



Tobacco provisions of the *Health Bill*: Lords amendments

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In considering the Commons amendments on the *Health Bill* [HL] on 9 November 2009, the only issue for the Lords in respect of the new tobacco control provisions was the future of tobacco vending machines.

Part 3 of the *Health Bill* contains miscellaneous provisions, including measures to protect children and young people from the harm caused by smoking. One provision, clause 21, would prohibit the display of tobacco products at the point-of-sale (i.e. in shops). As originally drafted, clause 22 would prohibit or impose requirements on the sale of tobacco products from vending machines. Both clauses provoked a great deal of debate during all stages of the Bill's progress through the House of Commons.

During Report Stage the Commons supported the Government's prohibition of point of sales tobacco displays in shops (clause 21) by a majority of 108. However, an amendment to clause 22, moved by Ian McCartney MP, to prohibit tobacco vending machines, was agreed by the Commons without a vote. On Third Reading, Andy Burnham, Secretary of State for Health, said that the Government would not seek to overturn Ian McCartney's amendment, but would consider how best to put it into effect. Ian McCartney's amendment (Commons Amendment 11) was the only Commons amendment in respect of the tobacco control provisions.

In the House of Lords, the Government moved that the Lords agree Commons Amendment 11 and proposed consequential amendments 11A to 11G to give Amendment 11 its full effect. However, Earl Howe moved an opposing amendment that the Lords disagree with Commons Amendment 11. On division, the Lords disagreed with Earl Howe's amendment by a majority of 87 and agreed the Government's Motion and consequential amendments 11A to 11G.

The purpose of this note is to provide an update on the tobacco control provisions and, in particular, the treatment of Commons Amendment 11 in the Lords.

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1 Introduction

The *Health Bill* 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. The Bill completed its stages in the Lords on 12 May 2009.

The Bill passed to the House of Commons where it had its Second Reading on 8 June 2009 as Bill 97 of 2008-09. Committee Stage took place over 8 sittings, beginning on Tuesday 16 June and ending on Thursday 25 June 2009. The tobacco control provisions contained in Part 3 of the Bill were considered by the Public Bill Committee on 23 June 2009 and on 25 June 2009. Report and Third Reading took place on 12th October. The Lords considered the Commons amendments on 9 November 2009. The *Health Bill* is due to return to the Commons today, 10 November 2009, for consideration of the Lords amendments.

Detailed information on the tobacco control provisions in the Bill and the background to them can be found in the Library Research Paper prepared for Second Reading in the Commons: 09/49, [Health Bill \[HL\] Tobacco Control Provisions](#). Major changes and areas of debate arising during the Bill's Committee Stage in the Commons were set out in Library Research Paper 09/67 [Health Bill: Committee Stage Report](#).

Further information is available on the Library's *Bill Gateways* pages. The Parliamentary website on *Progress of Bills* provides links to the different versions of the Bill, its explanatory notes and to the debates on it, as well as the memoranda submitted to the Public Bill Committee.¹

2 Tobacco control provisions at Commons Third Reading

The new tobacco control provisions (clauses 20 - 24) are contained in Part III of the *Health Bill*. 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')*

¹ <http://services.parliament.uk/bills/2008-09/health.html>

- *Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991 (the 1991 NI Order)*

The tobacco control 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. Scotland has its own separate *Health Bill* currently before the Scottish Parliament.²

Although the five new tobacco control clauses (and Schedule 4) are only a very small part of a large Bill, they have proved to be contentious.

2.1 Specialist tobacconists – clause 20

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.

Although clause 20 was debated in Second Reading and by the Public Bill Committee, clause 20 has remained intact throughout its progress through the House of Commons. Clause 20 was not subject to any amendments or debate during the Bill's Report Stage and Third Reading.

2.2 Prohibition of tobacco displays in shops – clause 21

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'). 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 (in respect of the 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.

It is proposed by the Government that implementation of clause 21 would be subject to further consultation and 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.

This clause to prohibit tobacco displays has been debated extensively at all stages of the Bill's progress through the House of Commons. During Report Stage and Third Reading, Amendment 1, sought to remove clause 21 from the Bill altogether. This amendment was moved by Mike Penning (Conservative), who argued that clause 21 would greatly affect businesses at a difficult time and that there was insufficient evidence to support a ban on tobacco displays.³

² *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>

³ HC Deb 12 October 2009 c85

Others argued variously that clause 21 would:

- hit hardest small retailers;
- cause significant loss of turnover and put many small shops out of business at a time when the economy could least afford to lose them;⁴
- result in an increase in the illicit tobacco trade (resulting in a loss of duty) and a rise in 'white products' (i.e. those products which are made in the eastern bloc and are brought into the UK cheaply and sold on).

Speaking for the Government, Gillian Merron, reiterated that the evidence supports the Government's focus on ending tobacco displays and that a similar ban in Ireland had been effective.⁵ She said that regulations to implement clause 21 would be flexible rather than proscriptive; retailers will be free to cover tobacco products as they see fit, provided they cover the tobacco they stock.⁶ She also argued that the Government was aware of the way in which the economic climate had affected businesses, which is why the regulations to impose a tobacco display ban would not commence until 2011 for larger shops and 2013 for smaller shops.⁷

Voting on whether Amendment 1 should be made, the House of Commons divided 180 to 288; the Commons supported the Government's prohibition of point of sale tobacco displays by a majority of 108.⁸ As a consequence, clause 21 returned to the House of Lords intact.

2.3 Tobacco vending machines – clause 22 and 23

Although clause 22 of the *Health Bill* emerged intact from its Public Bill Committee stage, the clause was subsequently amended on Report. As originally drafted, clause 22 and 23 would have amended 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 was proposed by the Government that the 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.

However, during Report Stage the Commons agreed an amendment to ban tobacco vending machines moved by Ian McCartney MP (see Commons Amendments 11 below).

2.4 Schedule 4

Clause 24 would give effect to Schedule 4. This Schedule would make various minor and consequential amendments. This clause has survived all its Commons stages intact.

3 Commons Amendment 11

There was only one Commons amendment in respect of the tobacco control provisions: Commons Amendment 11, moved by Ian McCartney, which was passed by the Commons without going to a vote.

⁴ HC Deb 12 October 2009 c86

⁵ HC Deb 12 October 2009 c104

⁶ HC Deb 12 October 2009 c106

⁷ HC Deb 12 October 2009 c107

⁸ HC Deb 12 October 2009 c120-121

Ian McCartney MP put down several amendments about tobacco vending machines for the Report Stage of the *Health Bill*. One of these, amendment number 5, proposed amending clause 22 of the Bill (power to prohibit or restrict tobacco sales from vending machines) by leaving out the phrase “or imposing requirements in relation to” at page 26, line 4. This would mean that clause 22 section (1), which amends the *Children and Young Persons (Protection from Tobacco) Act 1991*, would now read:

The appropriate national authority may by regulations make provision prohibiting the sale of tobacco from an automatic machine in England and Wales.

In effect, the amendment would remove the power for the appropriate national authority (defined as the Secretary of State in relation to England and the Welsh Ministers in relation to Wales) by regulations to impose requirements on the sale of tobacco from vending machines.

In tabling his amendment, Ian McCartney said that his overriding objective was to ensure that cigarette vending machines were banned. Previously, on Second Reading of the *Health Bill* on 8 June 2008, Ian McCartney had presented a case for an outright ban on cigarette vending machines. The stated aim of his amendment on Report was to test the resolve of the House:

[...] in attempting to close an outrageous loophole in safeguards intended to prevent tens of thousands of children from illness and premature deaths in the years to come. We require the Secretary of State to regulate to prohibit the sale of tobacco from vending machines.⁹

In talking to his amendment, Ian McCartney argued a number of points including:

- tobacco vending machines undermine the legal age restriction on the purchase of cigarettes (by law purchasers must be aged 18 or over);
- children use tobacco vending machines on a daily basis in disproportionately high numbers – some as young as ten; and
- tobacco vending machines are a ‘death trap’ for the next generation of children and young people who will become addicted to cigarettes.¹⁰

Amendment 5 (now Commons Amendment 11) to clause 22 of the *Health Bill*, was agreed by the House of Commons without a vote. As the Bill stands, the appropriate national authorities are left with only a power to prohibit tobacco sales from vending machines.

On Third Reading, Andy Burnham, Secretary of State for Health, said that whilst he would watch with interest how the amendment is received in the House of Lords, the Government would not seek to overturn Ian McCartney’s amendment to ban tobacco vending machines, but, respecting the decision of the House of Commons, would consider how best to put its will into effect.¹¹

4 Lords Amendments to Commons Amendment 11

In the House of Lords, Baroness Thornton, speaking on behalf of the Government, moved that the Lords agree Commons Amendment 11 and also proposed Government amendments 11A to 11G as consequential amendments to the Bill.

⁹ HC Deb 12 October 2009 c98

¹⁰ HC Deb 12 October 2009 c199

¹¹ HC Deb 12 October 2009 c132

In explaining the Government's position, Baroness Thornton said that during Commons' Report the debate on tobacco vending machines had provoked strong views across all parties and, significantly, Amendment 11 was accepted with all parties being offered a free vote.¹² Since Amendment 11 was the result of a free vote, the Secretary of State for Health had made clear in Third Reading that the will of that House would be respected and the Government would not seek to overturn the amendment in the Lords.¹³ In any event, implementation of Amendment 11 would bring the UK in line with the 16 other European states who have already banned tobacco vending machines.¹⁴

Speaking to consequential Government amendments 11A to 11G, Baroness Thornton explained that they were necessary in order to give full effect to Commons Amendment 11:

The consequential amendments remove all remaining references to restrictions from the vending machine clauses and omit wording in the Bill which is not required in the context of a ban. They replicate the other amendments that were tabled by the right honourable Member for Makerfield on Commons Report but which were not reached. They ensure that Clause 22 would be workable and also align Clause 23 on Northern Ireland with England and Wales. We can confirm that Ministers in both Wales and Northern Ireland are also committed to prohibiting the sale of tobacco from vending machines in accordance with these amendments.

The Government are committed to protecting our children from the harms of smoking and the prohibition of sales of tobacco from vending machines represents a step forward to achieving this aim.¹⁵

Earl Howe moved, as an amendment to the Government's Motion, that the Lords disagree with Commons Amendment 11. He agreed that there was a clear need to reduce underage smoking and to stop children from accessing cigarettes from vending machines. However, rather than an outright ban on tobacco vending machines, he argued that a two-step approach, as the Government originally favoured, was both fair and proportionate. Specifically, Earl Howe argued that Ministers should exercise a power to restrict access to tobacco vending machines by children and force vending machine operators to come-up with credible and workable systems. If, after a period of time, such systems were shown not to be effective, Ministers could then consider exercising an additional power to ban the machines altogether.¹⁶

Earl Howe argued that tobacco vending machines should not be prohibited before giving the industry an opportunity, with the technology available today, to tighten regulation. He drew attention to a radio frequency control system, already in use on tobacco vending machines in a number of locations, and recommended by the Department of Health in its consultation document.¹⁷ Earl Howe argued that to proceed immediately to an outright ban on tobacco vending machines would bring about disproportionate harm to roughly 650 people directly employed by the industry and several hundred more in the supply chain.¹⁸ Finally, Earl Howe also drew attention to the fact there Amendment 11 was agreed in the Commons without a vote:

The Government have allowed themselves to get into the position of acquiescing in the result of a debate in another place that was arrived at not after a free vote, nor even after a whipped vote, but after no vote at all. The amendment in the name of the right

¹² HL Deb 9 November 2009 c605

¹³ HL Deb 9 November 2009 c605

¹⁴ HL Deb 9 November 2009 c605

¹⁵ HL Deb 9 November 2009 c605

¹⁶ HL Deb 9 November 2009 c606

¹⁷ HL Deb 9 November 2009 c605-607

¹⁸ HL Deb 9 November 2009 c606

honourable Member Mr Ian McCartney was agreed to by default after the Government Whips failed to provide tellers. That fact puts this House into a rather different situation from the one we normally face at Lords' consideration stage. In moving that the House do disagree with a Commons amendment, we are usually saying we believe that the judgment taken by another place was wrong. In this case, however, the other place did not have a chance to exercise its judgment at all. We simply do not know what the collective will of the House of Commons would have been.

For that reason alone, it is surely right that we ask the other place at least to go through the Lobby before we put 650 people out of work.¹⁹

Earl Howe's amendment provoked a long debate on tobacco vending machines; a number of Members spoke with strong opinions being expressed on both sides of the argument. A number of Members supported Earl Howe's amendment, including Lord Palmer, Lord Naseby and Lord Monson. Other Members, including Lord Walton of Detchant, Baroness Finlay of Llandaff and Lord Patel, supported the Government's position on Commons Amendment 11 and welcomed a prohibition of tobacco vending machines as a positive step towards preventing underage smoking.

On division, the Lords disagreed with Earl Howe's amendment by a majority of 87 and agreed the Government's Motion and consequential amendments 11A to 11G.²⁰ The Bill returned to the House of Commons on 10 November 2009 for consideration.

¹⁹ HL Deb 9 November 2009 c606-607

²⁰ HL Deb 9 November 2009 c621-623 and c. 638