote the product to customers ... Photographic examples clearly show that

⁷⁰ HL Deb 9 March 2009 c399GC

⁷¹ HL Deb 9 March 2009 c400GC

⁷² HL Deb 9 March 2009 c400GC

⁷³ HL Deb 9 March 2009 c384GC

⁷⁴ HL Deb 9 March 2009 c389GC

⁷⁵ HL Deb 9 March 2009 c398GC

such displays are used as a marketing tool ... The displays are believed to be typical across the retail trade as a whole".⁷⁶

The stand part debate also focused on whether a ban on tobacco displays would work in practice. Baroness Thornton said that clause 21 was not about preventing any viewing ever of a cigarette pack by a child, but there was a difference between seeing a single cigarette pack and being exposed to a large, brightly lit and colourful gantry in the local corner shop next to sweets.⁷⁷ In effect, it was the Government's position that clause 21 was an essential public health measure and it should stand part of the Bill.

Value of the Government's evidence and the consultation process

In the stand part debate, Earl Howe argued that to prevent a retailer from displaying a product that may be legally sold could only be justified if the decision was based on the firmest of evidence – in his view the Government's case was inadequate:

The principal justification for a point-of-sale display ban, in the view of the Government, is that it will remove an important influence on would-be smokers to take up smoking, more especially teenagers. What evidence is there that displays of cigarettes have that effect? We are told that since the passing of the Tobacco Advertising and Promotion Act 2002, tobacco companies have sought to get around the spirit of the law on advertising by encouraging retailers to install ever larger and more elaborate gantries to display cigarettes, and that these have in effect become a means of advertising. If that statement is to be believed, we need to show that that is happening on a wide scale and, moreover, that display gantries in themselves act as an enticement to people to take up smoking. Evidence for large gantries exists. Many of us have seen photographs of them. However, the Government said in their consultation paper at paragraph 31:

"Increases in size or prominence of display of tobacco products since TAPA came into force have yet to be confirmed by research".

I am not sure therefore whether we can say more at this stage other than that some examples of large gantries have been observed. We cannot say that they are typical.

However, more importantly, what actual effect are displays having? At the presentation attended by noble Lords last week—I shall paraphrase—it was said that awareness of new packs among the young has increased since the ad ban; that young people still know their brands; and that this must be a function of point of sale display. A greater leap of logic, especially from an academic source, is not often found. We are supposed to believe that young people never see a cigarette pack other than in shops. A moment's reflection should make us realise that that proposition is ridiculous. We need therefore to look more widely for evidence that point-of-sale displays influence the take-up of smoking.

There are various jurisdictions around the world where display bans have been implemented. The Department of Health place reliance on two in particular; namely, Iceland and the province of Saskatchewan in Canada. In neither of those places do the data, when examined, prove the department's case or go anywhere

⁷⁶ HL Deb 9 March 2009 cc393-4GC

⁷⁷ HL Deb 9 March 2009 cc390-394GC

near showing that they may even have a ghost of a case. I am talking here about proving cause and effect. In Canada as a whole, smoking prevalence has reduced pretty steadily over the past 10 years. In Saskatchewan, where a display ban was first introduced in 2002, the rate of decline in smoking prevalence has been less steep than in a number of provinces where there has been no display ban in force. So I am far from convinced that Saskatchewan has anything useful to tell us.⁷⁸

Other Members, including Lord Borrie, thought that Lord Howe had identified a substantive problem with the evidence. They argued variously that since bans on tobacco displays in other countries are relatively new it is still difficult to be sure of their impact on both shopkeepers and young children.⁷⁹

Lord Naseby thought the Department of Health's consultation on the display of tobacco products was flawed. In his view, no relevant and convincing evidence had been submitted to demonstrate that the banning of product displays would lead to fewer young people smoking:

[...] the consultation on product display was flawed. Three options were in the original consultation paper put out by the Department of Health, but the only two that were considered were numbers 1 and 3—that is, maintaining the status quo or total prohibition. I do not understand why option 2 put forward by the department—the making of regulations to restrict displays—was totally ignored. That seems to me entirely wrong, and it is not just me who feels aggrieved by it. The code of conduct on consultations put forward by the present Government says—and it should be adhered to by all government departments—that all options should be considered.

The consultation was at further serious fault in not taking account of the large number of people likely to be substantially affected by the proposals on tobacco, particularly small-scale retailers, who, frankly, we all know are unfamiliar with the complexity and form of language in a consultation paper and did not find it accessible. Where accessibility is so limited, engagement beyond the printed word is considered by the new department of BERR to be a consideration to which departments should have regard.

These serious shortcomings of the consultation paper and process were brought to the attention of the Equality and Human Rights Commission by the Tobacco Retailers Alliance. It agreed that this was wrong but, as yet, we have had no further response from it. In short, there were most serious omissions and shortcomings in the consultation process and the paper. Frankly, there is no satisfactory remedy to that situation other than to reject Clause 19 [now clause 21].

Thirdly, the results of the consultation, flawed as it was, seriously misrepresented the situation. I discovered that of the 90,000 responses, 49,000 came from Smoke Free North West and comprised written postcards or e-mails. Is anybody suggesting that that is real consultation? Perhaps we ought to look at who provides the money for these organisations. I further discovered that 79,000 out of

⁷⁸ HL Deb 5 March 2009 cc363-4GC

⁷⁹ HL Deb 5 March 2009 c368

90,000 representations came from government-funded bodies. Therefore, it is not surprising that they responded as the Government wished them to.⁸⁰

Earl Howe had earlier criticised the Department's published responses to the consultation on the basis that they had omitted to reflect the scale and volume of the retailers' responses.⁸¹

Baroness Thornton defended the Government's evidential case in support of clause 21. In doing so, she referenced a number of reports including the Cancer Research UK report detailing findings of primary research with UK adolescents. Answering criticism that the consultation was flawed, Baroness Thornton provided a break down of the responses received and, in respect of Asian shopkeepers, confirmed that she would be meeting with representatives of the relevant association:

We received more than 100,000 responses to the consultation: 10,586 responses from small retailers, including the pre-prepared postcards or e-mails made available to respondents from third parties; 11 responses from large retailers; 21 responses from retail industry representative organisations, including trade organisations; and seven responses from organisations that receive funding directly from the department for programmes of work relating to smoking. We received 85,000 responses from members of the public, which also included pre-prepared postcards or e-mails made available by third parties.

The noble Lord said that the consultation was unsatisfactory in terms of Asian shopkeepers and the Equality and Human Rights Commission. I have dealt with the correspondence on this issue and have invited representatives of the relevant association to a meeting tomorrow. However, the organisation which was helping them to submit letters to the Equality and Human Rights Commission was funded by the tobacco industry. In view of the Government's policy on this matter, I cannot meet with an organisation which is funded directly by the tobacco industry. However, as I want to take their concerns on board, I have invited them to join my larger meeting tomorrow, if they wish to do so.⁸²

The Earl of Listowel argued that clause 21 was a necessary health measure to protect children.⁸³ Other Members, including Baroness Meacher, also endorsed the Government's evidential case:

I am impressed by the point-of-sale evidence. The fact is that it has taken over as the main marketing tool for cigarettes. If it had no effect on demand, would tobacco companies really be so desperate for the Government not to introduce this change? That seems to be the best evidence that this is a good measure and will reduce the demand for cigarettes. I find the absolute horror on the part of the tobacco companies that this might happen quite impressive. There is now research to show that point-of-sale marketing influences young people. It is horrifying that 46 per cent of UK teens are aware of tobacco marketing at point of

⁸⁰ HL Deb 9 March 2009 cc385-6GC

⁸¹ HL Deb 5 March 2009 c368GC

⁸² HL Deb 9 March 2009 c397GC

⁸³ HL Deb 5 March 2009 c378GC

sale, which surely must influence what they are doing. I do not believe that it does not: I believe that it does.⁸⁴

Commercial freedoms

During the stand part debate on clause 21, Earl Howe argued that if tobacco companies are prevented from engaging in commercial competition at point of sale, they would resort to competing on price, with the consequence of cigarettes becoming cheaper.⁸⁵ Other Members also challenged the logic of allowing retailers to legally sell tobacco products but prohibiting them from displaying the products inside their shop premises. Lord Borrie spoke of the likely effects on competition of a ban on tobacco displays:

In an attempt to claim that they are conscious of the damaging effects of the measure on smaller retailers, the Government have said that they will introduce the ban for large outlets in 2011 and for smaller retailers only in 2013. That, in itself, distorts competition between the big and the small. What do the Government think they are doing interfering in normal competition between different types of retailers in that way? In any case, there is little doubt that the restrictions on display will adversely affect competition generally, especially as display is one of the few ways left for the consumer to know what brands are available.⁸⁶

Lord Stoddart of Swindon argued that if such a precedent were established, the display of other products might also be at risk, such as certain unhealthy foods and alcohol.⁸⁷

However, Lord Rea and others challenged this view. They argued variously that tobacco products had to be treated differently because of the damaging effects on health of smoking.

Proportionality – the impact on small retailers

Some Members argued that if a ban on tobacco displays were approved it would cause immense collateral damage to small corner shops. Earl Howe said the level of concern was very high; he highlighted the fact that a year ago, before the proposals were published, the Tobacco Retailers Alliance had 16,000 members; it now has 26,000.⁸⁸

However, Lord Faulkner of Worcester questioned whether the profitability of small retailers was more important than reducing the take up of smoking among young children; in any event, he argued that there was no evidence that the profits of tobacconists would go down since they would have the opportunity to diversify.⁸⁹ Baroness Young of Old Scone was also of the view that smoking was one of the biggest health challenges and she did not accept that a ban on tobacco displays would have such a detrimental effect on small shops.⁹⁰

⁸⁴ HL Deb 5 March 2009 c377GC

⁸⁵ HL Deb 9 March 2009 c399GC

⁸⁶ HL Deb 5 March 2009 c369GC

⁸⁷ HL Deb 5 March 2009 c372GC

⁸⁸ HL Deb 5 March 2009 c367GC

⁸⁹ HL Deb 5 March 2009 c371GC

⁹⁰ HL Deb 9 March 2009 c390GC

Baroness Thornton spoke specifically on the question of proportionality. She argued that international experience had shown that removing tobacco displays need not be costly; by her estimation, following the Canadian example, around £8.40 per square foot of display covered. Given that the small independent newsagents had a minimum display area of 1 metre by 1.3 metres, she estimated the cost could be as little as £120, with a display of 25 square feet being covered at a cost of around £210. Her point was that this was much less than the estimated average cost of £1,000 a store allowed in the Impact Assessment that accompanied the Bill. She argued that, in any event, experience in Canada had shown that the tobacco industry continued to fund the cost of tobacco gantries even after a prohibition on display had been implemented.⁹¹ She reasoned that, since the legislation would not commence until 2011 for larger stores and 2013 for small ones, changes to gantries to remove tobacco displays could be made in the normal refurbishment cycle for many stores. An extra two years' lead-in time would enable small shops to take advantage of innovative solutions developed by the larger stores.⁹²

Baroness Thornton did not accept that removing tobacco displays would impact on businesses by reducing footfall trade; that is the sale of other items such as newspapers and sweets to customers who buy cigarettes. She thought this was being unrealistic for three reasons. First, people who chose to smoke would continue to buy cigarettes and secondary purchases even after tobacco is removed from display. Secondly, the provisions of the Bill would apply equally to all tobacco retailers, so it would not favour one over another. Finally, small retailers would diversify their businesses to take account of customers' changing spending patterns.⁹³

During the stand part debate on clause 21, Lord Laird stressed that the Northern Ireland Assembly had already passed a motion, supported by all parties, to prohibit tobacco displays in shops at the first available opportunity, and that this proposal had been supported by small retailers.⁹⁴ Although Earl Howe later challenged the extent to which retailers supported the proposal, Lord Laird argued that his basic point was still valid: that Northern Ireland (rather than Canada or Iceland) could be used as an example by those supporting a ban on tobacco displays.⁹⁵

It was eventually agreed in Grand Committee that clause 21 should stand part of the Bill, although a number of Members made it clear that they would table further amendments to it.

b. Amendments in Grand Committee

In addition to a stand part debate, clause 21 was also the subject of a number of probing amendments tabled in Grand Committee.

⁹¹ HL Deb 9 March 2009 cc394-5GC

⁹² HL Deb 9 March 2009 c396GC

⁹³ HL Deb 9 March 2009 cc394-396GC

⁹⁴ HL Deb 5 March 2009 cc362-3GC

⁹⁵ HL Deb 9 March 2009, cc381-384GC

Earl Howe moved amendment 82 which was essentially a probing amendment on how the proposal for so-called ‘requested’ tobacco displays would work in practice. Earl Howe thought the proposal raised a number of unanswered questions:

[...] in the regulatory impact assessment, the Government have suggested that a curtain could be used to hide tobacco products. If a parent requests to view tobacco products at a supermarket but is accompanied by their child, is the retailer allowed to comply with the request? If a customer asks for a tobacco product in a small shop while schoolchildren are present, what should the retailer do? In a busy supermarket it is also likely that requests for tobacco will be made every minute, or even more frequently at peak times, and displays will therefore be almost permanently on view, unlike in small shops. Would that be legally acceptable? If a retailer were to employ someone aged over 18 whose job it was to peruse products over long periods, would this be a means of circumventing the legislation? How long would a reasonable period be for viewing products prior to purchase? In thinking about questions of this kind, I cannot help feeling that the provisions here are a nonsense; they will be unworkable.⁹⁶

The practicability of the ‘requested display’ measure was also questioned by Lord Borrie, Lord Stoddart of Swindon and Baroness Cumberlege.

Baroness Thornton sought to clarify in more detail how a ‘requested tobacco display’ would work under clause 21, reiterating many of the points raised in the earlier stand part debate on the same clause.⁹⁷ The amendment was withdrawn.

Amendment 85 and consequential amendments 108, 110 and 111, tabled by Baroness Barker, would have removed the power for the appropriate Minister to regulate price lists. However, Baroness Barker explained that her real reason for tabling the amendment was to probe the Government’s reason for seeking to remove the display of prices for tobacco products.

In stating the Government’s position, Baroness Thornton argued that without this provision in the Bill there was a real risk that if displays were removed, the tobacco industry would next turn its attention to exploiting price lists as a means of promoting tobacco products. She argued that the Government was trying to find a balance between price lists not being used to promote or advertise tobacco products and the reasonable requirement that price lists should be available, seen and easily comprehensible.⁹⁸ In withdrawing her amendment, Baroness Barker stressed that her main concern in raising the issue was the smuggling of illegal tobacco products.⁹⁹

Earl Howe moved amendment 86 which sought to amend the *Children and Young Persons Act 1933* to make it an offence to buy or attempt to buy tobacco on behalf of an individual aged under 18 (often referred to as proxy purchasing). Earl Howe agreed that the Government’s underlying aim to bear down on the prevalence of smoking by children was wholly right in public health terms. However, he thought the two main measures -

⁹⁶ HL Deb 5 March 2009 c355GC

⁹⁷ HL Deb 5 March 2009 c357GC

⁹⁸ HL Deb 5 March 2009 c360GC

⁹⁹ HL Deb 5 March 2009 c363GC

the ban on tobacco displays and restrictions on vending machines - impinged on personal and commercial freedoms. He could not see how the Government could justify implementing clause 21 unless it could say it had done as much as it could to make the current law effective. He argued that making proxy purchasing an offence was just one way of making the current law more effective.¹⁰⁰

A number of Members supported the principles underlying the amendment. For instance, Baroness Coussins argued that if an offence of proxy purchase was a good idea in relation to alcohol, it must surely be a good idea in relation to smoking.¹⁰¹

Responding to the amendment, Baroness Thornton said that such a law would be difficult to enforce, as illustrated by the fact that prosecutions for proxy purchasing of alcohol are rare. She argued that trading standards services would need formal authorisation to undertake surveillance. She also argued that other means of obtaining cigarettes were more commonly used by underage people, stating that in 2006 almost 80 per cent of children aged between 11 and 15 bought their own cigarettes from a shop.¹⁰²

Undeterred, Earl Howe argued that creating parity between alcohol and tobacco in the way that the law treats proxy purchasing would send a powerful message to children, parents and others.¹⁰³ However, amendment 86 was withdrawn.

c. Amendments tabled in report stage

A number of amendments to clause 21 were tabled during the Health Bill's report stage. For instance, amendment 42 sought to limit tobacco displays to one packet only for each tobacco product offered for sale in a shop. Lord Borrie described his amendment as a compromise 'to give the Government the opportunity to come up with a less draconian proposition than is embodied in clause 21'.¹⁰⁴

Baroness Thornton argued that amendment 42 would result in only a partial ban of tobacco displays and as such would not only fail to achieve the public health benefits sought but would also increase the regulatory burden. She also agreed with those who had argued against the amendment on the basis that a partial display would provide a clear incentive for the tobacco industry to make the most of what display it had left by developing new brands to fill that display space:

We know from the trade press that the number of brand variants for 15 of the most common brands in the UK increased from 74 in 1998 to 95 in 2003—an increase of 28 per cent over five years. However, in the five years following the ban on tobacco advertising, the number of brand variants increased from 95 in 2003 to 172 in 2008—a much larger increase of more than 80 per cent. In other words, in just 10 years, the number of brand variants more than doubled.

¹⁰⁰ HL Deb 9 March 2009 cc403-404GC

¹⁰¹ HL Deb 9 March 2009 c405GC

¹⁰² HL Deb 9 March 2009 cc407-8GC

¹⁰³ HL Deb 9 March 2009 c409GC

¹⁰⁴ HL Deb 6 May 2009 c566

The amendment would provide a clear incentive for companies to develop new brand variants so that they could increase the number of their products on view and have a greater impact than their competitors. That could result in larger displays.¹⁰⁵

Lord Borrie also spoke to amendment 43, which would allow tobacco displays in licensed or club premises where access was restricted to individuals aged 18 or over.¹⁰⁶ However, Baroness Thornton argued that this amendment missed altogether the second public health objective of Government policy - that is, to support people who smoke but want to quit.¹⁰⁷ Amendments 42 and 43 were both withdrawn.

Earl Howe moved amendment 44 which was, to all intents and purposes, another probing amendment on the 'requested displays' provisions of clause 21. He also spoke to amendment 45. Earl Howe reiterated many of his earlier comments in Grand Committee on how the requested display provision gave rise to a number of practical issues. His point was that Parliament had no detailed answers because the draft regulations had not yet been published. He argued that Ministers may give assurances that it will not be an offence to make a requested display to an adult who happens to have a child with them, but it is impossible to know what difficulties may arise until the regulations are seen.¹⁰⁸ Earl Howe also questioned whether requested displays would be the only exemption to the general ban on tobacco displays. For instance, he thought that duty-free sales of tobacco at airports must surely be a candidate for exemption on the basis that they provide essential revenue to UK airports.

In response, Baroness Thornton reiterated that it should not be an offence for shopkeepers to show adults a tobacco product before they buy it or as they make their purchase.¹⁰⁹ She also confirmed that the Government was already working with representatives of the airport duty-free tobacconists, as well as other retail organisations, to ensure that regulations take account of their particular circumstances.

Amendment 44 was withdrawn and amendment 45 was not moved.

However, in addition to these probing amendments, Earl Howe moved amendment 46 which sought to expunge clause 21 altogether from the Bill. This amendment effectively led to another lengthy debate on whether clause 21 should stand part of the Bill. It is fair to say that many Members expressed the same views on clause 21 as in previous debates. However, a few new points were made.

Earl Howe conceded that in Saskatchewan in Canada youth smoking had declined since 2002 when the tobacco display ban was brought in. He argued, however, that this was not persuasive evidence since the figures for the rest of Canada also showed a decline in youth smoking:

¹⁰⁵ HL Deb 6 May 2009 cc564-566

¹⁰⁶ HL Deb 6 May 2009 c558

¹⁰⁷ HL Deb 6 May 2009 c566

¹⁰⁸ HL Deb 6 May 2009 cc566-568

¹⁰⁹ HL Deb 6 May 2009 c568

Youth smoking has gone down throughout Canada in the past few years; but in places such as Quebec, British Columbia, Ontario and Nova Scotia, which until very recently had no display ban, the rate of decline in youth smoking has been much steeper than in places in which a ban has been in force. That fact makes it very difficult to conclude, even tentatively, that the display ban in Saskatchewan was responsible for the decline in smoking.¹¹⁰

He also highlighted other factors that had contributed to Iceland's fall in youth smoking:

Iceland introduced a display ban in 2001. Various statistics are available, some of which suggest that there has been a decline in smoking prevalence among the young since the ban was brought in, but what tends not to be mentioned is that, simultaneous to introducing the display ban, the Icelandic Government did three other things; they put up the price of cigarettes, introduced restrictions on smoking in public places, and introduced a positive licensing system for retail sales. Again, therefore, one cannot point to the display ban and say that it has brought about an improvement in smoking prevalence among the young. The statistics, in any case, do not tell a clear story.¹¹¹

Earl Howe questioned the evidence of Cancer Research UK and Professor Gerard Hastings and the claim that there was a link between brand awareness among young people and smoking behaviour. Instead, he drew on the studies of Elaine Goddard and Clive Smee (former chief economic adviser to the Department of Health). He said that the Goddard study had found that the major predictors of whether an adolescent became a smoker were socio-economic (i.e. family circumstances), whilst the Smee study had found that there was no statistically significant relationship between tobacco advertising and the prevalence of adolescent smoking.¹¹²

Baroness Barker, in setting out the formal position of her party, explained that although the Liberal Democrats had supported a number of amendments in Grand Committee, such as an amendment to have a comprehensive health strategy and an outright ban on tobacco vending machines, there would be a free vote in respect of clause 21. Personally, she was of the view that the evidence for clause 21 was unreliable:

The evidence from Canada and Iceland is extremely weak, and that is the main evidence that has been used by the cancer charities. I am afraid that the fact that it is not convincing has not necessarily been put to me by tobacco manufacturers, who I have the pleasure of not meeting. The NHS Confederation itself said that those studies cannot prove causation. That is a key stumbling block for me because of something that has not been mentioned so far. People have drawn parallels with other products, and I have found many of those parallels spurious. What has concerned me is the number of young people who make their way to finding distributors of other addictive drugs. The policy of "out of sight" has not worked for other drugs such as cannabis and heroin. Noble Lords have not mentioned the fact that, between 2001 and 2007, sales of smuggled tobacco in Canada increased by 2,000 per cent.

¹¹⁰ HL Deb 6 May 2009 c570

¹¹¹ Ibid

¹¹² HL Deb 6 May 2009 c571

The one organisation that I have met is ASH. I have been trying to find evidence not only that this strategy will deter young people from buying products in shops but that it will not drive them into the hands of the illegal trader. For me, that is a major consideration. Having thought about this every day for several months, I have on balance come to the conclusion that the noble Earl, Lord Howe, is right. My colleagues, as noble Lords have heard, disagree strongly with me. It is their right to do so. I respect them, and I respect Members on other Benches who disagree with those on their Front Benches. We will have a free vote. I do not know what the outcome will be [...] I simply hope that when any Government present serious public health proposals to this House in the future, they can do so on the basis of independent and reliable evidence. That is what we have missed all the way through.¹¹³

Lord Naseby challenged Baroness Thornton on her earlier estimate given in Grand Committee of £120 as the cost of covering-up gantries. He argued that representations from a large number of stores indicated, that in their judgment, the costs would be between £1,500 and £2,000.¹¹⁴

Conversely, a number of Members, including Baroness Northover, Baroness Coussins, Baroness O’Cathain, Lord Judd and Lord Patel said that clause 21 should stand part of the Bill as an important health measure. Lord Faulkner of Worcester argued that the evidence from the research of Professor Gerard Hastings was rigorous and stood-up to scrutiny. On the issue of proportionality, he said that the prohibition of point of sale displays would not take effect until 2013 for small retailers, given them adequate lead-in time to prepare. He also thought it feasible that a low-cost solution to altering shop gantries would be found.¹¹⁵

Lord Rea made the point that tobacco should be highly regulated and available only through licensed outlets.¹¹⁶ Baroness Tonge was not only convinced by the arguments of Professor Hastings, particularly his surveys of young people’s behaviour, but also by the fact that a prohibition on tobacco displays was being supported by every possible medical organisation.¹¹⁷

Facing yet another challenge to clause 21, Baroness Thornton said the Government simply did not want cigarettes in corner shops alongside sweets and magazines, given the susceptibility of children to promotions.¹¹⁸ She confirmed that there would be a full public consultation on draft regulations.¹¹⁹ In answer to Lord Naseby’s specific point on the true cost of removing tobacco displays, Baroness Thornton said:

We have not misled the House but given information in good faith, based on quotes received by the Department of Health from the vice-president of a Canadian company with experience of how Canada removed tobacco displays. The company told us that the cost of a permanent solution for a single business

¹¹³ HL Deb 6 May 2009 cc589-590

¹¹⁴ HL Deb 6 May 2009 c574

¹¹⁵ HL Deb 6 May 2009 cc578-579

¹¹⁶ HL Deb 6 May 2009 c586

¹¹⁷ HL Deb 6 May 2009 cc587-588

¹¹⁸ HL Deb 6 May 2008 c590

¹¹⁹ HL Deb 6 May 2009 c593

with 25 square feet of display, with magnetic flaps applied to existing gantries, was £8.47 per square foot. It would total £212 to remove that much display. The same quoted costs should be as little as £120 for a minimal display of around 14 square feet in a very small, independent newsagent. Those costs have been used to illustrate that other countries have used low-cost solutions; they are not, for example, the basis for the analysis of our impact assessment, which uses a more generous figure of £1,000 per shop, but have been used to combat the alarmist figures circulated by the tobacco industry.¹²⁰

There was a division on amendment 46 and whether clause 21 should stand part of the Bill, which the Government won by a margin of 94 votes.

3. Clause 22 – prohibit or restrict vending machines

a. *Debate and amendments in Grand Committee*

In Grand Committee there were strong opposing opinions in respect of clause 22. Amendments were moved either to ban tobacco vending machines altogether or to limit the power of the appropriate Minister so that they could regulate but not prohibit the use of machines. In giving the Government's position, Baroness Thornton said that in promoting clause 22 the Government was trying to take the middle road.¹²¹

For instance, amendment 87, moved by Lord Crisp, sought to ban the sale of tobacco from vending machines altogether in England and Wales. Lord Crisp also spoke to the other amendments in the group (amendments 89, 91 and 96), the main purpose of which was to create an absolute duty on the appropriate ministers to ban tobacco vending machines outright. If the Government was not minded to go as far as prohibiting tobacco vending machines, four of the amendments provided that the vending machines could be prohibited with a small number of exceptions. Amendments 97 to 103 would make equivalent changes to clause 23, in relation to the regulation of tobacco vending machines in Northern Ireland.

In moving the amendments, Lord Crisp said he understood the Minister's dilemma in seeking the correct balance between the rights of individuals to do something that is legal, the rights of businesses to carry on a legal trade and the Government's wish to help people to give up smoking and to stop children from purchasing cigarettes. He argued that this was a difficult balance and in promoting clause 22 the Government was in danger of coming to a poor compromise.¹²² He argued that it was relatively easy for children to get access to tobacco vending machines; a 2007 survey had found that 17% of children aged between 11 and 15 had used vending machines as their usual source of supply.¹²³ Lord Crisp also referenced another 2008 survey that showed that only 5 per cent of adults had used a vending machine in the past 6 months. He said that the argument against vending machines was simple: they made it much more convenient for children to purchase cigarettes, but if they were not there selling tobacco, they would not

¹²⁰ HL Deb 6 May 2009 cc592-593

¹²¹ HL DEB 9 March 2009 c423GC

¹²² HL Deb 9 March 2009 c410GC

¹²³ HL Deb 9 March 2009 c410GC

disadvantage many adults who in any case have other sources of supply.¹²⁴ Lord Crisp made three further points. First, that to ban tobacco vending machines would be in line with other legislation dealing with products that are banned to children (e.g. alcohol cannot be sold from a vending machine). Second, 22 countries in Europe do not permit the sale of tobacco from vending machines. Third, public opinion would probably support his amendment; he quoted figures that 65 per cent of the general public would support a prohibition on the sale of tobacco in vending machines.¹²⁵ He conceded that businesses who manufacture and maintain tobacco vending machines might suffer, but he thought it might be possible to put other products in the machines. Whilst acknowledging that a number of countries, including Germany, had introduced an age ID card system, Lord Crisp said he did not underestimate the skill of children to get around this. He concluded:

In order to preserve vending machines we are trying to set up systems which will not work very effectively and will have loopholes that will allow children still to be able to purchase cigarettes. We are making life much more complicated than we need to when a simple solution is available to the Minister: that is, to prohibit the sale of tobacco in cigarette machines. Adults who are disadvantaged can easily go somewhere else, and that may well benefit the small corner shop. She does not need to be brave to go down this route because the amendment is in line with all other government legislation on this kind of issue, in line with much of what our European neighbours do and, so far as we can tell, in line with public opinion.¹²⁶

At the other extreme, Lord Naseby moved an amendment to clause 22 that tobacco vending machines should be regulated but not prohibited. In moving amendment 88, Lord Naseby made two key points. First, he argued that the main source of cigarettes for young people was not from vending machines but from other young people or buying them illicitly from people who had smuggled cigarettes into the country and were selling them off cheaply at car boot sales and so on. He argued that such sources should be tackled if the Government wants to reduce smoking among young people. Secondly, he argued that stricter regulation of tobacco vending machines could considerably improve the compliance rates. By way of illustration he mentioned the success of Trading Standards in London, who had recently carried out a vigorous enforcement action, including personal visits to those establishments whose compliance with underage legislation was poor. Lord Naseby's point was that good, strict regulation could lead to a high level of compliance.¹²⁷

Earl Howe spoke to amendment 90 which sought to limit regulation-making powers to only those tobacco vending machines likely to be accessed by children. However, amendment 90 was effectively a probing amendment on why the Government had provided in clause 22 for the possibility that tobacco vending machines could be banned in the future. Earl Howe said he supported clause 22 in its aim to regulate the use of tobacco vending machines in respect of children; indeed, he argued that more should be done to make it even harder for children to access the machines through, perhaps the

¹²⁴ HL Deb 9 March 2009 cc410-411GC

¹²⁵ HL Deb 9 March 2009 c411GC

¹²⁶ HL Deb 9 March 2009 c413GC

¹²⁷ HL Deb 9 March 2009 cc420-421GC

use of ID cards, ID coin systems and remote control.¹²⁸ However, he did not support measures that would prevent adults from purchasing cigarettes from vending machines, arguing that there are locations which are accessible only by adults.¹²⁹

Responding to Lord Crisp's group of amendments, Baroness Thornton said that whilst the Government agreed with the principle that underage sales from tobacco vending machines should be prevented, at the moment it was of the view that it should take a proportionate approach, giving vending machine operators and owners an opportunity to prevent underage sales before prohibiting tobacco sales altogether.¹³⁰ She also confirmed that in recognition of the importance of clause 22, all regulations relating to vending machines in England, Wales or Northern Ireland would be subject to approval by affirmative resolution of Parliament, the National Assembly for Wales or the Northern Ireland Assembly, so ensuring an appropriate opportunity for scrutiny and debate.¹³¹

In response to Lord Naseby's amendment, Baroness Thornton said that since the restrictions would not apply until 2011, it was the Government's view that those who operate vending machines, or have them on their premises, have from now until at least 2013 to show that they are able to stop children buying cigarettes from their machines.¹³²

Baroness Thornton thought that Amendment 90 would be difficult to monitor and enforce:

First, how would we know which premises to exclude? There would need to be a process for premises to provide the necessary evidence and assurance that they consistently operate robust and reliable age-limiting policies and procedures whenever the premises is open to the public, and I am aware that club premises primarily used in the evenings or later at night may also be available for use during the daytime, which might mean that younger people are allowed access.

Secondly, there is the question of enforcement. Who will be responsible for deciding whether the premises were liable under the law or not? Local trading standards officers, perhaps, which would add to the burden and work of local authorities. Thirdly, what would happen if the age policy changed in the club? Would we need an offence of failure to notify a change in circumstances, and again who would keep track of such changes and take on the extra work that this would involve? The system would be rather difficult and burdensome on local enforcement authorities, and in addition it would be inflexible. We found that allowing such exemptions was proving ineffective in reducing underage tobacco sales. Under this amendment, our hands would be tied and we would be unable to bring those premises into the scope of the regulations without further primary legislation.¹³³

Amendments 87 and 88 were withdrawn and amendment 90 was not moved.

¹²⁸ See section V (B) of this Paper for an explanation of each of these systems

¹²⁹ HL Deb 9 March 2009 cc421-422GC

¹³⁰ HL Deb 9 March 2009 c418GC

¹³¹ HL Deb 9 March 2009 c424GC

¹³² HL Deb 9 March 2009 c423GC

¹³³ HL Deb 9 March 2009 c424GC

b. Debate and amendments during report stage

Clause 22 was debated yet again during the Bill's report stage. Amendment 47 was moved by Baroness Finlay of Llandaff with the sole purpose of banning tobacco vending machines altogether. In outlining her reasons for the amendment, Baroness Finlay drew on 2006 statistics from the British Heart Foundation:

It is said that less than 1 per cent of tobacco sales are from vending machines. The British Heart Foundation estimated that in 2006, more than 46,000 children acquired their cigarettes from vending machines. Forty-five million cigarettes were sold to 11 to 15 year-olds through vending machines. There are 22 countries in Europe that have already taken the step of banning vending machines. Banning vending machines will not restrict smokers' choice at all; in fact, it will support those small shopkeepers on whose behalf we have previously heard arguments.

If someone is desperate to get their packet of cigarettes and there is not a vending machine in the club, they will go to the small local corner shop, most of which are open until late at night. However, the reality is that among adults, only about one in 20 uses a vending machine. Underage children and teenagers can easily obtain cigarettes from vending machines. They are meant to be installed in the eyesight of whoever is manning the bar in a pub, but "within the eyesight" sometimes means not facing the majority of customers and serving the majority of customers.¹³⁴

Lord Walton of Detchant supported the amendment. He was persuaded by the evidence from a recent survey in the north-east of England that showed that child smokers as young as 11 were found to be able to buy cigarettes from vending machines. He argued that legal measures to stop children purchasing cigarettes from vending machines were being widely flouted.¹³⁵ Other Members also supported the amendment, including Baroness Barker, who had not supported clause 21 on division because she thought the evidence was inadequate, but took the opposite view in respect of clause 22:

Unlike the previous debate, the evidence base here is quite clear; in fact, I will add to it. A wholly unscientific poll of every adult smoker I have spoken to in the past month has come up with a 100 per cent result: they all think that vending machines are a complete anachronism. They belong to the time when the whole of Wales shut on a Sunday. Well, it no longer does, and all they therefore are is, as other noble Lords have said, a way for young people to get around that scrutiny and supervision which some of us believe is important in cigarette transactions.¹³⁶

On report, as in Grand Committee, Baroness Thornton argued against an outright ban of tobacco vending machines. She said that the Government wanted to be proportionate in its response to the serious problem of young people accessing tobacco from vending machines. She argued that age-restriction mechanisms applied to vending machines could prevent underage access to cigarettes, while maintaining the source of cigarettes

¹³⁴ HL Deb 6 May 2009 cc597-598

¹³⁵ HL Deb 6 May 2009 c598

¹³⁶ HL Deb 6 May 2009 c599

for adults. However, she reiterated that should underage sales from vending machines remain a problem after 2013, the Government would move to ban them.¹³⁷

There was a division on amendment 47 which the government won by 48 votes.

4. Plain Packaging

There is no clause in the Bill to impose plain packaging of tobacco products. However, during both Grand Committee and report stage Lord Patel moved amendments to enable the Secretary of State through regulations to impose plain-packaging requirements on all tobacco products. On both occasions the amendments were withdrawn but not before they had provoked a great deal of debate.

In explaining why he had tabled amendment 105 in Grand Committee, Lord Patel argued that tobacco packaging was an important part of tobacco marketing, communicating attitudes such as style and sophistication to the would-be smoker - in short, it was a form of advertising:

Tobacco branding should be prohibited because it is plainly advertising. It recruits young people into a lifetime addiction and misleads smokers about the relative safety of different brands. So is it advertising? According to legal opinion from Sir Richard Buxton, a former Lord Justice of Appeal, the packaging being used by the tobacco industry meets the definition set out by the 2003 EU directive for tobacco products, which is,

“any form of commercial communication with the aim or direct or indirect effect of promoting tobacco products”.

Since the advertising ban of 2002, the pack has acquired even greater importance as a tool that the tobacco industry uses to recruit smokers to replace those who have quit or died. The ban on advertising therefore did not lead to an end of the influence of the cigarette brand but rather the displacing of its potency to the cigarette pack.¹³⁸

Lord Patel argued that the use of branding, particularly the colours or livery on the packs, misled smokers into thinking that their favoured brand or brand variant was a safer product than other brands.¹³⁹ He explained that he had tabled the amendment in order that young people and smokers may be given a real, free and informed choice about whether they smoke; branding had to be prohibited as it inhibits that choice.¹⁴⁰

Lord Walton of Detchant, who had added his name to the amendment, said that cigarette packaging had been called the ‘silent salesman’. He made the point that, since 2002, the number of cigarette brand variants had more than doubled as tobacco companies increasingly use the pack itself as a promotional tool.¹⁴¹ A number of other Members also supported the amendment, including Lord Campbell-Savours who argued that the

¹³⁷ HL Deb 6 May 2009 cc599-600

¹³⁸ HL Deb 11 March 2009 c440GC

¹³⁹ HL Deb 11 March 2009 c441GC

¹⁴⁰ HL Deb 11 March 2009 c442GC

¹⁴¹ HL Deb 11 March 2009 c442GC

introduction of a standardised, single-coloured pack for all cigarettes with the name of the manufacturer in very small print on the side would isolate imports and help those who want to help others to stop smoking.¹⁴²

However, Baroness Golding and others spoke against the amendment. She thought that tobacco manufacturers had already met requirements to put government health warnings and nicotine and tar contents on a large part of the packet and now it was being proposed that plain packaging should be introduced. She argued that this was an inconsistent approach.¹⁴³ Lord Borrie argued that such a measure would be contrary to the harmonised EU and international system of trademark protection.¹⁴⁴ Lord Naseby, also questioned the legality of introducing plain packaging for tobacco products:

[...] I have done a little delving on the legal situation, and it would be helpful for the Committee to understand the legal position. Prohibiting the use of trademarks—in other words, brands—on tobacco packaging would, first, impose restrictions on the registration and use of trademarks based on the nature of the goods and services for which such marks are registered, contrary to the harmonised European international system of trademark protection. The noble Lord has already mentioned the European Court of Human Rights and TRIPS. Secondly, it would be unlawful interference with the human right, established by the European Court of Human Rights, to free speech between the manufacturer and the consumer of a product. Thirdly, it would constitute a barrier to the functioning of the internal market, which is contrary to EU law. Fourthly, it would undermine the very basis of intellectual property rights, which are, as the noble Lord said, of a global nature and of great significance and which need to be protected internationally, with implications far beyond the tobacco industry.¹⁴⁵

Lord Naseby was of the opinion that plain packaging regulations would amount to a deprivation of a manufacturer's valuable property rights, in the trade mark, copyright and designs incorporated in the packaging as well as in the good will arising in the resulting brand, which would be contrary to Article 1 of the First Protocol of the ECHR. He argued that such deprivation would be unlawful and would require the payment of compensation. A further argument made by Lord Naseby was that plain packaging would inevitably inhibit the ability of manufacturers to communicate with consumers in relation to a lawful product and, in turn, inhibit the ability of consumers to receive information. He argued that this would be an infringement of Article 10 of the ECHR, which recognises free speech, including commercial free speech, as a fundamental right.¹⁴⁶ As a final point, Lord Naseby argued that if plain packaging was introduced, competition between brands would be based on price and tobacco smuggling would increase.¹⁴⁷

In response, Lord Patel stated that there was a provision in the 1994 agreement on Trade-related Aspects of Intellectual Property Rights (known as TRIPS) for governments

¹⁴² HL Deb 11 March 2009 cc444GC

¹⁴³ HL Deb 11 March 2009 cc444-445GC

¹⁴⁴ HL Deb 11 March 2009 cc445-446GC

¹⁴⁵ HL Deb 11 March 2009 c445GC

¹⁴⁶ HL Deb 11 March 2009 c447GC

¹⁴⁷ HL Deb 11 March 2009 c447GC

to act to protect public health and to provide limited exceptions to the rights conferred by a trademark where that is appropriate:

As I interpret it, that means that the rights of trademarks are subject to the wider public good and, therefore, can be constrained when shown to benefit public health.¹⁴⁸

Whilst acknowledging this provision in TRIPS, Lord Naseby thought care had to be taken before ‘creating a pariah group of products’. He also emphasised that the law, as it stands would require a great deal of evidence to meet the public interest test.¹⁴⁹

Baroness Thornton set out the Government’s position on plain packaging for tobacco products:

The Government’s position on plain packaging was set out by the Secretary of State in a Written Ministerial Statement made in another place that stated:

“We believe that more needs to be done to develop our understanding of how the packaging of tobacco products influences smoking by both adults and young people. The Government will therefore keep tobacco packaging under close review”.—[*Official Report*, Commons, 9/12/08; col. 47WS.]

That review, I suspect—I will confirm this if the Committee wishes—will address the points raised by my noble friend Lord Borrie and the noble Lord, Lord Naseby. We have committed to developing the evidence base on whether selling tobacco products in plain or generic packaging could change behaviour and, in particular, protect young people from tobacco industry marketing. However, we consider it premature at this stage to take this major step. To be completely clear, the UK is perfectly capable of being in the vanguard of new movements in public health, but I note that no other jurisdiction in the world has yet introduced such legislation. We will work hard to ensure that the emerging evidence on plain packaging is kept under review, and the Government’s policy will change if and when that is appropriate. I hope that, in the light of the Government’s commitment to develop the evidence on plain packaging and to keep the issue of tobacco packaging under review, the noble Lord will feel able to withdraw the amendment.¹⁵⁰

In effect, before considering a measure to introduce plain packaging for tobacco products, the Government wants to strengthen and build on the evidence base in respect of the impact of packaging.

Lord Patel moved a very similar amendment during the Bill’s report stage. Amendment 60 sought to provide the Secretary of State with powers to make regulations (following consultation) which would restrict the use of branding, including the shape and colour of tobacco products and their packaging.¹⁵¹ Again, this provoked a lengthy debate on the issue of plain packaging with most Members reiterating the arguments they had previously expressed in Grand Committee. However, Baroness Thornton did confirm that

¹⁴⁸ HL Deb 11 March 2009 c448GC

¹⁴⁹ HL Deb 11 March 2009 c448GC

¹⁵⁰ HL Deb 11 March 2009 cc451-452GC

¹⁵¹ HL Deb 6 May 2009 cc603-604

evidence gathering on plain-packaging would be included in the Government's new tobacco control strategy.¹⁵²

5. Guidelines for engagement with the tobacco industry

In Grand Committee, Baroness Northover moved amendment 107 to give Government the power to require tobacco manufacturers to disclose the scale and scope of their marketing activities. She said that this information was essential if the Government was to identify and develop effective policy responses to marketing tactics used by the industry to get round the ban on advertising, promotion and sponsorship. She proposed that all the information could be published in aggregate at industry level, as in the case of the US and Canada, rather than identifying individual companies.¹⁵³ Baroness Northover argued that, whilst the TAPA 2002 had dealt effectively with the conspicuous marketing which is generally described as 'above the line' advertising, it failed to deal with 'below the line' advertising such as price promotions, retailer incentives and point-of-sale display, and the evidence would suggest that there had been an expansion of below-the-line promotional activity.¹⁵⁴

Baroness Northover also moved amendment 107B, to review and publish guidelines on the Government's interaction with the tobacco industry. She argued that both amendments 107 and 107B would help the government to adhere fully to Article 5.3 of the WHO Framework Convention on Tobacco Control. This states that when parties to the treaty are setting and implementing public policies related to tobacco control, they should "act to protect these policies from commercial and other vested interests of the tobacco industry".¹⁵⁵

Lord Faulkner of Worcester and others spoke in support of both amendments. However, Lord Stoddart of Swindon and others argued that the tobacco industry had every right as a legal organisation to promote itself within the law.¹⁵⁶ Lord Naseby questioned the legality of a requirement for the tobacco industry to report all promotional activities.¹⁵⁷

Responding to Amendment 107, Baroness Thornton said she could see the arguments on both sides but, on balance, could not accept the amendment:

Experience has shown that if you clamp down on the tobacco industry in one area of promotion, it will actively look for alternative means of promotion. Knowing what promotional activities are being planned, developed and implemented by tobacco companies would clearly be an advantage and allow public health policy to keep pace with developments. On the other hand, some noble Lords vociferously said that they consider that such a requirement would go beyond the bounds of a proportionate and appropriate burden on business and be likely to compromise sensitive commercial confidences. I have to ask whether we need to ensure that

¹⁵² HL Deb 6 May 2009 c607

¹⁵³ HL Deb 11 March 2009 c457GC

¹⁵⁴ HL Deb 11 March 2009 cc457-458GC

¹⁵⁵ HL Deb 11 March 2009 cc459-460GC

¹⁵⁶ HL Deb 11 March 2009 cc463-465GC

¹⁵⁷ HL Deb 11 March 2009 c462GC

commercial confidence is protected in this area. There are arguments on both sides but, on balance, I do not feel able to accept this amendment. Nevertheless, I have listened carefully to all the points made during this debate. I would be interested to hear more on the subject and will be happy to meet noble Lords to listen further to their views on this topic.¹⁵⁸

In respect of Amendment 107B, Baroness Thornton stated that in November 2008 the Government had been involved in developing and agreeing final guidelines for the implementation of Article 5.3 of the WHO's Framework Convention on Tobacco Control. Given the nature of these new guidelines, Baroness Thornton was not convinced of the necessity for Amendment 107B and its proposal for a review and the publication of more guidelines.¹⁵⁹

Both amendments were withdrawn in Grand Committee. However, during the Bill's report stage, Baroness Northover moved amendment 61 with the similar objective of ensuring implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control.¹⁶⁰ The amendment would not prevent the tobacco industry speaking to the Government, but it would define the terms of engagement. In effect, the tobacco industry would be obliged to work within a transparent framework when communicating with the Government.¹⁶¹

In response, Baroness Thornton reiterated her earlier comments made in Grand Committee but in addition she confirmed that other Government departments would be reminded of their obligations to abide by Article 5.3 guidelines.¹⁶² The Minister also sought to reassure Lord Naseby that the guidelines were proportionate and that they would allow appropriate discussions with the tobacco industry to take place.¹⁶³

Amendment 61 was subsequently withdrawn.

6. Comprehensive tobacco strategy

In Grand Committee, both Baroness Tonge and Lord Patel moved very similar amendments. Baroness Tonge's amendment would have imposed a statutory duty on the Secretary of State to provide a report to Parliament by 2010 on a comprehensive strategy to reduce tobacco usage, to include an assessment of efforts to reduce the amount of smuggled tobacco sold in the UK.¹⁶⁴ Lord Patel's amendment would have required the publication of a comprehensive strategy by 21 July 2009, to include an evaluation programme for the strategy to be updated in the light of new evidence.

Both amendments received full support from all Members with no one speaking against them. However both were withdrawn when Baroness Thornton confirmed that, following its consultation on the *Future of Tobacco Control*, the Government intends to publish a

¹⁵⁸ HL Deb 11 March 2009 c466GC

¹⁵⁹ HL Deb 11 March 2009 c466GC

¹⁶⁰ HL Deb 6 May 2009 cc608-609

¹⁶¹ HL Deb 6 May 2009 cc608-609

¹⁶² HL Deb 6 May 2009 c609

¹⁶³ HL Deb 6 May 2009 c609-610

¹⁶⁴ Amendment 194

comprehensive strategy on the future of tobacco control later in 2009.¹⁶⁵ She also confirmed that tackling the illicit trade in tobacco would continue to be an important element of the Government's strategy:

Tackling illicit tobacco remains a priority for the Government. In November 2008, we published *Tackling Tobacco Smuggling Together*, an integrated strategy for HM Revenue and Customs and the new UK Border Agency. I recommend that noble Lords look at this updated strategy to see how ambitious the Government are with regard to reducing the amount of illicit tobacco.

The new HMRC/UK Border Agency strategic partnership will be central to the future of the strategy, which is underpinned by these key principles: making it harder for smugglers to source tobacco; disrupting the supply and distribution chain; increasing the risks and reducing the rewards of smuggling; and tackling demand by raising public awareness. Under this partnership, HMRC is committed to strengthening its work with the police, local government and health and business stakeholders to tackle the demand for and supply of illicit tobacco. The Department of Health is working with HMRC to encourage collaboration in the fight against illicit trade, particularly at the local level, and is supporting the development of a new marketing strategy aimed at changing attitudes and behaviour around illicit tobacco.

We must recognise that tobacco smuggling is a global problem requiring global solutions. A detailed international protocol on illicit trade is being developed under the World Health Organisation's Framework Convention on Tobacco Control, and HMRC is taking a lead role in its development.¹⁶⁶

7. A licensing system for the sale of tobacco

Lord Patel moved amendment 106 in Grand Committee which sought to create a licensing system for the sale of tobacco, with the effect that it could only be sold by those with a valid licence. Lord Patel argued that retailers would benefit from a clear and transparent licensing system which set out in full their responsibilities when selling a tobacco product. He thought the amendment would help restrict the availability of tobacco to young people, both through retailers and the smuggled market.¹⁶⁷

However, the amendment was withdrawn following Baroness Thornton's explanation that the Government had already consulted on this issue in 2006, following the 2004 public health White Paper *Choosing Health*. On 1 April 2009 the Government had brought into force restricted premises orders and restricted sales orders – in effect, a negative licensing scheme. Baroness Thornton said that the Government had opted for a negative licensing system because it thought it would be more cost-effective. However, she confirmed that the Government was committed to keeping the position under review and intended to report on the impact of these Orders in 2010. She said that if there was still a

¹⁶⁵ HL Deb 9 March 2009 c435GC

¹⁶⁶ HL Deb 9 March 2009 cc436-437GC

¹⁶⁷ HL Deb 11 March 2009 c453-454GC

problem with the illegal sale of tobacco to young people, the Government would reconsider the merits of an enhanced licensing scheme.¹⁶⁸

V Position in Scotland

Responsibility for tobacco advertising is devolved to the Scottish Parliament. *A Breath of Fresh Air for Scotland* was the first tobacco action plan designed specifically for Scotland, launched in January 2004. To inform the development of a new longer term smoking prevention strategy, the Scottish Government undertook a wide-ranging consultation between December 2006 and February 2007, including a proposal for further statutory controls on the sale and display of tobacco products. There were also four regional public seminars. Ministers also had a specific meeting with representatives of the Scottish Youth Parliament.¹⁶⁹

On 21 May 2008, the Scottish Government published *Scotland's Future is Smoke Free: A Smoking Prevention Action Plan*.¹⁷⁰ This new action plan sets out a programme of measures designed specifically to dissuade children and young people from smoking by reducing the affordability, attractiveness and availability of tobacco products to them. This included a commitment to introduce further statutory controls on the sale and display of tobacco products. On the same day Shona Robison, the Public Health Minister, announced plans to the Scottish Parliament to ban the open display of tobacco products in shops. She said:

[...] we propose measures to reduce the attractiveness of cigarettes, countering positive images of cigarettes in the media and at points of sale and reducing the opportunities for children and young people to be exposed to smoking.

All such measures are important but the one I would expect to have the greatest impact is our proposal to introduce legislative controls to further restrict the displays of tobacco products at point of sale.

Despite tobacco advertising having been banned in 2002, there are growing concerns that prominent and public displays of cigarettes and other tobacco products in shops and other points of sale, are undermining our wider tobacco control efforts to "denormalise" smoking by shifting cultural perceptions of smoking and discouraging young people from starting to smoke in the first place.

Children and young people have been found to be far more receptive to tobacco advertising than adults. The evidence is clear, young people exposed to tobacco advertising and promotion are more likely to take up smoking.

There is also evidence that displays stimulate impulse purchases among those not intending to buy cigarettes and, importantly, among smokers who are trying to give up.

¹⁶⁸ HL Deb 11 March 2009 c456-457GC

¹⁶⁹ The Scottish Government, Consultation on the Smoking Prevention Working Group Report: Towards a future without tobacco, 7 December 2006, <http://www.scotland.gov.uk/Publications/2006/12/07154302/0>

¹⁷⁰ The Scottish Government, *Scotland's Future is Smoke Free: A Smoking Prevention Action Plan*, 21 May 2008, <http://www.scotland.gov.uk/Publications/2008/05/19144342/0>

So giving cigarettes pride of place in shops (a much sought after position in product placement terms) sits uncomfortably with our ambition to create a climate in which everything possible is done to dissuade people, particularly children and young people, from smoking.¹⁷¹

The Minister said that whilst she recognised concerns in the retail sector about banning tobacco displays because of fears it might impact adversely on businesses, such tobacco displays were clearly being used as a promotional tool. She also told Parliament that similar moves in other countries had not seen a dramatic impact on businesses:

The protection of children and young people from the impact of tobacco must be paramount and there are instances -and this is one- when the benefits to public health of the nation must take precedence.

As we move forward with the legislative process, I will engage fully with retailers on this. International experience has shown that where tobacco display bans have been implemented it has not had a dramatic impact on local business. Following a ban on displays one of the Canadian Provinces, for example, no shops were forced to close. Moreover, experience would suggest, the cost of refit is largely borne by the tobacco wholesalers that supply tobacco products to the retail chain. The important thing is that the removal of displays does change public perceptions of smoking.¹⁷²

The *Tobacco and Primary Medical Services (Scotland) Bill* (SP Bill 22), an Executive Bill, was introduced in the Scottish Parliament by Nicola Sturgeon MSP on 25 February 2009.¹⁷³ The Bill is currently being considered at Stage 1, and has been referred to the Health and Sport Committee as lead committee. Very briefly, part 1 of the Bill contains a number of new controls on tobacco sales, including:

- a ban on the display of tobacco products
- a ban on the sale of tobacco products from vending machines
- the establishment of a register of tobacco retailers
- the introduction of tobacco retailing banning orders

In addition, the Bill consolidates and updates some existing tobacco sales legislation including:

- *Children and Young Persons (Scotland) Act 1937*
- *Children and Young Persons (Protection from Tobacco) Act 1991*
- TAPA 2002 and
- *Smoking, Health and Social Care (Scotland) Act 2005*.

Importantly, part 1 of the Bill would create the following offences:

¹⁷¹ The Scottish Government press release, 'Action to stub out smoking', 21 May 2008, <http://www.scotland.gov.uk/News/Releases/2008/05/21134808>

¹⁷² Ibid

¹⁷³ The *Tobacco and Primary Medical Services (Scotland) Bill* (SP Bill 22) (as introduced) and its Policy Memorandum and Explanatory notes can be accessed at: <http://www.scottish.parliament.uk/s3/bills/22-TobacPrimMedSer/index.htm>

- an offence of displaying tobacco products and smoking related products in a place where tobacco products are offered for sale;
- an offence of displaying prices of tobacco products or smoking related products where such display has been prohibited by regulations;
- an offence of selling tobacco products to persons under 18;
- an offence of selling tobacco products from vending machines; and
- offences of carrying on a tobacco business whilst not on the register of tobacco retailers or carrying on such a business from unregistered premises.

Part 1 would also create a new enforcement regime of fixed penalty notices for offences under that Part. Obviously, an important aim of the Bill is to reduce the attractiveness and availability of tobacco products to children and young people.¹⁷⁴

VI Position in other countries

A. Prohibition on the display of tobacco products

According to the separate Impact Assessment on clause 21 of the Health Bill (the proposal to prohibit the display of tobacco products), an increasing number of jurisdictions have either taken action to limit or prohibit the display of tobacco products or have plans to do so.¹⁷⁵ They include:

- Iceland (from August 2001)
- Thailand (from September 2005)
- Ireland (awaiting commencement of legislation)
- Norway (awaiting EEA/EU approval)
- Canada (provinces of Saskatchewan, Manitoba, Nunavut, Prince Edward Island, British Columbia, Northwest territories, Nova Scotia, Ontario, Quebec and Alberta)
- New Zealand (undertaken consultation)
- Australia (states of Victoria, New South Wales and Queensland have consulted on legislation; Tasmania has introduced a ban)

B. Tobacco vending machines - types of age restriction systems

According to the separate Impact Assessment on clause 22 of the Health Bill (the proposal to introduce further restrictions on, or to prohibit, tobacco vending machines), various types of age restriction mechanisms and systems have already been adopted by other countries. For example:

¹⁷⁴ Scottish Parliament Information Centre (SPICe) Briefing (09/34), *Tobacco and Primary Medical services (Scotland) Bill*, 7 May 2009, <http://www.scottish.parliament.uk/business/research/briefings-09/SB09-34.pdf>

¹⁷⁵ Department of Health, 'Impact Assessments for the Health Bill', 21 May 2009 http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_099765

- Electronic card systems are used in Germany and the Netherlands, and are soon to be introduced in Japan. Although electronic age verification card systems may vary, basically, tobacco companies provide an electronic ID card (after proof of age has been made) that allows customers to activate tobacco vending machines. Alternatively, an electronic chip or code is inserted into the tobacco purchaser's ATM card (on proof that the cardholder is 18 years or older). A customer is able to buy tobacco from the vending machine only if they insert the card, which electronically 'awakens' the machine.
- In the Republic of Ireland, a proportion of tobacco vending machines use an ID coin mechanism. Under this system, the purchaser is required to obtain an ID coin from a member of staff in the establishment, which is then inserted into the tobacco vending machine before purchase. The vending machine cannot be activated without the insertion of an ID coin. The stated benefit of this system is that staff are able to monitor who is purchasing tobacco from the vending machine and ask, if necessary, for proof of age.
- In New Zealand, tobacco vending machines operate by remote control. This means that the vending machine can only be activated by means of a remote control held by a member of staff. Again, the system requires a potential purchaser to ask a member of staff to activate the machine, providing an opportunity for the member of staff to ask for proof of age where necessary.¹⁷⁶

¹⁷⁶ Ibid

VII Appendix: Youth smoking statistics¹⁷⁷

A. Smoking prevalence among young people

The most recent and reliable source of evidence on smoking rates among children and young people in England is the 2007 survey of *Drug use, smoking and drinking among young people in England*¹⁷⁸. Key findings from the survey show that there has been a gradual decline in the proportion of school pupils aged 11 to 15 years who smoke regularly (at least one cigarette per week).

In 2007, 6% of pupils aged 11 to 15 smoked regularly; the smallest proportion since pupils' smoking was first measured in the survey in 1982 (when 11% of pupils were regular smokers). The 2007 prevalence rate is also below the 9% target for 2010 set by the government. The target was actually reached in 2003 for all children but 2007 is the first year that the proportion of regular smokers among girls as well as boys was below 9%.

Smoking behaviour among school pupils aged 11-15 years, by gender, England 1982 to 2007

	1982	1986	1990	1994	1998	2000	2001	2002	2003	2004	2005	2006	2007
	<i>Percentages:</i>												
All pupils													
Ever smoked	53	46	43	47	47	45	44	42	42	39	40	39	33
Regular smoker	11	10	10	12	11	10	10	10	9	9	9	9	6
Occasional smoker	8	5	6	9	8	9	8	7	7	5	6	5	5
Used to smoke	10	10	7	8	10	8	8	7	8	8	8	7	6
Tried smoking	24	21	20	19	19	19	19	17	18	17	17	17	15
Never smoked	47	54	57	53	53	55	56	58	58	61	60	61	67
Boys													
Ever smoked	55	45	44	47	46	44	42	39	40	37	37	36	31
Regular smoker	11	7	9	10	9	9	8	9	7	7	7	7	5
Occasional smoker	7	5	6	9	8	7	7	6	6	4	5	4	4
Used to smoke	11	10	7	7	9	8	8	6	7	7	7	7	6
Tried smoking	26	23	22	21	20	20	20	18	20	19	18	18	16
Never smoked	45	55	56	53	54	56	58	61	60	63	63	64	69
Girls													
Ever smoked	51	47	42	48	49	47	45	44	44	41	42	41	36
Regular smoker	11	12	11	13	12	12	11	11	11	10	10	10	8
Occasional smoker	9	5	6	10	8	10	9	8	8	7	8	6	6
Used to smoke	10	10	7	8	10	8	8	8	8	8	8	8	7
Tried smoking	22	19	18	17	18	17	17	16	17	15	16	16	15
Never smoked	49	53	58	52	51	53	55	56	56	59	58	59	64

Source: Drug Use, Smoking and Drinking among Young People in England in 2007. The NHS Information Centre

The proportion of young people who smoke regularly varies with age and sex. Girls appear more likely than boys to smoke regularly (8% compared with 5%). The proportion

¹⁷⁷ The following statistics have been compiled by Rachael Harker of the Library's Social and General Statistics Section

¹⁷⁸ NHS Information Centre, 'Drug use, smoking and drinking among young people in England in 2007', <http://www.ic.nhs.uk/statistics-and-data-collections/health-and-lifestyles-related-surveys/smoking-drinking-and-drug-use-among-young-people-in-england/drug-use-smoking-and-drinking-among-young-people-in-england-2007>

of regular smokers in 2007 increased with age from 1% of 11 year olds to 15% of 15 year olds.

Smoking behaviour among school pupils aged 11-15 years, by gender and age, England 2007

	All ages	11 years	12 years	13 years	14 years	15 years
<i>Percentages:</i>						
All pupils						
Ever smoked	33	9	17	31	45	55
Regular smoker	6	1	1	3	9	15
Occasional smoker	5	0	2	4	8	10
Used to smoke	6	1	3	6	9	11
Tried smoking	15	7	11	18	19	19
Never smoked	67	91	83	69	55	45
Boys						
Ever smoked	31	11	18	28	41	50
Regular smoker	5	1	1	3	7	12
Occasional smoker	4	1	2	3	7	8
Used to smoke	6	2	3	5	8	10
Tried smoking	16	8	12	18	20	20
Never smoked	69	89	82	72	59	50
Girls						
Ever smoked	36	7	17	34	50	61
Regular smoker	8	1	1	4	12	19
Occasional smoker	6	-	2	5	10	13
Used to smoke	7	1	4	7	10	12
Tried smoking	15	6	10	19	18	18
Never smoked	64	93	83	66	50	39

Source: Drug Use, Smoking and Drinking among Young People in England in 2007. The NHS Information Centre

B. Sources of cigarettes

The 2006 survey on *Drug use, smoking and drinking among young people in England* asked young people where they obtained their cigarettes from. Pupils who smoked were likely to get cigarettes from several sources. Most commonly, they bought them in a shop (65%). More than half of all smokers (55%) bought cigarettes from a newsagent, tobacconist or sweet shop; while 24% bought them from a garage shop, and 21% from a supermarket.

Almost two thirds of pupils (63%) were given cigarettes by other people; most frequently friends (57%), with a smaller proportion reporting that they were given them by siblings (12%) and parents (7%).

More than a third (35%) said they usually bought cigarettes from other people, most often friends or relatives (27%) but also from 'someone else' (17%). 14% usually bought cigarettes from a vending machine.

Usual sources of cigarettes among young people aged 11-15 years, by gender, England 2006

	All pupils	Boys	Girls
<i>Percentage who had:</i>			
Bought from any shop	65	63	66
Newsagent/tobacconist/sweetshop	55	53	56
Garage shop	24	24	23
Supermarket	21	23	20
Bought from a vending machine	14	15	13
Other type of shop	13	12	13
Bought from street markets	4	7	2
Bought from the internet	1	1	0
Bought from other people	35	33	36
Friends or relatives	27	24	28
Someone else	17	18	17
Given by other people	63	57	66
Friends	57	53	60
Brothers or sisters	12	10	12
Parents	7	5	7
Found or taken	7	7	7
Other	6	8	5

Note: Percentages total more than 100 because pupils could give more than one answer

Source: Smoking, Drinking and Drug Use among Young People in England in 2006. The NHS Information Centre

C. Socio-economic status

There is no direct evidence suggesting a relationship between children's smoking behaviour and the socio-economic status of their family. This is because surveys involving school children do not tend to question children on their parents' employment status, educational background etc. Consequently some form of proxy variable is used as an indicator of social class. In the *Smoking, Drinking and Drug Use* surveys receipt of free school meals and the number of books in pupils' homes are used as proxies of social class.

Analysis of the 2007 survey data found that there was a statistically significant relationship between books in the home and regular smoking. Pupils whose family had enough books to fill three or more bookcases (roughly 200 books or more) had reduced odds of being regular smokers compared with pupils who had no books in the home (odds ratio=0.48). There was no significant relationship between regular smoking and whether pupils received free school meals, an indicator of family poverty.

D. Statistical evidence on the impact of tobacco display bans

The Department of Health states that:

Point of sale displays have already been removed in a number of countries including Canada. Comprehensive results compiled by the Canadian Tobacco Use

Monitoring Survey shows that removing point of sale display has coincided with a fall in smoking prevalence rates amongst 15 to 19 year olds - from 29 per cent in 2002 to 19 per cent in 2007.¹⁷⁹

While smoking prevalence among 15-19 year olds in Canada as a whole have fallen by 10 percentage points between 2002 and 2007, the tobacco display ban was not introduced in all provinces of Canada. There are only two provinces, Manitoba and Saskatchewan, where the ban has been implemented long enough to aim to assess any impact on smoking prevalence. The ban has been effective in Manitoba since 2004 and since 2005 in Saskatchewan. CTUMS data shows that smoking prevalence among 15-19 year olds in Manitoba was 21% in 2004 and 20% in 2007. Among the same age group in Saskatchewan, prevalence was 25% in 2005 and 22% in 2007. With a sample size in these provinces of around 550 young people aged 15-19, neither of these changes is a statistically significant result.

Some statistically significant evidence is available from Iceland where a tobacco display ban was implemented in 2001. According to data from the European School Survey Project on Alcohol and Other Drugs¹⁸⁰ the proportion of 15-16 year olds who smoked regularly was 28% in 1999 and 16% in 2007, a statistically significant shift (the sample size of the survey for each cycle is around 2,500 young people). Please note that while this result may be associated with the introduction of the ban it cannot be said that the change is a direct consequence of the legislation. However, it is interesting to note that the degree of change in smoking prevalence among 15-16 year olds in Iceland is more pronounced than in any other European country where comparable 1999 and 2007 data is available.

¹⁷⁹ Department of Health press notice, Johnson stubs out recruitment of young smokers', 9 December 2008, http://www.dh.gov.uk/en/News/Recentstories/DH_091689

¹⁸⁰ <http://www.espad.org>

Proportion of 15-16 year olds who smoked regularly in selected European countries, 1999 and 2007

	1999	2007	% change
Iceland	28	16	-43%
UK	34	22	-35%
Norway	71	46	-35%
Ireland	73	52	-29%
Sweden	67	51	-24%
Greece	59	45	-24%
Finland	75	60	-20%
Poland	68	56	-18%
France	72	60	-17%
Hungary	72	65	-10%
Romania	57	54	-5%
Italy	64	61	-5%
Slovenia	64	61	-5%
Croatia	69	67	-3%
Czech Republic	79	79	0%
Slovakia	72	73	1%
Ukraine	69	74	7%

Source: European School Survey Project on Alcohol and Other Drugs (ESPAD)

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1. Department of Health, *Cancer Reform Strategy*, December 2007
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/dh_081006
2. Department of Health, *Consultation on the Future of Tobacco Control*, May 2008
http://www.dh.gov.uk/en/consultations/liveconsultations/dh_085120
3. Department of Health, *Consultation on the Future of Tobacco Control—Consultation Report*, December 2008
http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382
4. Secretary of State for Health (Alan Johnson), Written Ministerial Statement, HC Deb 9th December 2008, c43WS
<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm081209/wmstext/81209m0001.htm>

This Research Paper does not seek to provide a summary of the many different views of trade bodies, charities or other interested groups on either the perceived value to health or the cost to business of implementing the new tobacco controls. A list of all those who responded to the Department of Health's Consultation on the Future of Tobacco Control is provided at the back of its report published in December 2008, which can be accessed at:

http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382

The following links may also be helpful:

5. The Tobacco Manufacturers' Association (TMA), <http://www.the-tma.org.uk/>
6. Save our shops http://www.tobaccoretailersalliance.org.uk/press_releases/171.html
7. National Federation of Retail Newsagents <http://www.nfrnonline.com/>
8. Association of Convenience Stores <http://www.acs.org.uk/>
9. Association of Independent Tobacco Specialists <http://uk.loadedweb.com/cities/south-glamorgan/cardiff/directory/1603342.html>
10. Tobacco Retailers Alliance <http://www.tobaccoretailersalliance.org.uk/>
11. British Retail Consortium <http://www.brc.org.uk/>
12. Federation of Small Businesses
<http://www.fsb.org.uk/default.aspx?loc=general&id=0>
13. FOREST <http://www.forestonline.org/output/home.aspx>
14. Action on Smoking and Health (ASH), <http://www.ash.org.uk/>

15. Cancer Research UK <http://www.cancerresearchuk.org/>
16. British Heart Foundation <http://www.bhf.org.uk/>
17. National Heart Forum <http://www.heartforum.org.uk/>
18. British Lung Foundation <http://www.lunguk.org/>
19. Roy Castle Lung Cancer Foundation <http://www.roycastle.org/>
20. Community Action on Health <http://www.caoh.org.uk/site/>
21. Trading Standards Institute <http://www.tradingstandards.gov.uk/>
22. Local Authorities Coordinators of Regulatory Services (LACORS)
<http://www.lacors.gov.uk/lacors/home.aspx>
23. Tobacco and Primary Medical Services (Scotland) Bill (SP Bill 22)
<http://www.scottish.parliament.uk/s3/bills/22-TobacPrimMedSer/index.htm>
24. The Scottish Government, *Scotland's Future is Smoke-Free: A Smoking Prevention Action Plan*, 21 May 2008
<http://www.scotland.gov.uk/Resource/Doc/223415/0060163.pdf>